Commercial Law Developments

2006

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PRINCIPAL CASES

SECURED TRANSACTIONS

Scope Issues

1. *Wells Fargo Bank Minnesota, NA v. v. Robex, Inc.,*
711 N.W.2d 732 (Iowa Ct. App. 2006)
Newly formed corporate borrower estopped from claiming that it lacked sufficient rights in property offered as collateral for security interest to attach because it provided lender with a written representation that it did have such rights.

2. *In re Worldcom, Inc.,*
339 B.R. 56 (Bankr. S.D.N.Y. 2006)
Failure to satisfy the bright-line test under § 1-203(b) merely means that all the facts and circumstances of the transaction must be analyzed under § 1-203(a), to determine whether the lessor has retained a meaningful reversionary interest in the goods. Fact that leased goods were a fungible part of a much larger pool of nearly identical, unmarked equipment was highly relevant to whether lessor would ever be able to take the goods back and thus whether the transaction was a sale or lease.

3. *In re United Air Lines, Inc.*,
447 F.3d 504 (7th Cir. 2006)
Following analogous decision from 2005, airline's lease of realty near airport was a security arrangement because rent was for period of bonds, rental was based on bond repayment schedule, not value of property, balloon payment is not typical for a lease, and lessor has no interest at end of lease term.

4. *Fodale v. Waste Management of Michigan, Inc.*,
271 Mich. App 11 (2006)
Secured party's option to purchase debtor's interest in redemption agreement for a set price upon default was governed by Article 9 and constituted an invalid pre-default waiver of the right to notification of disposition, the right to a commercially reasonable sale, and the right to a surplus.

5. *Espinosa v. United of Omaha Life Insurance Co.*,
137 P.3d 631 (N.M. Ct. App. 2006)
Anti-assignment rules for former Article 9 did not apply to annuity issued as part of a structured settlement of a tort claim because the annuity was excluded from the scope of Article 9 as both a tort claim and a policy of insurance.

6. *In re JII Liquidating, Inc.*,
344 B.R. 875 (Bankr. N.D. Ill. 2006)
Article 9 does not apply to a security interest in unearned insurance premiums, and thus premium financer did not need to file a UCC financing statement to perfect its security interest; it needed merely to obtain the right to cancel the policies.

Attachment Issues

7. *In re Utah Aircraft Alliance*,
342 B.R. 327 (10th Cir. BAP 2006)
Retention of title by seller of aircraft was limited in effect to retention of a security interest even though the aircraft were never moved and remained in the seller's hangar. Moreover, seller's interest was unperfected even though it remained the registered owner in the FAA Aircraft Registry.

8. *Madisonville State Bank v. Citizens Bank of Texas*,
184 S.W.3d 835 (Tex. Ct. App. 2006)
Deposits were not identifiable as proceeds of accounts despite evidence that $1.3 million of the $5.3 million deposited during the relevant period were derived from accounts.

9. *Border State Bank v. Edgar*,
2006 WL 2729475 (Minn. Ct. App. 2006)
Security agreement purporting to grant security interest in "settlement on ADM lawsuit" was inadequate to give a security interest in the debtor's commercial tort claim against ADM because there was no settlement of that claim.

10. *Compass Bank v. Kone*,
134 P.3d 500 (Colo. Ct. App. 2006)
Section 9-203(b)(3) satisfied although written security agreement lacked collateral description because stock redemption agreement executed at the same time provided that debtor's undertaking was to be secured and financing statement, also executed be the debtor contemporaneously and attached to the redemption agreement described the collateral as "fixtures, equipment, inventory."

11. *Commercial Credit Counseling Services, Inc. v. W.W. Grainger, Inc.*,
840 N.E.2d 843 (Ind. App. 2006)
Borrowing the UFTA definition of "value" – after falsely declaring that the UCC lacks it a definition of that term – and concluding that no security interest attached because an unperformed contractual promise is not value.

12. *In re Sabol*,
337 B.R. 195 (Bankr. C.D. Ill. 2006)
Composite document rule not satisfied by loan application that described the collateral, debtor's authenticated authorization to file, a promissory note indicating the existence of collateral, and the financing statement because, in part, the description in the loan application was added by the lender after the debtors signed it and the financing statement was filed two weeks after the loan and the debtor may never have seen it.

13. *In re Aura Systems, Inc.*,
347 B.R. 720 (Bankr. C.D. Cal. 2006)
After the revisions to Article 9 of the California Commercial Code went into effect, a judgment creditor can no longer create a judicial lien on personal property by filing notice thereof with the Secretary of State if the judgment debtor is not located in California.

14. *Banc of America Strategic Solutions, Inc. v. Cooker Restaurant Corp.*,
2006 WL 2535734 (Ohio Ct. App. 2006)
No security interest can attach to an Ohio liquor license because such a license is not property under Ohio law.

15. *Decision Point, Inc. v. Reece & Nichols Realtors, Inc.*,
144 P.3d 706 (Kan. 2006)
Kansas version of Uniform Consumer Credit Code prohibits real estate agents from granting a security interest in their right to receive commissions.

16. *In re Rebecca A. Knight, M.D., S.C.*,
2006 WL 3147714 (Bankr. C.D. Ill. 2006)
Indication below signature line of corporate debtor's president that she signed security agreement "individually" did not necessarily render ineffective attempted authentication on behalf of corporation or prevent attachment of security interest.

17. *In re ACRO Business Finance Corp.*,
357 B.R. 785 (Bankr. D. Minn. 2006)
Creditor of loan originator did not have a security interest in portions of the originator's receivables sold to participants.

Perfection Issues

18. *In re Commercial Money Center*,
350 B.R. 465 (9th Cir. BAP 2006)
Payment streams stripped from chattel paper are properly classified as general intangibles, not as chattel paper.

19. *In re Cook*,
457 F.3d 561 (6th Cir. 2006)
Bank acting as trustee of mortgage-backed securities and which had possession of mortgage note was properly perfected even though no assignment of the mortgage had been recorded.

20. *In re Duesterhaus Fertilizer Inc.*,
347 B.R. 646 (Bankr. C.D. Ill. 2006)
In lieu filing in new state that lacked a description of the collateral and instead merely referenced the prior filing in a different jurisdiction was ineffective.

21. *Pankratz Implement Co. v. Citizens National Bank*,
130 P.3d 57 (Kan. 2006)
Filing against "Roger House" not effective against debtor whose name was "Rodger House" because filing was not disclosed in official search.

22. *Host America Corp. v. Coastline Financial, Inc.*,
2006 WL 1579614 (D. Utah. 2006)
Filing against "K W M Electronics Corporation" was inadequate against K.W.M. Electronics Corporation because standard search logic used by filing office did not compensate for any errors, even the absence of periods.

23. *In re Tyingham Holdings, Inc.*
354 B.R. 363 (Bankr. E.D. Va. 2006)
Financing statements filed against "Tyringham Holdings" was ineffective against debtor's whose registered name was "Tyringham Holdings, Inc." because an official search under correct name did not yield the filing even though an unofficial search using an abbreviated portion of the debtor's name did yield the filing.

24. *Corona Fruits & Veggies, Inc. v. Frozsun Foods, Inc.*,
48 Cal Rptr. 3d 868 (Cal. Ct. App. 2006)
Filing against "Armando Munoz" ineffective against Armando Munoz Juarez.

25. *In re Stewart*,
2006 WL 3193374 (Bankr. D. Kan. 2006)
Filing identifying the debtor as "Richard Stewart" was ineffective because the debtor's legal name is "Richard Morgan Stewart IV" and a search under the debtor's legal name did not uncover the filing.

26. *In re Borden*,
353 B.R. 886 (Bankr. D. Neb. 2006)
A filing against "Michael R. Borden" that identified him as "Mike Borden" was seriously misleading because the filing apparently was not disclosed in a search using the longer first name, which the court identified as the debtor's "legal name" and, therefore, his "correct name" under § 9-506(c).

27. *In re Berry*,
2006 WL 2795507 (Bankr. D. Kan. 2006)
A financing statement must provide the legal name of an individual debtor, and hence listing the debtor's first name as "Mike," instead of "Michael," will be inadequate if the filing is not uncovered in a search using the full name. The court's 2003 decision in *In re Erwin* "should be accorded the proverbial 'decent burial.' " A second decision three months later confirmed that the filing was not disclosed in a search under the debtor's full name, and thus the filing as ineffective. 2006 WL 3499682 (Bankr. D. Kan. 2006).

28. *In re Jones*,
2006 WL 3590097 (Bankr. D. Kan 2006)
A financing statement filed against a man whose "legal name" was "Christopher Gary Jones" that identified the debtor as "Chris Jones" was seriously misleading because a search under the fuller name did not disclose the filing.

29. *In re Clayson*,
341 B.R. 137 (Bankr. W.D.N.Y. 2006)
Auctioneer hired by debtor with the consent of an unperfected secured party had by selling the collateral and issuing a check jointly payable to the debtor and the secured party, authenticated an agreement to hold the collateral for the secured party and thereby perfected the secured party's security interest.

30. *In re Aliquippa Machine Co.*,
343 B.R. 145 (Bankr. W.D. Pa. 2006)
Section 9-509(b)(1)'s authorization to file an "initial financing statement" allows the secured party to file a second financing statement after the first financing statement lapsed.

31. *In re Verus Investment Management, LLC*,
344 B.R. 536 (Bankr. N.D. Ohio 2006)
Certificate of deposit is a deposit account, not an instrument, and when depositary assigned its security interest to a third party, the assignee remained perfected under § 9-310(c).

32. *In re Fewell,*
352 B.R. 98 (Bankr. E.D. Ark. 2006)
The assignee, from the depositary, of a security interest in an uncertificated certificate of deposit is perfected under § 9-310(c).

33. *In re Fields*,
351 B.R. 887 (Bankr. S.D. Ohio 2006)
Assignee of lender's perfected security interest in motor vehicle remained perfected under § 9-310(c) without taking any action to change the notation on the certificate of title.

34. *In re O'Neill*,
344 B.R. 142 (Bankr. D. Colo. 2006)
Because perfection of a security interest in a motor vehicle through compliance with the state's certificate of title statute is the equivalent to perfection by filing, perfection attained after the debtor filed for bankruptcy but within 20 days of attachment related back to the time of attachment under § 9-317(e) and therefore was protected from avoidance by § 546(b) of the Bankruptcy Code.

35. *In re Global Environmental Services Group, LLC*,
2006 WL 980582 (Bankr. D. Haw. 2006)
Seller of motor vehicles who retained a security interest in the cars, maintained possession of the certificates of title, and never had the cars re-titled in the buyer'/debtor's name was unperfected.

36. *Shirley Medical Clinic, P.C. v. Commissioner of Internal Revenue*,
446 F. Supp. 2d 1028 (S.D. Iowa 2006)
Financing statement describing the collateral to include "any lawsuit due or pending" is inadequate to perfect a security interest in a commercial tort claim.

Priority Issues

37. *Kentucky Highlands Investment Corp. v. Bank of Corbin, Inc.*,
217 S.W.3d 851 (Ky. Ct. App. 2006)
Depositary's setoff rights have priority over rights of creditor with security interest in deposit account as proceeds of receivables who lacked control, even though the debtor improperly deposited such proceeds in an apparent effort to thwart the creditor; the collusion standard of § 9-332(b) does not apply to priority in the deposit account itself.

38. *Madisonville State Bank v. Canterbury, Stuber, Elderm Gooch & Surratt, P.C.*,
209 S.W.2d 254 (Tex. Ct. App. 2006)
Law firm which received payment for services from debtor's deposit account was not entitled to summary judgment that pursuant to § 9-332 it took the funds free of a lender's security interest because the lender did not have control over the deposit account and the security interest encumbered the deposits only as proceeds of other collateral.

39. *Pinnacle Bank v. Darland Construction Co.*,
709 N.W.2d 635 (Neb. 2006)
Creditor of debtor garnished account debtor, who paid account obligation to court. Secured party with an interest in debtor's accounts objected but objection was overruled. Court later disbursed the money to the garnishor. Secured party then sought to replevin the money but the court ruled that money, unlike goods, was not generally subject to replevin.

40. *In re Huber Contracting, Inc.*,
347 B.R. 205 (Bankr. W.D. Tex. 2006)
Depositary's security interest in general contractor's deposit account had priority over subcontractor's statutory lien on the deposited funds.

41. *United States v. Jesco Construction Corp.*,
2006 WL 8448980 (E.D. La. 2006)
A lender with a perfected security interest in a contractor's accounts had priority in the proceeds of one account due from the Army Corps of Engineers over the surety that, after the debtor's default, completed performance on a contract relating to a different project for the Corps and was subrogated to the Corps' rights related thereto.

42. *R.C. Moore, Inc. v. Les-Care Kitchens Inc.*,
2006 WL 2590064 (Me. Super. Ct. 2006)
Garnishee bank waives security interest in deposits by failing to claim it in its initial answer to the summons and by allowing the debtor to withdraw funds after the summons was received.

43. *Nebraska Beef Ltd. v. KBF Financial, Inc.*,
2006 WL 538790 (N.D. Tex. 2006)
Absent a subordination agreement, funds improperly paid by account debtors to senior secured party's lock box instead of junior secured party's lock box were rightfully retained by senior secured party.

44. *Novartis Animal Health US, Inc. v. Earle Palmer Brown, LLC* ,
424 F. Supp. 2d 1358 (N.D. Ga. 2006)
Account debtor who pre-payed account cannot get affirmative recovery from assignee of account, merely reduce the obligation owed.

45. *Keybank, N.A. v. DPR Construction, Inc.*,
149 P.3d 233 (Or. Ct. App. 2006)
Account assignee's payment instruction to account debtor was not received until after the account had paid the debtor because it did not arrive at the building – even though it had arrived at the address – designated in the agreement between the debtor and the account debtor as the place to send notifications.

46. *Wells Fargo Bank Minnesota v. B.C.B.U., Inc.*,
49 Cal. Rptr. 3d 324 (Cal. App. 2006)
Lessee under finance lease, who never accepted the goods and therefore was not liable under § 2A-407, was nevertheless obligated pursuant to § 9-403 to pay the lessor's assignee because the lessee had in the lease agreed not to assert any claims or defenses to payment.

47. *In re Buffalo Molded Plastics, Inc.*,
354 B.R. 731 (Bankr. W.D. Pa. 2006)
Tooling to be used by the debtor for ten months to make parts and then sold to customer to whom the parts were also sold may be either equipment or inventory. To resolve a priority dispute between the debtor's main lender and the tooling supplier with a PMSI, a jury must make that determination. It must also decide whether the customer still qualifies as a buyer in ordinary course of business. Under choice of law principles, court will not apply Michigan Tooling Lien Act.

48. *Integrity Bank Plus v. Talking Sales, Inc.*,
2006 WL 212193 (D. Minn. 2006)
Buyer who purchased farm equipment, never took delivery, and immediately consigned them back to the seller – something the seller had never done before – was not a buyer in ordinary course of business. Buyer's secured party was negligent in not conducting a lien search and owed a duty of reasonable care to seller's secured party.

49. *DaimlerChrysler Services North America, LLC v. Labate Chrysler, Jeep, Dodge, Inc.*,
2006 WL 2792160 (N.D. Ohio 2006)
Debtor cannot strip off security interest in inventory by selling to itself as a buyer in ordinary course of business because it knew that the sale violated the ownership rights of the secured party.

50. *Bombardier Capital, Inc. v. Hensley*,
2006 WL 2709212 (Ky. Ct. App. 2006)
Buyers of $53,000 mobile home who paid only $18,000 because of seller's failure to install air conditioner and perform other duties under the sales agreement were buyers in ordinary course of business.

51. *In re Master Services, Inc.*,
172 Fed. Appx. (8th Cir. 2006)
Seller did not gain priority over prior lender pursuant to § 9-324(a) because it filed more than 20 days after the goods were delivered to the debtor, installed, and operational.

52. *First National Bank in Munday v. Lubbock Feeders, L.P.*,
183 S.W.3d 875 (Tex. Ct. App. 2006)
To qualify as a PMSI, loan must be "closely allied" with debtor's purchase of the collateral but need not precede that purchase. Advances made as much as 18 days after debtor's purchase were closely allied because they could be traced to the purchase (in some unspecified manner). Notification requirement of § 9-324(d) is triggered by the debtor's actual possession and thus never applies if the PMSI secured party has possession.

53. *Lewiston State Bank v. Greenling Equipment, L.L.C.*,
147 P.3d 951 (Utah Ct. App. 2006)
PMSI status was not retained and transferred to new creditor who, one month after providing the funds to pay off debtor's original PMSI lender and obtaining from it a release of the collateral – provided additional credit and obtained a security interest of its own.

54. *In re Murray*,
352 B.R. 340 (Bankr. M.D. Ga. 2006)
Debt incurred in connection with purchase of motor vehicle for documentary fee, certificate of title fee, and extended service contract was all for the "price" and thus creditor had a PMSI.

55. *In re White*,
352 B.R. 633 (Bankr. E.D. La. 2006)
Debt incurred in connection with purchase of motor vehicle for sales tax and fees was for the "price" and thus creditor had a PMSI; however, debts for and extended warranty and gap insurance coverage were not for the price of the car but instead for insurance, and thus excluded from the scope of the Article 9 and no PMSI was created in them.

56. *In re Peaslee,*
358 B.R. 545 (Bankr. W.D.N.Y. 2006)
Negative equity in car traded in and part of amount financed in connection with purchase of new car was not part of the new car's purchase price and, because New York follows the transformation rule for PMSIs in consumer transactions, undermined purchase-money status of creditor's security interest entirely, leaving the lien outside the protection of the new hanging paragraph in § 1325(a)(5) of the Bankruptcy Code.

57. *In re Graupner*,
356 B.R. 907 (Bankr. N.D. Ga. 2006)
Creditor's financing of the negative equity in the debtor's trade-in car along with the sticker price of a new car was all part of the "price" of the new car, and thus creditor had a PMSI securing the entire obligation. The decision was based in part on court's interpretation of § 9-103 *in pari materia* with provision of Georgia Motor Vehicle Certificate of Title Act defining the term "price."

58. *Le Chase Data/Telecom Services, LLC v. Goebert*,
844 N.E.2d 771 (N.Y. 2006)
Perfected accounts factor was on notice that funds due to debtor were part of a construction project and thus it did not qualify as a good faith purchaser under NY Lien Law. Factor failed to file a Notice of Assignment or a Notice of Lending pursuant to that law and, therefore, its receipt of the account proceeds violated the statutory trust established by the law.

59. *Money Store Investment Corp. v. Summers*,
849 N.E.2d 544 (Ind. 2006)
Debt owed to unsecured creditor did not become secured when unsecured creditor acquired senior mortgage with dragnet clause, in effort to achieve priority over junior mortgagee.

60. *America Investment Financial v. United States*,
476 F.3d 810 (10th Cir. 2006)
Lender's security interest in medical provider's contracts with insurers did not have priority over a federal tax lien in the provider's receivables due from those insurers pursuant to those contracts for services rendered by the provider more than 45 days after notice of the federal tax lien was filed.

61. *Pacific International Marketing, Inc. v. A & B Produce, Inc.*,
462 F.3d 279 (3d Cir. 2006)
Carrier could not receive payment out of a PACA trust for the charges associated with transporting the produce to the debtor.

62. *"R" Best Produce, Inc. v. Shulman-Rabin Marketng Corp.,*
467 F.3d 238 (2d Cir. 2006)
Carrier could not receive payment out of a PACA trust for the charges associated with transporting the produce to the debtor.

63. *Fin Ag, Inc. v. Hufnagle,*
720 N.W.2d 579 (Minn. 2006)
Under the Food Security Act, a buyer of farm products takes free of a security interest created by the seller but not a security interest created further up the chain of title.

64. *In re Novak*,
354 B.R. 611 (Bankr. E.D.N.Y. 2006)
Creditor with judgment lien against one tenant in common was entitled to priority with respect to that tenant's presumed 50% interest because agreement between the two tenants to share ownership in proportion to their respective contributions toward the purchase price was neither reflected on the deed nor recorded.

65. *Feliciana Bank & Trust v. Manuel & Sessions, LLC*,
943 So. 2d 746 (Miss. Ct. App. 2006)
Security interest of lender with properly recorded deed of trust had priority over buyer of timber.

Enforcement & Liability Issues

66. *Eureka VIII LLC v. Niagara Falls Holdings LLC*,
899 A.2d 95 (Del. Sup. Ct. 2006)
LLC member's breach of LLC agreement by allowing secured creditor to gain control over the member warranted loss of membership interest and retention of only passive economic rights.

67. *Hightower v. Watson Quality Ford, Inc.*,
2006 WL 1626587 (D. Miss. 2006)
Auto dealer that assigned chattel paper to bank without recourse was potentially liable for bank's improper notification of disposition because, under traditional contract principles, an assignor becomes a surety of the assignee's performance.

68. *City National Bank of Florida v. Morgan Stanley DW, Inc.*,
2006 WL 1582074 (S.D.N.Y. 2006)
Brokerage allowed customer to transfer funds out of account despite the lack of written authorization from the secured party, which the control agreement required. Nevertheless, the brokerage might not be liable because the secured party failed to object within ten days of receiving the account statement.

69. *GMAC v. Honest Air Conditioning & Heating, Inc.*,
933 So. 2d 34 (Fla. Ct. App. 2006)
Secured party conducting a disposition that released its lien upon receiving a check from a buyer of the collateral could not collect the balance due from the debtor after the check bounced because its actions impaired the collateral.

70. *Bank of the Sierra v. Kallis*,
2006 WL 3513568 (E.D. Cal. 2006)
Bank's disposition of collateral may not have been commercially reasonable – and summary judgment was therefore denied – because the sale was public, it was conducted during the middle of the day, only three bidders attended, and the bank set bidding to open at less than 30% of the amount offered by another party seeking to buy at a private sale and at only about 16% of the value listed in the bank's own records.

71. *Turner v. Firstar Bank*,
845 N.E.2d 816 (Ill. Ct. App. 2006)
Bank liable for $225,000 in punitive damages for causing debtor's car to be repossessed when debtor was not in default and for taking no action to see that the repo agent returned to her the goods that were in the car.

72. *Borley Storage and Transfer Co. v. Whitted*,
710 N.W.2d 71 (Neb. 2006)
Unjustifiable impairment of collateral discharges only sureties, not co-makers. Decision based on former § 3-606. Result is now codified at § 3-605(d) (applying only to secondary obligors).

73. *Trustmark National Bank v. Barnard*,
930 So. 2d 1281 (Miss. Ct. App. 2006)
Secured Party's impairment of collateral cannot discharge maker of the note, only indorsers and accommodation parties.

74. *Lister v. Lee-Swofford Investments, L.L.P.*,
195 S.W.3d 746 (Tex. Ct. App. 2006)
Public sale of inventory of tractor parts was commercially reasonable despite low sales prices and absence of parts dealers because sale was widely advertised and circulars describing the auction were mailed to such dealers.

75. *AmSouth Bank v. Trailer Source, Inc.*,
206 S.W.3d 425 (Tenn. Ct. App. 2006)
Junior secured party's failure to perfect until one day before the senior's foreclosure sale left it without the right to notification of the sale. Nevertheless the junior has standing to challenge the sale's commercial reasonableness.

76. *SPW Associates, LLP v. Anderson*,
718 N.W.2d 580 (N.D. 2006)
One member of a joint venture could grant a security interest in property of the joint venture and could consent to the secured party's acceptance of the collateral in satisfaction of the debt, so that the secured party did not need to send notification of the proposed acceptance to the other joint venturer or to conduct a disposition.

77. *Proactive Technologies, Inc. v. Denver Place Associates Ltd. Partnership*,
141 P.3d 959 (Colo. Ct. App. 2006)
Consequential damages in the form of lost profits are not available (under former Article 9) for conducting a commercially unreasonable disposition.

78. *Auto Credit of Nashville v. Wimmer*,
2006 WL 2523979 (Tenn. Ct. App. 2006)
Creditor who sent notification of a proposed disposition to the debtor 20 days before the sale but who had not received confirmation that the debtor received the notification, had not acted reasonably and thus debtor was entitled to statutory damages, which would she could set off against her obligation for the deficiency.

79. *Diaz v. Gonzalez*,
2006 WL 3350774 (Cal. Ct. App. 2006)
Secured creditor whose improper notification of disposition barred a deficiency was also barred from foreclosing on additional collateral.

80. *Martens v. Ariana & Nathaniel Contracting, Inc.*,
2006 WL 2987741 (W.D. Pa. 2006)
Secured lender's contractual *right* to inspect manufactured home during construction did not give it a *duty* to protect the debtor from negligent or fraudulent construction.

81. *Kaltenbach v. Richards*,
464 F.3d 524 (3d Cir. 2006)
An attorney can be a "debt collector" generally, and thus subject to all the restrictions imposed by the Fair Debt Collection Practices Act, even when doing nothing more than enforcing a security interest.

82. *Wilson v. Draper & Goldberg, P.L.L.C.*,
443 F.3d 373 (4th Cir. 2006)
Attorney seeking to foreclose deed of trust is a "debt collector" subject to the Fair Debt Collections Practices Act.

BANKRUPTCY

83. *Howard Delivery Serv., Inc. v. Zurich American Ins. Co.*,
126 S. Ct. 2105 (2006)
Debtor's obligation to insurance company for unpaid worker's compensation premiums is not entitled to § 507(a)(5) priority.

84. *In re Official Committee of Unsecured Creditors of Dornier Aviation (North America), Inc.*,
453 F.3d 225 (4th Cir. 2006)
Parent corporation's sale of spare parts to debtor was properly treated as an equity contribution, rather than a debt obligation, even though grounds for equitable subordination did not exist, because: (1) the parent was an insider, (2) the lack of a fixed maturity date for the purported loan, (3) the fact that the debtor was not required to pay until it became profitable, (4) the debtor's long history of unprofitability, and (5) the parent's assumption of the debtor's losses.

85. *In re First Alliance Mortgage Co.*,
471 F.3d 977 (9th Cir. 2006)
Although creditor of debtor was properly liable for aiding and abetting the debtor's fraud, the creditor's claims were not subject to equitable subordination because creditors' activities were neither carried out in contemplation of nor a factor contributing toward the debtor's subsequent bankruptcy, and the creditor did nothing to improve its status as a creditor at the expense of any other creditor.

86. *In re Submicron Systems, Corp.*,
432 F.3d 448 (3d Cir. 2006)
District Court's finding that advances to severely undercapitalized debtor by existing lenders were debt, not equity , was not clearly erroneous despite lenders' designees on debtor's board of directors and lack of documentation for some of the loans.

87. *In re Oakwood Homes Corp.*,
449 F.3d 588 (3d Cir. 2006)
Indenture trustee's claims against debtor/guarantor for unmatured interest were properly disallowed but its remaining claims for future shortfalls of principal should not be discounted to present value.

88. *In re Enron Corp.*,
340 B.R. 180 (Bankr. S.D.N.Y. 2006)
Claims of creditors were subject to disallowance under § 502(d) even though: (i) they were transferred post-petition; (ii) the preference claim against the transferor had not been adjudicated; and (iii) the transferees acted in good faith.

89. *In re Adelphia Communications Corp.*,
336 B.R.610 (Bankr. S.D.N.Y. 2006)
Existence of "interdebtor" conflicts – something prevalent in large, multi-debtor Chapter 11 cases, does not require or justify appointment of a trustee or other fiduciary. Debtor's counsel is disqualified from acting for or against any debtor in such interdebtor disputes.

90. *In re Skuna River Lumber, LLC*,
352 B.R. 788 (Bankr. W.D. Miss. 2006)
Secured claimants may be surcharged under § 506(c) for services of auction firm hired by Chapter 11 debtor even though many items were purchased by the secured claimants with credit bids.

91. *In re Rose*,
347 B.R. 284 (Bankr. S.D. Ohio 2006)
Secured party entitled to administrative expense priority for unpaid postpetition adequate protection payments and loss in value of collateral resulting from debtor's waste.

92. *In re Verestar*,
343 B.R. 444 (Bankr. S.D.N.Y. 2006)
Creditors Committee had potential cause of action for equitable subordination – but not substantive consolidation – for parent company's alleged looting of subsidiary. Committee also had action against parent for alter ego liability based on parent's complete control of subsidiary.

93. *In re Garden Ridge Corp.*,
338 B.R. 627 (Bankr. D. Del. 2006)
Substantive consolidation does not convert into mutual obligations for the purposes of setoff a debt owed by one debtor to an employee and obligation due from employee to a related debtor.

94. *In re Wagers*,
340 B.R. 391 (Bankr. D. Kan. 2006)
Prepetition retainer agreement for postpetition legal services was an outright sale of cash and future tax refunds to law firm – despite debtor's retained reversionary interest – and therefore prevented the assets from becoming property of the estate.

95. *In re Dick Cepek, Inc.*,
339 B.R. 730 (9th Cir. BAP 2006)
Attorney for Chapter 11 debtor who drew on prepetition retainer could not, following conversion to Chapter 7, be ordered to disgorge fees to achieve equal distribution among administrative claimants.

96. *In re Appalachian Star Ventures, Inc.*,
341 B.R. 222 (Bankr. E.D. Tenn 2006)
Even if disgorgement of attorney fees by Chapter 11 debtor's attorney is necessary upon conversion to Chapter 7 to achieve a pro rata distribution among administrative expense claimants, disgorgement is not required if the attorney had a lien on the retainer.

97. *Region Bank v. Mills*,
2006 WL 2193202 (W.D. La. 2006)
Bank's pre-petition security interest in federal farm subsidy payments did not extend to post-petition subsidies for crops planted post-petition.

98. *In re Dawson*,
2006 WL 2372821 (Bankr. N.D. Ohio 2006)
Failure of secured creditor to provide code for ignition lock to prevent car from becoming inoperable postpetition violates the automatic stay.

99. *In re Pratt*,
462 F.3d 14 (1st Cir. 2006)
A secured party that declined to repossess the inoperable car that the debtor had surrendered violated the discharge injunction by refusing to release the title certificate without payment because this prevented the debtor from disposing of the car.

Leases & Executory Contracts

100. *In re Exide Technologies, Inc.*,
340 B.R. 222 (Bankr. D. Del. 2006)
Exclusive trademark license that debtor granted in connection with sale of its business was an executory contract which the debtor in possession could reject.

101. *In re CP Holdings, Inc.*,
349 B.R. 189 (8th Cir. BAP 2006)
Mortgagee with an interest in rents is entitled to proceeds of bankruptcy claim arising from lessee's rejection of lease because lessee's rejection did not constitute a termination of the lease.

102. *In re Chapin Revenue Cycle Management, LLC*,
343 B.R. 728 (Bankr. M.D. Fla. 2006)
Agreement under which licensor had obligation to allow debtor continued use of software and debtor had obligation to maintain confidentiality of software was executory contract; debtor's incurable default in distributing portions of the source code to candidates for position to service and maintain the software was not material and did not prevent debtor from assuming the contract.

Avoidance Powers

103. *In re Ramba, Inc.*,
437 F.3d 457 (5th Cir. 2006)
Payment 180 days after invoice when industry standard is 120 days is not according to ordinary business terms for the purposes of the § 547(c)(2) preference defense. Transfer of fully encumbered property cannot be avoidable preferences because no equitable interest of the debtor in property is transferred and the estate is not diminished.

104. *In re Fruehauf Trailer Corp.*,
444 F.3d 203 (3d Cir. 2006)
District court did not err in concluding that insolvent debtor did not receive reasonably equivalent value in exchange for increase to pension plans of key employees despite lack of precise calculation of the benefit received because cost was twice the norm of other companies' employee retention plans, the change was not presented to the board as part of the debtor's employee retention plan, and the officers who presented it stood to gain significantly by it, suggesting the change was not an arm's length transaction.

105. *In re Incomnet, Inc.*,
463 F.3d 1064 (9th Cir. 2006)
Nonprofit corporation to which the FCC delegated responsibility for collecting and disbursing funds to support universal service pursuant to the Telecommunications Act was "initial transferee" of funds collected, and thus liable for preferential transfer.

106. *In re Born,*
357 B.R. 630 (10th Cir. BAP 2006)
Trustee who uses § 544 powers to avoid an unperfected lien is not entitled to also recover from the secured party whatever post-petition payments the debtor made to the secured party in order to keep possession of the collateral.

107. *In re Deuel*,
361 B.R. 509 (9th Cir. BAP 2006)
Trustee can use avoiding powers to avoid unrecorded mortgage noted on debtor's schedules because trustee's constructive knowledge of mortgage arose after the petition – distinguishes Ninth Circuit decision in *In re Professional Investment Properties of America*, 995 F.2d 623 (9th Cir. 1992).

108. *Mann v. GTCR Golder Rauner, LLC*,
351 B.R. 708 (D. Ariz. 2006)
Person who negotiated transfer as CEO and director, but who resigned those positions shortly before transfer was consummated, was not an insider when the transfer occurred and thus the one-year preference period did not apply.

109. *In re Moore*,
2006 WL 3064781 (Bankr. D. Ariz. 2006)
PMSI lender's perfection of security interest 29 days after it attached and 19 days after the debtor filed for bankruptcy protection did not violate the stay but was nevertheless avoidable under § 549; Protection from avoidance granted by § 546(b) was inapplicable because state certificate of title statute provides only a 10-day relation back rule and the exception to the automatic stay for post-petition perfection is not a relation back rule.

110. *In re National Forge Co.,*
344 B.R. 340 (W.D. Pa. 2006)
§ 546(e) insulates from avoidance any fraudulent transfer involved in the redemption of shares of a privately held corporation.

111. *In re Jackson*,
2006 WL 3064087 (Bankr. N.D. Ohio 2006)
Seller of used car with delayed perfection was not protected from preference avoidance by the fact that it was listed as the owner on the certificate of title that the seller surrendered in the process of getting a new certificate issued that identified the buyer as owner.

112. *In re Kerst*,
347 B.R. 418 (Bankr. D. Colo. 2006)
Rejecting earmarking preference defense unless defendant was a guarantor or otherwise obligated on the debt paid but treating a 47-day delay in perfection as nevertheless substantially contemporaneous for the purposes of the § 547(c)(1) defense because the delay was largely attributable to a third party over whom neither the debtor nor the preference defendant has any control.

113. *In re Pameco Corp.*,
356 B.R. 327 (Bankr. S.D.N.Y. 2006)
Supplier with a mechanic's lien on real property received avoidable preferential payment from subcontractor who later filed for bankruptcy, even though the general contractor provided the subcontractor with the funds used to make the payment and the supplier released its mechanic's lien in exchange.

114. *Haberbush v. Charles and Dorothy Cummins Family Ltd. Partnership*,
139 Cal. App. 4th 1630 (2006)
Bankruptcy Code does not preempt state law that gives assignee for the benefit of creditors power to avoid preferences (rejecting Ninth Circuit's 2005 decision in *Sherwood Partners*).

Reorganization Plans

115. *In re Atlanta Retail, Inc.*,
456 F.3d 1277 (11th Cir. 2006)
Confirmation of debtor's plan did not bar one creditor's action in state court against another for breach of intercreditor agreement (but not for equitable subordination).

116. *In re Aerosol Packaging, LLC*,
362 B.R. 43 (Bankr. N.D. Ga. 2006)
Senior secured lender could vote the claim of a junior lender who had contractually subordinated its claim and promised in the intercreditor agreement to transfer to the senior its right to vote on any plan of reorganization.

Sales & Assignments of Assets

117. *In re World Health Alternatives, Inc.*,
344 B.R. 291 (Bankr. D. Del. 2006)
Court could order, pursuant to agreement among debtor, secured party, and creditors' committee, a sale of substantially all of the debtor's assets by which some of the secured party's claim is carved out for the benefit of general, unsecured claimants, thereby bypassing priority tax claimants.

118. *Gulf States Reorganization Group, Inc. v. Nucor Corp.*,
466 F.3d 961 (11th Cir. 2006), *cert. denied*, 127 S. Ct. 2920 (2007)
Buyer's participation in a bankruptcy auction can violate antitrust laws.

GUARANTIES & RELATED MATTERS

119. *Kilpatrick Bros. Painting v. Chippewa Hills School District*,
2006 WL 664210 (Mich. Ct. App. 2006)
School District did not discharge obligor on performance bond by hiring – before terminating the bonded contractor – another contractor to correct problems with the work contracted for; any technical violations of the bond were not sufficiently material to discharge the surety.

120. *Mercury Cabling Systems LLC v. North American Specialty Insurance, Co.,*
2006 WL 1320489 (Conn. Super. Ct. 2006)
Refusal of creditor to accept debtor's tender of less than full payment did not discharge surety.

121. *Boutros v. Minoso*,
944 So. 2d 1076 (Fla. Ct. App. 2006)
Guarantor's equitable claims for contribution from co-guarantor – as distinguished from his legal claims as an assignee of the secured party – were unaffected by his failure to dispose of the collateral in a commercially reasonable manner.

122. *Commercial Casualty Insurance Co. of Georgia v. United States*,
71 Fed. Cl. 104 (Fed. Cl. 2006)
Liberty Mutual Insurance Co. v. United States,
70 Fed. Cl. 37 (2006)
Nova Casualty Co. v. United States,
69 Fed. Cl. 284 (2006)
Payment bond surety that paid subcontractors was subrogated to the rights of both the subcontractors paid and the general contractor, and thus had privity of contract to pursue a claim against the government on the general contract and sovereign immunity did not bar to the claim.

LETTERS OF CREDIT

123. *In re Builders Transport, Inc.*,
471 F.3d 1178 (11th Cir. 2006)
Debtor\applicant entitled to order directing lessor's assignee to turn over excess from draw on letter of credit even though assignee was also debtor's secured lender.

124. *In re Spring Ford Industries,*
338 B.R. 255 (E.D. Pa. 2006)
Excess proceeds from draw on letter of credit belong to applicant, not issuer.

125. *J.P. Morgan Trust Co. v. U.S. Bank*,
446 F. Supp. 2d 956 (E.D. Wis. 2006)
Letter of credit that authorized draw if issuer sent notice of non-renewal did not permit draw immediately before final expiration date.

LENDING, CONTRACTING & COMMERCIAL LITIGATION

126. *Nagrampa v. Mailcoups, Inc.*,
469 F.3d 1257 (9th Cir. 2006)
Unconscionability of arbitration clause in franchise agreement is for court, not arbitrator to decide. Provision was procedurally unconscionable because it was presented by franchisor to prospective franchisee without any opportunity for negotiation. The provision was substantively unconscionable because it gave the franchisor access to a judicial forum to obtain provisional remedies to protect its intellectual property, while providing the franchisee with only the arbitral forum to resolve her claims. In addition, the forum selection clause in the arbitration provision was substantively unconscionable because it selected a forum at the franchisor's headquarters, 3,000 miles away from the franchisee's location and where the franchise agreement was to be performed.

127. *In re United Air Lines, Inc.*,
438 F.3d 720 (7th Cir. 2006)
Indenture trustee was obligated to make payment to borrower upon proper draws for construction project despite borrower's subsequent bankruptcy and could not set off obligation to make payments against borrower's defaulted obligations.

128. *Cordy v. Vanderbilt Manufacturing & Finance, Inc.*,
445 F.3d 1106 (8th Cir. 2006)
Floor plan financer's practice of lending up to 65% of retail value – instead, as the written agreement provided, of wholesale value – did not modify the deal because the agreement provided for a separate Statement of Transaction for each financed vehicle and provided that such Statement would not modify the terms of the deal. The practice also did not create a course of dealing that the borrower could enforce because the written agreement contained a clause prohibiting modification by course of dealing.

129. *Power & Telephone Supply Co. v. SunTrust Banks, Inc.*,
447 F.3d 923 (6th Cir. 2006)
Lead bank under credit facility which also executed interest rate swaps with borrower did not owe any duty to borrower to advise it on the appropriateness of the transactions and thus no negligence claim could be sustained.

130. *Minnesota Voyageur Houseboats, Inc. v. Las Vegas Marine Supply, Inc.*,
708 N.W.2d 521 (Minn. 2006)
Bank's contractual right to setoff, expressly granted in promissory note, was not subject to the limitation on the equitable right of setoff that the debt be due and owing. Hence, Bank had priority over creditor that served writ of garnishment on bank.

131. *Neuro-Rehab Associates, Inc. v. AMRESCO Commercial Finance, LLC*,
2006 WL 1704258 (D. Mass. 2006)
Borrower which defaulted on $20 million secured loan by failing to give a required notification and failing to obtain lender's consent leases of two alternative facilities was entitled to preliminary injunction prohibiting the lender from accelerating debt or foreclosing on the collateral because the defaults appear to have caused no harm to the creditor's fully secured position and, under the loan agreement, the creditor's consent could not unreasonably be withheld.

132. *Rosett v. Trepeck*,
2006 WL 1687980 (Mich App. 2006)
Agreement to settle $350,000 debt for $25,000 if payment is made within 30 days, or for $100,000 if made later was an unenforceable penalty.

133. *McCullough v. Goodrich & Pennington Mortgage Fund, Inc.*,
2006 WL 1432442 (D.S.C. 2006)
Mortgage loan servicer owed no duty of care to mortgage lender's secured creditor and thus could not be liable for negligent impairment of collateral.

134. *Geiger & Peters, Inc. v. Berghoff*,
854 N.E.2d 842 (Ind. Ct. App. 2006)
Corporate president – who also serves as president of a competitor – did not owe a fiduciary duty to the guarantor of the corporation's debts or to a secured creditor of the corporation, and thus could not be liable for tortious interference with a business relationship.

135. *Beal Savings Bank v. Sommer*,
815 N.Y.S.2d 63 (N.Y. App. Div. 2006)
Individual creditors had no right to pursue direct action against guarantors without authorization from a super majority of creditors under credit facility.

136. *Ary Jewelers, LLC. v. IBJTC Business Credit Corp.*,
414 F. Supp. 2d 90 (D. Mass. 2006)
Cause of action for tortious interference with business relations may exist against potential lender who, after backing out of deal upon learning of foreign bribery scandal involving principal of potential borrower, informed another potential lender of those facts.

137. *In re Adelphia Communications Corp.,*
342 B.R. 142 (Bankr. S.D.N.Y. 2006)
Debtor whose obligation to pay interest was computed from grid based on market rates and the debtor's financial condition did not have to retroactively pay more for the period when the debtor inaccurately reported its financial condition.

138. *In re Miller*,
341 B.R. 764 (Bankr. E.D. Mo. 2006)
Default rate of interest on business loan, though valid under Iowa law that the parties had chosen in their agreement, violated Missouri law, was against fundamental policy of Missouri, and was therefore unenforceable.

139. *Abercrombie v. Wells Fargo Bank*,
417 F. Supp. 2d 1006 (N.D. Ill. 2006)
Provision in consumer loan agreement giving lender the right to notice of and opportunity to cure any breach of the agreement before suit is brought did not prevent commencement of TILA claim because the violation cannot later be cured and the cause of action does not arise out of a breach of the agreement.

140. *Precision Theatrical Effects, Inc. v. United Banks, N.A.*,
143 P.3d 442 (Mont. 2006)
Bank was not entitled to summary judgment on claim brought against it by a borrower for freezing the borrower's deposit account upon learning of the arrest of the borrower's president and owner – a fact which placed the borrower's license to operate in jeopardy. The loan agreement allowed such action upon a good faith belief that the bank "would have difficulty collecting the amount owed," but the bank may not have acted in good faith because it had $1.6 million in other collateral to secure a debt of only $211,000.

141. *Hoyt Properties, Inc. v. Production Resource Group, LLC*,
716 N.W.2d 366 (Minn. App. 2006)
Attorney's false statement during settlement negotiations that there was no basis for piercing the corporate veil was grounds for rescinding the agreement.

142. *Harbinger Capital Partners Master Fund I, Ltd. v. Granite Broadcasting Corp.*,
906 A.2d 218 (Del. Ch. 2006)
Preferred stockholder did not have standing to bring fraudulent transfer claim against corporation, despite new GAAP rule treating preferred stock as debt, because stockholder was not a creditor.

143. *Esopus Creek Value LP v. Hauf*,
913 A.2d 593 (Del. Ch. 2006)
It would inequitable for solvent corporation and its officers to file for bankruptcy to seek court approval for asset sale – without stockholder approval, as required by Delaware law and the articles of incorporation – solely because the corporation has not filed its annual report for several years and is therefore prohibited from having a shareholders meeting.

144. *Delta Funding Corp. v. Harris*,
912 A.2d 104 (N.J. 2006)
Arbitration clause in sub-prime mortgage loan was unconscionable to the extent that it permits arbitrator to assess costs against mortgagor, limits the arbitrator's discretion to award attorney's fees to the mortgagor if successful, and makes mortgagor bear the costs of any appeal even if successful, but those unconscionable provisions were severable from the arbitration clause generally and the provision excluding mortgage foreclosure from arbitration was not unconscionable.

145. *In re Citx Corp.*,
448 F.3d 672 (3d Cir. 2006)
Claim for deepening insolvency must be predicated on fraud, not mere negligence.

146. *Trenwick America Litigation Trust v. Earnst & Young, L.L.P.*,
906 A.2d 168 (Del. Ch. Ct. 2006), *aff'd*, 2007 WL 2317768 (Del. 2007)
Delaware does not impost a retroactive fiduciary duty on corporate directors simply because their chosen business plan does not succeed nor does it recognize a cause of action for deepening insolvency.

147. *Treibacher Industrie A.G. v. Allegheny Technologies, Inc.*,
464 F.3d 1235 (11th Cir. 2006)
Course of dealing trumps usage of trade in interpreting an agreement to buy and sell goods governed by the UN Convention on Contracts for the International Sale of Goods.

148. *Pro Golf of Fla., Inc. v. Pro Golf of America, Inc.*,
2006 WL 508631 (E.D. Mich. 2006)
Internet sales occur from where the seller ships, not where the buyer receives the goods, for the purposes of franchise agreement's exclusive right to sell in certain territory.

149. *J.R. Simplot Co. v. Bosen*,
2006 WL 3409103 (Id. 2006)
Agent of LLC who signed sales agreement without indicating that he signed in a representative capacity was individually liable on the agreement.