

# Commercial Law Developments

## 2018

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**SECURED TRANSACTIONS***Scope Issues*

1. *In re Pioneer Health Services, Inc.*,  
[739 F. App'x 240](#) (5th Cir. 2018)  
A conditional sales agreement by which a healthcare provider acquired a nonexclusive, perpetual license to an information system used for billing, scheduling, and record retention was not a lease but a sale with a retained security interest because the agreement provided for title to pass to the healthcare provider upon full payment.
2. *In re Brainard*,  
[2018 WL 341730](#) (Bankr. D.N.M. 2018)  
The court could not determine on a motion for summary judgment whether an agreement to buy and sell 50% of the “shares” of two limited liability companies, which provided for payment over a two-year period and for the seller to retain ownership until payment was made in full, created a security interest. Many facts remained unclear, including whether the buyer acquired or exercised the rights of ownership during the payment period, so that the only thing he lacked was title.
3. *In re Cornerstone Tower Services, Inc.*,  
[2018 WL 6199131](#) (Bankr. D. Neb. 2018)  
A transaction structured as a sale of all future receivables for \$50,690 “until” \$65,897 was paid was a true sale because the transaction documents described it as such, there was no obligation to repurchase accounts, and if there are no receipts on a particular day, the buyer was to receive no funds that day. However, because the buyer did not file a financing statement to perfect its interest, the accounts became property of the seller’s bankruptcy estate. It was impossible to determine on summary judgment whether the buyer’s collections during the preference period were made in the ordinary course of business or according to ordinary business terms.
4. *NY Capital Asset Corp. v. F&B Fuel Co.*,  
[2018 WL 1310218](#) (N.Y. Sup. Ct. 2018)  
A transaction in which a business sold for \$60,000 15% of its future accounts receivable, to be collected by way of daily withdrawals of \$870 from the business’s bank account until a total of \$87,000 was collected was a true sale and hence not subject to state usury law. Despite the presence of a guaranty, the transaction did not require payment if no accounts were generated; there was no definite term; and there would be no right to collect in bankruptcy.

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5. *In re Clinton Nurseries of Maryland, Inc.*,  
[2018 WL 2293554](#) (Bankr. D. Conn. 2018)  
Equipment leases pursuant to which the lessee had the option to purchase the equipment for \$1 were sales and secured transactions, not leases. It did not matter that the purchase was contingent on the lessee not being in default, and the lessee had defaulted. The characterization of the transaction is to be determined at its inception.
  6. *Nostrum Laboratories, Inc. v. Balboa Capital Corp.*,  
[2018 WL 2470734](#) (W.D. Mo. 2018)  
A master lease agreement that contained no purchase option but which referred in one place to “any purchase option relating to any lease,” and in another place to “any purchase option with respect to such lease,” was ambiguous and thus the parol evidence rule did not prevent admission of evidence of the parties’ intent regarding a purchase option.
  7. *In re Johnson*,  
[587 B.R. 195](#) (Bankr. M.D. Ga. 2018)  
A renewable one-month lease of a portable storage shed with an option to purchase after 48 months was a true lease, not a sale and a secured transaction, because the Tennessee Rental-Purchase Agreement Act expressly provides that an agreement for the use of personal property for personal, family, or household purposes, for an initial term of four months or less, even if automatically renewable and containing a term that allows the consumer to become the owner of the property, “shall not be construed to [create a] ‘security interest’ ” under U.C.C. § 1-203. Even if the Act did not apply, the transaction would still be a true lease under § 1-203 because the initial lease term was shorter than the remaining economic life of the goods and the lessee had no obligation to renew or purchase.
  8. *Pipkin v. Sun State Oil, Inc.*,  
[273 So. 3d 828](#) (Ala. 2018)  
An oil company that leased gasoline pumps to a customer could not rely on rules relating to trade fixtures to claim continued ownership of the pumps because those rules apply only in the context of a landlord-tenant relationship, and the oil company had no such relationship with the customer. Instead, it was necessary to determine whether the lease was a true lease or a sale with a retained security interest. Because the customer did not have a right to terminate the lease – that is, the customer did not have the right to discontinue paying the consideration owed under the agreement – and did have the right to become the owner of the pumps at the end of the lease term for no additional consideration, the lease was a sale with a retained security interest.

9. *Brandnamewatches International, LLC v. PNC Bank*,  
[2018 WL 3089325](#) (S.D. Fla. 2018)

A consignor's conversion claim against the consignee's secured party would not be dismissed because even though the secured party might have a priority interest in the consigned goods, it was not clear from the complaint whether the consignor's interest was perfected or whether the consignee was generally known by its creditors to be substantially engaged in consignment sales, a fact critical to determining the parties' rights.

10. *In re TSAWD Holdings, Inc.*,  
[2018 WL 6839743](#) (Bankr. D. Del. 2018)

Because the debtor's principal lender with a perfected security interest in the debtor's inventory had actual knowledge that the debtor was selling the consignor's goods on consignment, the consignor's interest was not – vis-à-vis the lender – subject to Article 9 and thus was not rendered subordinate by the consignor's failure to file a continuation statement and maintain perfection.

11. *In re TSAWD Holdings, Inc.*,  
[2018 WL 6885922](#) (Bankr. D. Del. 2018)

Because the debtor's principal lender with a perfected security interest in the debtor's inventory did not have actual knowledge that the debtor was selling the consignor's goods on consignment until the consignor filed a financing statement, the consignor's interest in goods sold before that time was subject to Article 9 and subordinate to the lender's security interest.

### *Attachment Issues*

#### **– Existence of Security Agreement**

12. *Jipping v. First National Bank Alaska*,  
[735 F. App'x 436](#) (9th Cir. 2018)

Although the debtor's first security agreement with a bank granted the bank a security interest in the debtor's deposit accounts and expressly stated that the security interest would "continue in effect even though all or any part of the Indebtedness is paid in full," because that secured obligation was paid off and the debtor's subsequent security agreement with the bank did not list deposit accounts as collateral and contained a merger clause stating that the subsequent agreement, "together with Related Documents, constitutes the entire understanding and agreement" of the parties, the bank's later loan was not secured by deposit accounts. The original security agreement was not a Related Document because it was not executed in connection with the subsequent loan.

13. *McPherson v. Western Tap Manufacturing Co.*,  
[2018 WL 1409375](#) (C.D. Ca. 2018)

There was sufficient evidence to raise a jury question about whether a security interest was granted in all its shares of a corporation (some of which the corporation did not own) to secure a debt to one shareholder for the purchase of her shares. Even though there was no written security agreement, the minutes of a board meeting stated that “[a]ll the stock of the corporation would be held as collateral for the note” and an action list prepared by the corporation’s accountant stated that “[s]ecurity agreements to be issued by shareholders . . . [shareholders] to place their stock as security for the above.”

14. *Zweizig v. Rote*,  
[2018 WL 3572524](#) (D. Or. 2018)

A judgment creditor could not avoid as a fraudulent transfer the filing of a financing statement against a judgment debtor by a related entity because, even if the complaint was brought within the limitations period, there was no evidence that a security interest was transferred. A financing statement not signed by the debtor does not create a security interest.

15. *In re Meena, Inc.*,  
[2018 WL 5880916](#) (Bankr. E.D.N.Y. 2018)

A franchisor that entered into three franchise agreements with two individual debtors, and which also entered into two purchase-money security agreements with the individuals, but which then proceeded to sell inventory to the corporations owned by the individuals, did not in fact have a franchise relationship with the corporations or a security interest in the corporations’ property.

#### – Description of the Collateral

16. *Vermeer Manufacturing Co. v. RDO Equipment Co.*,  
[2018 WL 1062684](#) (Cal. Ct. App. 2018)

The modified agreement between a law firm and its client that provided that the client would pay the firm half “of any settlement amount or amount decided by arbitrators or mediators or of any settlement amount agreed upon between the parties or obtained by judgment during or after the re-trial at any time from the start of this Engagement to the end of time” was sufficient to give the firm a lien on the client’s recovery on a judgment after the first and only trial because other language in the agreement made it clear that the firm has “a lien on any and all recovery” and “a lien on any recovery of any kind,” and the parties’ email correspondence confirmed the breadth of the lien.

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17. *ARA Incorporated v. City of Glendale*,  
[2018 WL 1411787](#) (D. Ariz. 2018)  
Because Minnesota law does not require an explicit after-acquired clause when the collateral is rotating collateral such as accounts, a factoring agreement that granted the factor a security interest in “all accounts” of the debtor and which defined “Accounts Receivable” to include accounts “arising . . . from time to time” was sufficient to cover accounts acquired after execution of the agreement.
  18. *In re Cocoa Services, LLC*,  
[2018 WL 1801240](#) (Bankr. S.D.N.Y. 2018)  
A security agreement that described the collateral as “[a]ll of the Debtor’s equipment . . . whether now owned or hereafter acquired and wherever located . . . [i]ncluding but not limited to the equipment listed below,” followed by a long list of specified items was sufficient to cover all equipment, not merely the items specifically listed. Moreover, it did not matter that the list of specified items indicated an incorrect address for those items.
  19. *Green Automotive, LP v. ATN Mangement Co.*,  
[2018 WL 4374204](#) (W.D. Okla. 2018)  
A letter memorializing a consulting agreement and which provided that “[i]n the event the Customer fails to pay . . . Consultant will retain the rights to file a UCC claim on the Customer’s assets related to the businesses” was ineffective to create a security interest because it did not contain an acceptable description of the collateral.
  20. *McPherson v. Western Tap Manufacturing Co.*,  
[2018 WL 1409375](#) (C.D. Ca. 2018)  
A description of collateral as all the shares of stock in a specified corporation reasonably identifies the collateral.
  21. *In re Connolly Geaney Ablitt & Willard P.C.*,  
[585 B.R. 644](#) (Bankr. D. Mass. 2018)  
A secured party’s security interest in the debtor’s “General intangibles, . . . including choses in action [and] causes of action,” did not attach to a fraud claim because the claim was not described with the specificity required by § 9-108(e)(1).
  22. *Mac Naughten v. Harmelech*,  
[2018 WL 3763879](#) (N.J. Super. Ct. 2018)  
A lawyer who acquired no security interest in his clients’ assets because the security agreement described the collateral as “all real or personal property wherever located,” which was not a reasonable description, could not unilaterally amend the security agreement and sign the clients’ names even though the original agreement contained language granting the lawyer permission “to sign [the clients’ names] to any UCC-1 or other documents reasonably necessary to perfect the security interest in the Property.” That language deals with perfecting the security interest, but there was no security interest to perfect.



23. *Gill v. Board of the National Credit Union Administration*,  
[2018 WL 5045755](#) (E.D.N.Y. 2018)

Although the written security agreement that was to collateralize a limousine lacked a description of the collateral when the debtor signed the agreement, it was nevertheless effective because a description that was consistent with parties' intent, the loan application, and the notice of lien filed with the state department of motor vehicles – and which identified the limousine by year, make, color, and VIN – was later added by the secured party.

24. *In re Somerset Regional Water Resources, LLC*,  
[592 B.R. 38](#) (Bankr. W.D. Pa. 2018)

A debtor-in-possession financing order that provided for the sole member of the debtor to “assign to Lender any rights or interest in the 2015 Federal tax refund due to him individually, but attributable to the operating losses of the Debtor” was ambiguous as to whether it covered a refund of 2014 taxes attributable to a carryback of 2015 losses. After considering parol evidence, it was apparent that the parties understood that the entirety of any refund generated on account of the 2015 operating losses was to be the collateral.

#### – Obligations Secured

25. *In re Factory Sales & Engineering, Inc.*,  
[2018 WL 3013352](#) (Bankr. E.D. La. 2018)

Collateral that the debtor provided to sureties that issued performance bonds remained encumbered after some of the bonds were released when the projects related to the bonds were completed because the indemnity agreement provided that the collateral security lasts until the debtor furnishes written evidence of the termination of past, present and future liability under “any Bond,” not “the Bond.”

#### – Rights in the Collateral

26. *In re Blake*,  
[2018 WL 1182178](#) (Bankr. S.D. Ill. 2018)

A bank's security interest in the debtors' crops, farm equipment, and general intangibles, attached to the debtor's rights under the Agricultural Risk Coverage Program once the debtor signed contracts to participate in the program, not later when payments were made under the program. Consequently, the bank's interest arose before the preference period and was not avoidable.

27. *In re B & M Hospitality LLC*,  
[2018 WL 1635228](#) (Bankr. E.D. Pa. 2018)

A liquor license is property under Pennsylvania law and a creditor's security interest did attach to it.

28. *Northwest Bank v. McKee Family Farms, Inc.*,  
[732 F. App'x 620](#) (9th Cir. 2018)

A bank that had a security interest in a seed licensee's existing and after-acquired crops did not have a security interest in seed crops grown by independent growers. Even though the license agreement expressly stated that, as between the owner of the variety and the licensee, the licensee was the owner, the growers were not a party to that agreement. Although some of the agreement with the growers specified that ownership of the seed remained with the licensee, those agreements were not signed until after the crop was harvested, and the crop was never delivered to the licensee or its agent.

29. *In re Flechas & Associates, P.A.*,  
[592 B.R. 639](#) (Bankr. S.D. Miss. 2018)

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

– Other

30. *In re SemCrude, L.P.*,  
[2018 WL 481862](#) (Bankr. D. Del. 2018)  
[2018 WL 6077979](#) (Bankr. D. Del. 2018)

An unpaid supplier that sold oil to the now bankruptcy buyer, which in the ordinary course of business had resold the oil to customers, had no security interest in or statutory lien on the oil because the supplier warranted that it sold the oil free and clear of security interests. It made no difference that the supplier claimed that its lien arose after the sale to the now bankrupt buyer.

31. *In re Chamberlayne Auto Sales & Repair, Inc.*,  
[585 B.R. 116](#) (Bankr. E.D. Va. 2018)

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

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32. *In re WB Services, LLC*,  
[2018 WL 4006934](#) (Bankr. D. Kan. 2018)  
An unpaid seller of heaters did not have a security interest in the heaters pursuant to § 2-401 even though the sales agreement provided that the seller retained title until the buyer made payment because the seller still had possession of the heaters. Thus, the seller was not entitled to summary judgment on the preference claim brought by the buyer's bankruptcy trustee to recover prepetition payments on the basis that § 547(b)(5) was not satisfied.
33. *Malek v. Gold Coast Exotic Imports, LLC*,  
[107 N.E.3d 1013](#) (Ill. Ct. App. 2018)  
An automobile dealer had a security interest in a vehicle despite the absence of an authenticated security agreement because the dealer had given value, the debtor had rights in the vehicle, and the dealer had possession of the vehicle.
34. *In re Smith*,  
[2018 WL 1466080](#) (Bankr. W.D. Ky. 2018)  
A bank with a security interest in the debtors' farm equipment and business machinery did not have a security interest in the insurance proceeds for two tobacco pole barns destroyed in a wind storm because they were permanent fixtures that became part of the realty.
35. *The Security National Bank of Sioux City v. Welte*,  
[2018 WL 6120206](#) (Iowa Ct. App. 2018)  
Even if a bank with a security interest in a farmer's equipment had an implied course of dealing that permitted the farmer to sell equipment free of the bank's security interest, the farmer's sale of two tractors to his son for less than a quarter of their value would not fall within that course of dealing, and therefore the security interests in the tractors survived.
36. *First American Bank v. SJP Group, Inc.*,  
[2018 WL 5722252](#) (D.N.J. 2018)  
Even if the bank that had loaned money to an employer, which had in turn used most of the funds to make a secured loan to an ESOP, had not released its security interest in the employer's contract rights, and even if the bank had not deemed the secured obligation fully satisfied, and even if the ESOP's grant of a security interest in its shares of stock in the employer was not a prohibited transaction under ERISA, the bank would still not have a security interest in the ESOP's rights under agreements with the employer and the plan trustee that settled the ESOP's claims made for overpayment for the stock. Those claims were not proceeds of the stock because they were not for diminution in value of the stock, but for overvaluing and overpaying for the stock in the first instance.

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37. *Silver Creek Farms, LLC v. Fullington*,  
[2018 WL 1990522](#) (S.D. Fla. 2018)  
The right of an unpaid seller of a horse to reclaim the horse under § 2-507(2) or § 2-702(2) is not a security interest. A term in the parties' agreement that, upon buyer's default in payment, "the Seller has the right to reclaim possession and all payments previously made are non-refundable," did not provide the sole remedy for breach.
38. *Colorado v. Madison*,  
[2018 WL 2054605](#) (Colo. Ct. App. 2018)  
A thief of wine who was ordered to pay restitution to the victims but who was entitled to get the wine back from the sheriff upon such payment did not thereby have a security interest or other ownership rights in the wine, and was therefore not entitled to sell the wine and apply the proceeds to the restitution obligation.
39. *Consumer Financial Protection Bureau v. RD Legal Funding, LLC*,  
[332 F. Supp. 3d 729](#) (S.D.N.Y. 2018), *appeal filed*, (2d Cir. Oct. 23, 2018)  
The assignment by individuals of their rights to payment under a settlement agreement with the NFL were void because the settlement agreements expressly prohibited assignment and stated that any attempted assignment was void. Although the New York version of § 9-408(d) overrides many restrictions on the assignment of general intangibles, it expressly excludes "the right to receive compensation for injuries or sickness as described in 26 U.S.C. § 104(a)(1) and (2)," and the settlement agreement, which was rooted in the physical injuries resulting from repeated brain injuries that retired NFL players experienced while active in professional football, involved such a right.
40. *In re Woodbridge Group of Companies, LLC*,  
[590 B.R. 99](#) (Bankr. D. Del. 2018)  
A promissory note that prohibited assignment without consent and stated that any attempted assignment without the required consent was void could not be assigned. Section 9-408 did not override the restriction on assignment because § 9-406 endorses the enforceability of anti-assignment provisions in the sale of promissory notes, whereas § 9-408 applies only to the grant of a security interest to secure a debt.
41. *Bob Bay and Son, Co. v. Circle Investment Corp.*,  
[2018 WL 3239909](#) (Ohio Ct. App. 2018)  
There is no longer under the common law of Ohio a landlord's distress lien on a defaulting tenant's personal property; to have a lien on such property the landlord must obtain a security interest under Article 9. The lease agreement, by expressly providing the landlord a right of re-entry upon default, did not grant a security interest in the tenant's personal property. The re-entry clause did not mention personal property and the lease otherwise stated that such property remained the tenant's.

42. *Restaurant Supply, LLC v. Pride Marketing and Procurement, Inc.*,  
[2018 WL 4038090](#) (E.D. La. 2018)

A purchasing cooperative did not have a security interest in rebates received from sellers and attributable to purchases the cooperative made on behalf of its members, and instead owned the rebates, because the cooperative's shareholder agreement had been modified to make its ownership clear. Although the shareholder agreement apparently retained some provisions referring to a security interest, the resulting ambiguity was resolved with parol evidence that showed that the intent was for the cooperative to own the rebates.

[2018 WL 5024072](#) (E.D. La. 2018) (on reconsideration)

Because the court overlooked evidence that the cooperative did not pay taxes on the rebates, and thus did not treat itself as the owner of them, reconsideration would be granted; a material fact remained in dispute prohibiting summary judgment.

43. *In re Strickland*,  
[2018 WL 4620643](#) (Bankr. S.D. Ala. 2018)

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

44. *Wheeling & Lake Erie Railway Co. v Keach*,  
[2018 WL 4696457](#) (D. Me. 2018)

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

45. *In re Woodbridge Group of Companies, LLC*,  
[2018 WL 4878830](#) (Bankr. D. Del. 2018)

Lenders who provided indirect financing for a real property transaction – they received a note from the borrower that was secured by the note and mortgage that the borrower received from the purchaser of the real property – did not have any interest in the real property or in proceeds of the real property. The lenders also had no right to enforce the note serving as collateral. Their security interest was unperfected because they did not file a financing statement or possession of the note serving as collateral. And, although the lenders relied on California law which provides delivery, transfer, and perfection of a promissory note shall be complete even if a licensed broker who has arranged a loan continues to service and retains possession of a promissory note, it was not clear that California law applies and, in any event, the borrower was not a licensed broker.

### *Perfection Issues*

#### **– Method of Perfection**

46. *In re Pacific Imperial Railroad, Inc.*  
[2018 WL 3689552](#) (Bankr. S.D. Cal. 2018)

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

47. *In re Raymond Renaissance Theater, LLC*,  
[583 B.R. 735](#) (Bankr. C.D. Cal. 2018)

Even if the owner of the debtor retained a security interest in funds that he provided to the debtor for deposit with a superior court in a interpleader action, and regardless of whether the debtor's interest in the deposited funds was money, an account, or a general intangible, the security interest was unperfected. The owner did not file a financing statement, did not take possession, and did not obtain the acknowledgment of the court that it held the funds for the owner's benefit.

48. *In re Jaghab*,  
[584 B.R. 472](#) (Bankr. E.D.N.Y. 2018)

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

49. *In re Cocoa Services, LLC*,  
[2018 WL 1801240](#) (Bankr. S.D.N.Y. 2018)  
Even if a secured party's fixture filing was ineffective to perfect a security interest in fixtures because it did not correctly identify the record owner of the real property and gave an incorrect address for the real property, the secured party's security interest was perfected by the financing statement it filed where the debtor is located.
50. *Malek v. Gold Coast Exotic Imports, LLC*,  
[107 N.E.3d 1013](#) (Ill. Ct. App. 2018)  
An automobile dealer perfected its security interest in a vehicle by possession because the Illinois certificate of title statute does not apply to a security interest in a vehicle "created by a . . . dealer who holds the vehicle for sale."

– Adequacy of Financing Statement

51. *In re Pierce*,  
[581 B.R. 912](#) (Bankr. S.D. Ga. 2018)  
Because the debtor's correct name is "Kenneth Ray Pierce," the name printed on his driver's license, not "Kenneth Pierce," the signature used on his driver's license, a filed financing statement that identified the debtor as "Kenneth Pierce," and which would not be disclosed in response to a search using the debtor's correct name, was ineffective.
52. *In re The Financial Oversight and Management Board for Puerto Rico*,  
[590 B.R. 577](#) (D.P.R. 2018), *appeal filed*, (1st Cir. Sept. 7, 2018)  
Filed financing statements that described the collateral as "[t]he pledged property described in the Security Agreement attached as Exhibit A hereto," and which attached the security agreement, were nevertheless ineffective to perfect because the attached security agreement did not define the pledged property and instead referenced a bond resolution that defined the term but which was not attached. It did not matter that the bond resolution was a publicly available document because it was not filed with the UCC records. Amendments to the financing statements that did describe the collateral were also ineffective because, by the time they were filed, the debtor's name had changed so as to make the name listed for the debtor in the originally filed financing statements seriously misleading, and the amendment did not correct the debtor's name.
53. *In re 8760 Service Group, LLC*,  
[586 B.R. 44](#) (Bankr. W.D. Mo. 2018)  
An amended financing statement describing the collateral as "[a]ll Accounts Receivable, Inventory, equipment and all business assets, located at 1803 W. Main Street," was effective even though the debtor's goods were located at a different address because the description was ambiguous – the address could restrict all the described collateral or merely the phrase "all business assets" – and thus a reasonably prudent searcher should inquire further.

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54. *In re I80 Equipment, LLC*,  
[591 B.R. 353](#) (Bankr. C.D. Ill. 2018)  
A filed financing statement that described the collateral solely as “[a]ll Collateral described in First Amended and Restated Security Agreement dated March 9, 2015 between Debtor and Secured Party,” but which did not attach the referenced security agreement, was ineffective to perfect. While § 9-108(b)(6) provides that any method of identifying the collateral is sufficient “if the identity of the collateral is objectively determinable,” the collateral description in the financing statement was effectively blank, and that is not objectively determinable even though it might have put searchers on notice that the secured party claimed a security interest in some assets of the debtor.
55. *In re B & M Hospitality LLC*,  
[584 B.R. 88](#) (Bankr. E.D. Pa. 2018)  
A filed financing statement that properly identified the debtor and which described the collateral as “[a]ll assets of the debtor” was sufficient to perfect a security interest in the debtor’s liquor license.
56. *Gray v. Bank or Early*,  
[2018 WL 9415069](#) (M.D. Ga. 2018)  
A filed financing statement describing the collateral as “all farm products including all 2015 crops” was sufficient to perfect a security interest in the debtor’s 2016 crops. Pursuant to § 9-315(d), the security interest in the cash proceeds of the crops was also perfected. The Bankruptcy Court was, however, authorized to limit the security interest pursuant to the “equities of the case” exception in § 552(b)(1).
57. *Knoxville TVA Employees Credit Union v. Houghton*,  
[2018 WL 3381506](#) (E.D. Tenn. 2018)  
An error of one digit in a filed financing statement’s description of a boat’s identification number did not render the financing statement ineffective to perfect (possibly dicta).
58. *Winfield Solutions, LLC v. Success Grain, Inc.*,  
[2018 WL 1595871](#) (E.D. Ark. 2018)  
A financing statement covering equipment, among other things, was not seriously misleading because it incorrectly included in the collateral description the statement, “this filing filed as ag lien.” A searcher would find the financing statement because the debtor’s name was listed correctly and the erroneous language would not mislead the searcher as to the collateral the financing statement covers.
59. *In re The Feed Store, LLC*,  
[2018 WL 1320168](#) (Bankr. N.D.W. Va. 2018)  
A secured party whose filed financing statement was erroneously assigned the same instrument number as another filing, and hence was not properly indexed, was nevertheless perfected. The rule treating a mis-indexed financing statement as effective to perfect does not deprive searchers of constitutionally required notice.



60. *In re Hill*,

[2018 WL 1916172](#) (Bankr. D. Neb. 2018)

Because the financing statement filed by the party with an agricultural lien on crops lacked the dates of the transactions giving rise to the lien, a signature of the person to whom the pesticides and fertilizer were furnished, and the lienholder's tax identification number, the agricultural lien was unperfected.

– **Possession**

61. *In re Community Home Financial Services, Inc.*,

[583 B.R. 1](#) (Bankr. S.D. Miss. 2018)

A secured party that obtained an assignment of mortgage loans represented by instruments that were in the possession of a law firm acting as custodian for the assignor was not perfected by possession because the Custodial Agreement identified the law firm as the agent of only the assignor, not the assignee/secured party. The secured party was not perfected through possession of a bailee because the law firm never acknowledged that it held the instruments for the secured party. Although a perfected security interest that is assigned normally remains perfected under § 9-310(c), that rule can be and was varied by agreement because the secured party's principal stated the name on the lockbox, custodial agreement, and all other documents should be amended, but he did not follow through.

– **Control**

62. *In re Cruz Rivera*,

[2018 WL 3702481](#) (Bankr. D.P.R. 2018)

A bank's security interest in its customer's deposit account was perfected by control even though the document granting the security interest was not notarized pursuant to the Puerto Rico Civil Code. The transaction was governed by Puerto Rico's version of Article 9, not by the Civil Code.

– **Collateral Covered by a Certificate of Title**

63. *In re Abell*,

[2018 WL 1787357](#) (Bankr. W.D. Ky. 2018)

A creditor's purchase-money security interest in a vehicle was not perfected because the interest was not stated on the first certificate of title issued due, apparently, to the creditor's failure to pay the filing fee. Under Kentucky law, perfection of a security interest in a motor vehicle is not accomplished when the fee and paperwork are submitted to the county clerk; perfection occurs when the notation is made on the certificate of title.

64. *In re Howard*,  
[2018 WL 6621280](#) (Bankr. W.D. Ky. 2018)  
A creditor's security interest in a manufactured home was perfected when the creditor filed a title lien statement in the county where the debtor was located at the time of purchase and the certificate of title was issued noting the lien. It did not matter that, shortly thereafter, the home was delivered to and the debtor moved to a different county.
65. *In re Thompson*,  
[2018 WL 2717044](#) (Bankr. W.D. Va. 2018)  
Because a security interest in a motor vehicle is perfected pursuant to Virginia law when the application to note the lien on the certificate of title is delivered to the Department of Motor Vehicles, the lender's security interest was perfected before the debtor's bankruptcy petition was filed, even though the certificate noting the lien was issued post-petition.
66. *In re Riffe*,  
[2018 WL 3788973](#) (Bankr. S.D.W. Va. 2018)  
A security interest in a manufactured home, which was perfected through compliance with the state certificate of title statute, did not become invalid or unperfected when the manufactured home became affixed to real property.

– Other

67. *In re National Truck Funding LLC*,  
[589 B.R. 294](#) (Bankr. S.D. Miss. 2018)  
Assuming the secured parties that had not filed a financing statement nevertheless had a perfected security interest in the debtor's trucks through compliance with the applicable certificate of title statute, the secured parties also had a perfected security interest in the rental payments received from the independent drivers to which the debtor had leased the trucks, as long as those payments were identifiable. The rental payments were cash proceeds not merely of the leases, but also of the trucks, and thus perfection could continue under § 9-315(d)(2).

– Bogus Filings

68. *JP Morgan Chase Bank v. Carraker*,  
[2018 WL 1959471](#) (Ariz. Ct. App. 2018)  
An individual who, without authorization, filed a financing statement against a bank and asserted a baseless claim for \$3 trillion was liable for \$500 under a nonuniform provision of the Arizona Commercial Code and the bank was entitled to an order declaring the financing statement void *ab initio*.

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

### ***PMSI Status***

71. *In re Jones*,  
[583 B.R. 749](#) (Bankr. W.D. Wash. 2018)  
Credit extended to a car buyer for optional gap insurance and maintenance contracts are not part of the price of the car or value given to enable the debtor to acquire the car, and are thus not included in the purchase-money obligation. The debtor's prepetition payments were to be allocated to the purchase-money obligation and the non-purchase-money obligation on a pro rata basis.
72. *In re Jaynes*,  
[2018 WL 6722360](#) (Bankr. E.D. Mich. 2018)  
A secured party's security interest in a vehicle was a PMSI even to the extent it secured negative equity in a trade-in and the premium for gap insurance coverage.

### ***Priority Issues***

#### **– Tax Liens**

73. *Bennett v. Bascom*,  
[2018 WL 1473798](#) (E.D. Ky. 2018)  
The IRS, which filed a notice of federal tax lien against the debtor, had priority in the proceeds of the debtor's partnership interest over a creditor with an unperfected security interest in the partnership interest, even though the partnership interest is not an asset on which a judgment creditor could acquire a judgment lien under state law.

74. *Payne Family Homes, LLC v. Servant Air Systems, Inc.*,  
[2018 WL 6592099](#) (E.D. Mo. 2018)

A secured party with an unperfected security interest did not have priority over a federal tax lien with respect to which a notice was properly filed, even as to accounts receivable that arose after the notice was filed.

75. *SE Property Holdings, LLC v. Unified Recovery Group, LLC*,  
[2018 WL 6267183](#) (E.D. La. 2018)

A lender with a security interest in the debtor's accounts, and which perfected that security interest years before the IRS filed a notice of tax lien, had priority over the IRS only to the extent that the security interest in the disputed account became choate before or within 45 days after the tax lien notice was filed. The fact that the debtor had assigned the account to a related party before it granted the security interest did not matter because the related party never perfected its interest, and thus the debtor was deemed to remain the owner of the account. The fact that the security agreement encumbered all accounts "subject only to Permitted Liens," did not subordinate the security interest to permitted liens (including the tax lien); it meant only that the security interest *might* be subordinated to permitted liens if such liens otherwise have priority. However, even though the debtor had, before the tax lien notice was filed, fully performed the services giving rise to the account at issue, the debtor's obligations also included providing the account debtor with the documentation needed to substantiate the work performed. Until the account debtor gave its approval of that documentation, the account was inchoate.

76. *Premo Autobody, Inc. v. Parker*,  
[2018 WL 4625626](#) (W.D. Va. 2018)

Both a perfected federal tax lien and an earlier perfected – and hence higher priority – security interest survived a judicial sale of the collateral by a judgment creditor of the taxpayer/debtor. Consequently, collateral could be sold and the proceeds distributed to pay, in order, the costs of the sale, the secured obligation owed to the senior secured party, and the federal tax liabilities included in the notice of federal tax lien, with any remainder disbursed to the buyers at the prior judicial sale.

#### – Buyers of Goods

77. *Takuanyi v. Center National Bank*,  
[2018 WL 1462330](#) (Minn. Ct. App. 2018)

The buyer of an automobile that never received a title certificate for the vehicle never acquired ownership of the vehicle and thus took subject to an existing security interest perfected by notation on the certificate. The buyer therefore had no conversion action against the secured party for repossessing the vehicle.

78. *H&S Contracting, Inc. v. Kinetic Leasing, Inc.*,  
[2018 WL 3340372](#) (D. Minn. 2018)

A secured party with a security interest in equipment had priority in the cash proceeds of the equipment that a buyer received when it resold the equipment less than one year after purchasing it from the original debtor. Although the original debtor was located on South Dakota and the buyer in Minnesota, and thus the secured party had one year to re-perfect as to the equipment or be deemed never to have been perfected as against a buyer, that rule did not apply to the cash proceeds that were received while the security interest was perfected. However, the secured party had no claim in conversion as to an item of equipment that the buyer resold less than one year after purchasing it because the secured party's security interest in that item became unperfected one year after the sale, and the buyer therefore took free of the security interest.

79. *Kourt Security Partners, LLC v. United Bank*,  
[2018 WL 1225516](#) (W. Va. 2018)

A buyer that purchased the assets of a business at a private sale conducted by the owner took the assets subject to a perfected security interest. The secured party never authorized the sale free and clear of its security interest.

80. *Inland Bank and Trust v. ARG International AG*,  
[2018 WL 3543905](#) (S.D.N.Y. 2018)

A bank's security interest in a corporation's inventory attached to the 300 tons of aluminum bars that the corporation purchased; even though the corporation never paid for the bars and the bars remained in the possession of a third-party warehouse, the corporation acquired ownership rights in the bars when the seller instructed the warehouse to release the bars to the corporation. When the corporation then resold the goods back to the original seller, with the resale price to be offset against the original sale price, the original seller did not qualify as a buyer in ordinary course of business because it acquired the bars in partial satisfaction of a money debt. However, a factual issue remained about whether the bank authorized the resale free and clear of its security interest because it never objected to the corporation's sales of its inventory and parties in the metal trading industry frequently buy and sell raw materials from the same counter-parties and "net out" the purchase prices of the open contracts.

81. *In re Turner Grain Merchandising, Inc.*,  
[2018 WL 7082063](#) (Bankr. E.D. Ark. 2018)

Although the bank with a perfected security interest in a seller's crops notified the buyer of its interest in the farmer's crops, the notices failed to strictly comply with the Food Security Act because they did not include the address of the bank, a description of the farm products subject to the security interest, or the name of the county or counties in which the farm products are produced or located. Consequently, the buyer took free of the bank's security interest.

82. *Pipkin v. Sun State Oil, Inc.*,

[2018 WL 4871132](#) (Ala. 2018)

An oil company's unperfected security interest in the gasoline pumps that it provided to a customer did not have priority over the rights of an individual who bought the real property and the pumps.

**– Competing Security Interests**

83. *In re Energy Future Holdings Corp.*,

[748 F. App'x 455](#) (3d Cir. 2018)

The first-lien lenders who funded the debtor's Deposit L/C Loan Collateral Account did not have priority over the other first-lien lenders in the remaining balance of that account when the credit facility ended because the intercreditor agreement gives all the first-lien lenders *pari passu* priority in all the collateral. While the credit agreement gives priority in the Deposit L/C/ Loan Collateral Account to pay "Deposit L/C Obligations," the first-lien lenders who funded that account are not owed such obligations.

84. *In re Novak*,

[2018 WL 4177831](#) (Bankr. D. Kan. 2018)

A bank with a perfected security interest in the debtor's assets was entitled to the insurance proceeds for a destroyed item of equipment because the trust that initially perfected a security interest in equipment had allowed its financing statement to lapse, and thus its security interest had become unperfected. Although the trust claimed that, when its security interest was perfected, it repossessed the collateral and then leased it back to the debtor, nothing in the record supported that allegation. Although the trust's contract with the debtor provided for title to revert back to the trust upon default, that language did nothing more than create a security interest. Although the trust was a loss payee on the insurance policy, that did not give the trust any greater rights to the proceeds.

85. *In re Tuscany Energy, LLC*,

[591 B.R. 630](#) (Bankr. S.D. Fla. 2018)

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

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86. *In re Essex Construction, LLC*,  
[591 B.R. 630](#) (Bankr. D. Md. 2018)  
Because priorities in bankruptcy are fixed as of the filing of the petition, a creditor with a first-priority security interest at that time retained priority over another perfected security interest even though the senior creditor's financing statement lapsed and the security interest became unperfected postpetition.
87. *Bayer Cropscience LP v. Texana Rice Mill, Ltd.*,  
[2018 WL 1378641](#) (E.D. Mo. 2018)  
The bank with a perfected security interest in the debtor's commercial tort claim had priority in the debtor's rights under an agreement settling that claim over another lender with an earlier security interest in the debtor's existing and after-acquired general intangibles, except to the extent that payment was for damage to equipment in which the earlier lender had a perfected security interest. Accordingly, the proceeds from the settlement agreement had to be apportioned. The bank was entitled to \$212,000 and the earlier lender was entitled to \$765,000.
88. *Peoples Bank v. Reliable Fast Case LLC*,  
[2018 WL 3633961](#) (N.D. Ind. 2018)  
A bank with a perfected, first-priority security interest in the debtor's accounts, the proceeds of which were deposited into a checking account at the bank, stated claims for conversion and unjust enrichment against a buyer of accounts by alleging that the buyer knew of the bank's security interest but nevertheless regularly debited the checking account. The allegations were sufficient to constitute "collusion" within the meaning of § 9-332(b) because from them it could be inferred that the buyer knew that the debtor's conduct constituted a breach of a duty and that the buyer gave substantial assistance or encouragement to the debtor to so conduct itself.
89. *Liberty Bell Bank v. Rogers*,  
[2018 WL 4110923](#) (D.N.J. 2018)  
A bank with a perfected, first-priority security interest in four copiers that the debtor leased to customer, along with other property, was entitled to only that portion of the proceeds of the lease attributable to the copiers. Although the secured party receiving the remaining \$50,000 in proceeds made only an \$18,000 loan to finance the debtor's acquisition on the other leased item, that secured party had a security interest in all of the debtor's lease proceeds to secure additional obligations.
90. *In re Flechas & Associates, P.A.*,  
[591 B.R. 630](#) (Bankr. S.D. Miss. 2018)  
A lender that had a perfected security interest in a law firm's right to a contingency fee had priority over a subsequent purchaser. Although the lender's interest was expressly limited to "fees remaining after [another party] has been paid," that other party was no longer claiming any portion of the fees.

91. *The Security National Bank of Sioux City v. Welte*,  
[2018 WL 6120206](#) (Iowa Ct. App. 2018)

A bank's perfected security interest in a farmer's equipment, which remained after a transfer to the farmer's son, had priority under § 9-325 over a purchase-money security interest granted by the son.

– Other

92. *Legacy Bank v. Fab Tech Drilling Equipment, Inc.*,  
[2018 WL 6928971](#) (Tex. Ct. App. 2018)

The holder of a prior perfected security interest in the debtor's accounts did not waive its interest in the collateral by not taking action to foreclose, despite the debtor's default for several years, before a judgment lien creditor sought to garnish the accounts, or by continuing to lend to the debtor after the garnishment action was filed. The security agreement expressly provided that the secured party would not be deemed to have waived any rights in the absence of a writing signed by the secured party and that no delay in exercising rights would operate as a waiver, and under § 9-201 the terms of the security agreement are binding on creditors of the debtor.

93. *S & H Packing & Sales Co. v. Tanimura Distributing, Inc.*,  
[883 F.3d 797](#) (9th Cir. 2018) (en banc)

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

[2018 WL 611546](#) (C.D. Cal. 2018) (on remand)

The factoring transaction was a loan, not a sale of receivables, because even though the factor collected from the account debtors, some of those amounts were to be refunded after collection of a factoring fee and other applicable fees, and the factor assumed the risk of non-payment by the account debtors only under tightly-circumscribed conditions, with full recourse to the debtor.

94. *Malek v. Gold Coast Exotic Imports, LLC*,  
[107 N.E.3d 1013](#) (Ill. Ct. App. 2018)

Because an automobile dealer's security interest in a vehicle was perfected by possession, the wife of the debtor, who was in the midst of a divorce proceeding, was not entitled to a writ of replevin.



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95. *In re Hill*,  
[2018 WL 1916172](#) (Bankr. D. Neb. 2018)  
A bank's perfected security interest in the debtor's crops had priority in the proceeds of the crops over an unperfected agricultural lien.
96. *In re Farmers Grain, LLC*,  
[588 B.R. 896](#) (Bankr. D. Id. 2018)  
A lender's perfected security interest in the debtor's grain was subordinate to the Oregon producer lien of a corn supplier because, even though the corn supplier failed to send notice of its lien to the lender within 20 days after filing, as required for priority under the statute, the lender had actual knowledge of the lien.
97. *Franklin State Bank & Trust Co. v. Crop Production Services, Inc.*,  
[2018 WL 3244105](#) (W.D. La. 2018)  
Disputed issues of material fact prevented summary judgment on whether a secured party with priority in the proceeds of the debtor's 2015 crop but who endorsed the check over to a junior secured party under the mistaken belief that the check represented proceeds of 2014 crops, was entitled to recover the proceeds.
98. *Southwest Lending LLC v. Recorp New Mexico Associates I LP*,  
[2018 WL 6583003](#) (N.M. Ct. App. 2018)  
A lender that had a mortgage and security interest in the debtor's water rights and permits, well sites or well site properties related thereto, all instruments, documents, any other contract rights or rights to the payment of money related thereto, and all equipment now or hereafter associated or used in connection therewith, and which later purported to purchase all the collateral at a public UCC sale, did not thereby acquire the water rights, which are real property, and could be foreclosed only by conducting a judicial foreclosure sale. Accordingly, the lender was not entitled to summary judgment on a prior mortgagee's claim of priority in real property, including the water rights.
99. *West Linn Paper Co. v. Columbia River Logisitics, Inc.*,  
[2018 WL 5116062](#) (D. Or. 2018)  
Factual issues prevented summary judgment on whether goods shipped to and stored by an entity related to the debtor remained part of the seller's inventory pursuant to the seller's warehouse agreement with that entity, or whether the debtor had acquired ownership or control of the goods sufficient for security interests granted by the debtor to attach to the goods.
100. *Santander Consumer USA, Inc. v. A-1 Towing Inc.*,  
[82 N.Y.S.3d 629](#) (App. Div. 2018)  
A towing company that towed and made some repairs to a vehicle failed to establish that it had a garagekeeper's lien with priority over an earlier perfected security interest because the towing company did not establish that it was a registered motor vehicle repair shop at the time it towed and repaired the vehicle.

101. *Nissan Motor Acceptance Corp. v. All County Towing*,  
[77 N.Y.S.3d 219](#) (Sup. Ct. 2018)

The statutory lien of a company that, at the request of police, towed and stored a vehicle, had priority with respect to the towing charges over the creditor with a perfected security interest in the vehicle. The company did not, however, have a lien for the storage charges because its notification to the secured creditor stated that the vehicle would be released upon full payment of all accrued charges but failed to state, as required by the lien statute, that the company “claim[ed] a lien” on the vehicle.

102. *Cordes v. United States*,  
[2018 WL 496839](#) (D. Colo. 2018)

A secured party that was aware that the two original borrowers and guarantor conducted their business with numerous related entities without regard to corporate separateness, and therefore insisted that many of those other entities grant a security interest in their assets, was not entitled to the portion of a tax refund owed to one entity but which the IRS sought to apply to the tax liability of another entity.

103. *In re Charleston Associates, LLC*,  
[2018 WL 4566674](#) (D. Nev. 2018)

A bank with a security interest in a deposit account failed to include a copy of its security agreement in the record on appeal, and thus the district court had no basis to conduct a *de novo* review of – and hence affirmed – the bankruptcy court order that a garnishor took funds free of the security interest under § 9-332.

104. *The Eclipse Group LLP v. Target Corp.*,  
[2018 WL 4680006](#) (S.D. Cal. 2018)

A law firm’s contractual lien on a client’s right to payment under an agreement settling a case handled by the law firm had priority over the rights of a judgment creditor that filed its notice of judgment lien ten months after the law firm acquired its contractual lien. It did not matter that the law firm was owned by a lawyer who had previously been the managing partner of the client because the judgment creditor presented no evidence of collusion.

105. *DeCastro v. Kavadia*,  
[2018 WL 4771528](#) (S.D.N.Y. 2018)

A lawyer’s charging lien on the diamonds that the lawyer helped recover for a client had priority over the rights of a judgment creditor that had filed a financing statement against the client and who claimed to have a perfected security interest. Even if the judgment creditor did have a security interest, the lawyer’s charging lien would have priority because it secured the efforts that enabled the client to acquire rights in the diamonds.

106. *United States v. LaBatte*,  
[2018 WL 6310281](#) (D.S.D. 2018)

The perfected security interest of the United States in a tractor, trailer, and mower to secure the debtor's liability on two outstanding loans had priority over the rights of a judgment lienor whose lien arose two years after the security interest was perfected. It was also prior to a mechanic's lien because the state statute governing mechanic's liens expressly states that they are not prior to liens held by the United States.

### ***Enforcement Issues***

#### **– Default**

107. *Wells Fargo Bank v. Worldwide Shrimp Co.*,  
[2018 WL 6696607](#) (N.D. Ill. 2018)

Because the debtor failed to provide the secured party with required financial information, the debtor was in default and the secured party was authorized to exercise the remedies available after default. Doing so could not be a breach of the duty of good faith because the agreement expressly authorized it. The secured party did not waive the breach; at most the secured party offered by email to discuss a possible waiver. The email message could not be a modification because state law requires a modification of a credit agreement to be signed by both parties and the debtor did not sign the message. Finally, the message could not be a basis for estoppel because it was not reasonable for the debtor to rely on it, given that the message merely offered to discuss the matter.

108. *Melrose Credit Union v. Soyferman*,  
[2018 WL 1004988](#) (N.Y. Sup. Ct. 2018)

Because the debtor failed to pay a balloon note when due, the secured party was entitled to summary judgment on the issue of default despite the debtor's affidavit describing his efforts to refinance the debt. The debtor's defense of waiver, based on the secured party's acceptance of partial payment after default, did not create a triable issue because the note expressly provided that, even if the holder did not require full payment upon default, the holder "will still have the right to do so if I am in default at a later time."

109. *Kirkendoll v. Entertainment Acquisitions, LLC*,  
[2018 WL 4431310](#) (M.D. La. 2018)

The holder of a promissory note that called for payment of \$35,200 per month until the entire \$2.5 million was paid had no claim to have the payment obligation accelerated despite the maker's default because the note provided that late payments give rise to a default when they are outstanding as of the "Maturity Date," which is defined as the seven-year anniversary of the note. For the same reason, the holder could not enforce the terms of the note providing for a security interest in specified collateral.

110. *Gawron v. Citadel Federal Credit Union*,  
[2018 WL 3737892](#) (Pa. Super. Ct. 2018)

A debtor had no cause of action against a secured party that repossessed her car because even though she had paid the arrearage prior to repossession, she had not paid the fee the secured party incurred in the first repossession attempt, which had failed because the debtor had not informed the secured party of her new address. and thus the debtor was in default.

111. *Valley v. Kiel*,  
[2018 WL 4923112](#) (Iowa Ct. App. 2018)

The sellers of a business that deal in cleaning equipment, who retained a security interest in the assets sold, were entitled to enforce the security agreement after the buyers failed to make payment on the secured obligation when due. Although the buyers claimed to have paid an amount equal to the true value of what they received, there was no mutual mistake of any fact so as to give a basis for reforming the contract. Although the buyers claimed that one of the sellers misrepresented that the assets included an exclusive distributorship, nothing in the sales agreement so stated and the agreement contained a merger clause. While the agreement did contain a covenant by the sellers not to compete, that clause in no way suggested that the buyers were purchasing an exclusive distributorship.

112. *Valley Commercial Capital, LLC v. N795FM, LLC*,  
[2018 WL 5634944](#) (S.D. Tex. 2018)

A debtor that had failed to make timely payments on its aircraft loan had no defense based on the lender's alleged promises to accept half payments and not to foreclose due to the declining health of the debtor's principal because the promise was not in writing and New Jersey law requires that an agreement by a creditor to forbear from enforcing an existing loan agreement must be documented in a signed writing. The debtor also had no defense based on promissory estoppel in part because the promissory note expressly stated that its terms could not be changed "orally or by estoppel or waiver or by an alleged oral modification regardless of any claimed partial performance thereto," and that no modification or waiver would be effective unless it was made in writing and signed by the creditor.

### **– Replevin & Repossession**

113. *Bank of America v. Yi*,  
[294 F. Supp. 3d 62](#) (W.D.N.Y. 2018)

A secured party with a security in the assets of a medical provider with thousands of patients was entitled to an order of seizure of the collateral and a preliminary injunction against the debtor transferring the collateral, even though such relief would likely shut down the debtor's operations. The debtor had defaulted on sizeable obligations, the secured party had refrained from exercising its rights for several months after default, the debtor's financial troubles began long ago, and the debtor has not shown progress towards securing alternative finance sources or reducing its debts.

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114. *BMO Harris Bank v. Montana Farms, LLC*,  
[2018 WL 1370606](#) (N.D. Miss. 2018)  
Because the debtor was in default and the secured party had established that the collateral was depreciating with use, the secured party was entitled to an order temporarily restraining the debtor from using, encumbering, or transferring the collateral.
115. *Temsa Ulasim Araclari Sanyi Ve Ticaret A.S. v. CH Bus Sales, LLC*,  
[2018 WL 4179456](#) (D. Del. 2018)  
A manufacturer of motorcoaches, which had a security interest in the coaches sold to its exclusive distributor, was entitled to a temporary restraining order prohibiting the distributor from selling any of the 41 motorcoaches financed by the manufacturer and requiring the distributor to identify the location of those motorcoaches. The manufacturer was not entitled to a TRO with respect to the 33 motorcoaches financed by a lender because the manufacturer had not yet shown it was likely to succeed on the merits with respect to those motorcoaches.
116. *Alliance Laundry Systems LLC v. Excellent Services Laundromat LLC*,  
[2018 WL 4374919](#) (D. Md. 2018)  
A secured party was entitled to a TRO prohibiting the debtor from selling, moving, or concealing the collateralized equipment and from transferring or expending the proceeds thereof, but it was not necessary to prohibit the debtor from moving liquid assets out of state.
117. *Hyman v. Capital One Auto Finance*,  
[306 F. Supp. 3d 756](#) (W.D. Pa. 2018) (denying most motions to dismiss)  
[320 F. Supp. 3d 707](#) (W.D. Pa. 2018) (denying summary judgment)  
The debtor stated causes of action against the secured party and its repossession agent for conversion, trespass to chattels, and trespass based on the repossession of her automobile despite her objection and passive resistance. The debtor also stated a cause of action under § 1983 against the police officers who arrived at the scene of the automobile repossession and threatened to arrest the debtor if she did not exit the car.
118. *Moorer v. Always Towing & Recovery, Inc.*,  
[2018 WL 4233005](#) (E.D. Wis. 2018)  
The debtor stated a claim against the secured party for illegal repossession of her car because, pursuant to the Wisconsin Consumer Act, a secured party has no right to repossess collateral until fifteen days after it sends notification of the default and right to cure, and such notice cannot be sent earlier than 10 days after the debtor the debtor is one full payment behind, yet the secured party sent the notification before that time.
119. *Beal v. Public Service Credit Union*,  
[2018 WL 3913992](#) (E.D. Mich. 2018)  
A debtor who claimed the repossession agent threatened him with a gun and beat him had no cause of action against the secured party for violation of the Fair Debt Collection Practices Act because the secured party is the creditor, not a collection agency, and there is no vicarious liability for creditors for violation of the FDPCA.

120. *Wright v. Santander Consumer USA, Inc.*,  
[2018 WL 2095171](#) (M.D. Fla. 2018)

The debtor stated a cause of action against a repossession agent for violation of the Fair Debt Collection Practices Act by claiming that: (i) the agent breached the peace during the repossession by purposefully displaying a pistol to dissuade the debtor from objecting to the repossession; and (ii) the secured party lacked a right to repossess the collateral based on its agreement to forbear collection efforts and allow the debtor to make his missed payment.

121. *Gable v. Universal Acceptance Corp.*,  
[2018 WL 4473349](#) (E.D. Wis. 2018)

A repossession company was not entitled to summary judgment on the debtor's claim against it for violation of the Fair Debt Collection Practices Act by repossessing the debtor's vehicle over the debtor's unequivocal objection. There was strong evidence that the debtor objected to the repossession both by explicitly telling the repossession agents that they did not have a legal right to take the car and by getting into the car after the agents began hoisting it onto their truck. The fact that the debtor acquiesced in the repossession and gave the agents his key to the car after the police arrived and informed him that the repossession was lawful does not mean that the debtor withdrew his objection. The police officers were simply wrong in their conclusion that the repossession agents were legally entitled to take the car over the debtor's objection.

122. *Richards v. Lawrence Towing, LLC*,  
[2018 WL 3426260](#) (S.D. Ind. 2018)  
[2018 WL 6804008](#) (S.D. Ind. 2018) (denying reconsideration)

Because the Fair Debt Collection Practices Act is not a mechanism for matters governed by other law, even if a towing company breached the peace during its repossession of collateral by involving the police, with the result that the repossession was not authorized by law or by the security agreement, the debtor had no FDCPA claim.

123. *Gill v. Board of the National Credit Union Administration*,  
[2018 WL 5045755](#) (E.D.N.Y. 2018)

A secured party had no liability for repossessing the collateral without advance notification because both the security agreement and § 9-609 authorize repossession after default without advance notification. Although the debtor alleged that the repossession agent misrepresented himself as a law enforcement officer and took the collateral despite the debtor's "heated" verbal protest, the allegations were insufficient to suggest that the repossession breached the peace.

124. *LV Car Service, LLC v. AWG Ambassador, LLC*,  
[416 P.3d 206](#) (Nev. 2018)

The trial court erred in not properly considering the choice-of-forum clause in the parties' security agreement before issuing a preliminary injunction prohibiting the secured party from repossessing collateral and requiring that he secured party return collateral already repossessed.

125. *Signature Financial LLC v. Auto Trans Group Inc.*,  
[2018 WL 1914557](#) (N.D. Ill. 2018)

Because the debtor had denied the secured party's claim of entitlement to possession of the collateral, an order of replevin would not be granted until a hearing was held and evidence could be offered. However, the debtor would be ordered to provide a report indicating: the current or last known location of each item of collateral; the condition of the collateral; and the name and contact person of each person in possession of the collateral.

126. *Magley v. M & W Inc.*,  
[2018 WL 3443976](#) (Mich. Ct. App. 2018)

A debtor stated a claim against a repossession agent for taking a tank and sprayer attached to the collateralized vehicle and for initially refusing to return the property despite a demand therefor. The fact that the agent was acting on behalf of the secured party did not insulate the agent for its own tortious acts. Although the debtor granted a security interest in accessions to the vehicle, which the security agreement defined to be "things attached to or installed in" the vehicle, the security agreement also included a disclaimer of the secured party's responsibility for other property "attached to" the collateral, suggesting that not every item attached to the vehicle became an accession. Accordingly, only property attached permanently became an accession. The tank and sprayer were not accessions and thus no security interest was granted. Even if the repossession agent was permitted to initially take the tank and sprayer, the debtor stated a claim for the agent's refusal to return them.

127. *Commerce Bank v. First State Trucking, Inc.*,  
[340 F. Supp. 3d 84](#) (D. Mass. 2018)

A bank with a security interest in an aircraft and which had properly alleged that the debtor was in default on the secured obligation was entitled to a preliminary injunction prohibiting the debtor from interfering with the bank's rights under the security agreement or from conveying or encumbering the collateral.

128. *Melrose Credit Union v. Ulysse*,  
[2018 WL 3118644](#) (N.Y. Sup. Ct. 2018)

A secured party was not entitled to a writ of replevin because it had not sufficiently alleged that it had demanded possession of the collateral from the debtor.

129. *Mason v. Farm Credit of Southern Colorado*,  
[419 P.3d 975](#) (Colo. 2018)

Because a secured party's replevin action against a third party was legal, not equitable, in nature, the third party had the right to a jury trial.

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– Notification of Disposition

130. *Suntrust Bank v. Monroe*,  
[2018 WL 651198](#) (Tex. Ct. App. 2017)  
Because the debtor’s luxury automobile was sold two years after the secured party assigned it to agency for sale and five months after the secured party sent notification that the vehicle would be sold at a private sale, there was adequate evidence to support the jury’s determination that notification of the sale was not reasonable.
131. *Missouri Credit Union v. Diaz*,  
[545 S.W.3d 856](#) (Mo. Ct. App. 2018)  
Strict compliance is needed to comply with the Missouri statute requiring a post-default notification of the right to cure. A secured party failed to send proper notification of the debtors’ right to cure because the notification sent listed a “Loan Amount,” a “Payment Amount,” a “Payoff Amount,” and a “Past Due Amount, and then stated that the debtors cure the default by paying the “Current Due Amount (above),” which was in fact never identified, and thus it failed to conspicuously advise the debtors of the amount which must be paid to cure the default.
132. *Williams v. American Honda Finance Corp.*,  
[98 N.E.3d 169](#) (Mass. 2018)  
A secured party’s pre- and post-disposition notifications to the debtor in a consumer goods transaction must describe any deficiency the debtor will owe. Because, under Massachusetts law, the deficiency on a car loan is to be calculated based on the car’s fair market value, rather than the foreclosure sale price or, each of the notifications must so state.  
[907 F.3d 83](#) (2d Cir. 2018)  
Because the secured party’s notifications described the deficiency for which the debtor would be liable based on the amount of the disposition proceeds, the notifications were inadequate.
133. *Bremer Bank v. Matejcek*,  
[916 N.W.2d 688](#) (Minn. Ct. App. 2018)  
A secured party had no duty to notify a joint debtor of the sale of the collateral or to conduct the sale in a commercially reasonable manner because the secured party merely consented to the other debtor’s sale, it did not conduct the sale.



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– **Conducting a Commercially Reasonable Disposition**

134. *Dow Chemical Employees' Credit Union v. Veiling*,  
[2018 WL 2746331](#) (Mich. Ct. App. 2018)

Sufficient evidence existed to support a jury determination that a secured party's sale of a boat was commercially reasonable. Although the \$41,600 sales price was below the \$70,340 retail value, a boat sold at retail is accompanied by a dealer warranty and a repossessed boat is not; the boat had been on the market for two years, during which it depreciated; prospective buyers know that repossessed boats tend not to be well cared for; the secured party had no information about the boat's history; and the boat had been on display at a marina visited by thousands and on a web site where it was viewed by 34,000 and the advertisement for it opened 1,858 times.

135. *Suntrust Bank v. Monroe*,  
[2018 WL 651198](#) (Tex. Ct. App. 2017)

Although the secured party's officer testified that it was common in the banking industry to use auction houses to sell repossessed automobiles, because there was no evidence to explain what the repairs to the vehicle were, why they were needed, or how much they had cost, and because the sale was conducted more than two years after the repossession, there was adequate basis for the jury's conclusion that the disposition was not commercially reasonable.

136. *Rapillo v. CitiMortgage, Inc.*,  
[2018 WL 1175127](#) (E.D.N.Y. 2018)

A lender's public sale of the debtor's shares in a cooperative apartment was not rendered ineffective by the creditor's failure to file a continuation statement; financing statements filed against a cooperative apartment have a 50-year effective period under New York's § 9-515(h). Even if lender failed to fully comply with Part 6 of Article 9 in conducting the sale, at which it was the high bidder, there was no allegation that the lender had acted in bad faith and thus the sale transferred the debtor's ownership rights in the collateral to the lender.

137. *People's Capital and Leasing Corp. v. McClung*,  
[2018 WL 2996902](#) (W.D. Tex. 2018)

A secured party that marketed the collateralized oilfield equipment in an industry publication in print, online, and by direct e-mail to all the registered buyers of an asset management company, and that sold the collateral at an average price per unit that exceeded the post-inspection, fair market values provided to it by the asset management company, produced evidence sufficient to show that it disposed of the collateral in a commercially reasonable manner. The guarantor failed to produce evidence that could create any factual dispute regarding this issue, and thus summary judgment was appropriate.

138. *MB Financial Bank v. Jacobs*,  
2018 WL 4099706 (Ill. Ct. App. 2018)  
Because the collateral was sold not by the secured party, but by the management company hired by the assignee for the benefit of creditors, and the assignee was the agent of the debtor, not the secured party, § 9-610(b) did not apply and there was no requirement that the sale be commercially reasonable. Even if the commercially reasonable standard did apply, a sale approved by an assignee is, pursuant to § 9-627(c)(4), commercially reasonable. Even if that rule were inapplicable, the sale was still commercially reasonable even though conducted on January 3. There was evidence that the sale was conducted in accordance with the industry standards and two interested parties participated in the auction over several rounds.
139. *Batchelar v. Interactive Brokers, LLC*,  
751 F. App'x 55 (2d Cir. 2018)  
A stock broker's liquidation of collateral in a margin account is governed by a robust federal regulatory scheme that preempts Article 9, and thus need not be conducted in a commercially reasonable manner.

#### – Collecting on Collateral

140. *CapitalPlus Equity, LLC v. Glenn Rieder, Inc.*,  
2018 WL 276352 (E.D. Wis. 2018)  
A factor that bought accounts from a subcontractor and had a backup security interest in all the subcontractor's accounts was not entitled to summary judgment on its action against an account debtor for paying the debtor after receiving an authenticated instruction to pay the factor. There was conflicting evidence about whether the factor had actually bought the account and, unless the factor bought the account, it would not be an "assignee" within the meaning of § 9-406. Moreover, it was not clear that the factor, as a secured party, had the right to demand payment from the account debtor.
141. *Factor King, LLC v. Housing Authority for the City of Meriden*,  
2018 WL 6016838 (Conn. Super. Ct. 2018)  
Although factor that obtained a backup security interest in all of the debtor's accounts had instructed an account debtor to make payment directly to the factor, the account debtor was not obligated to do so because the factor provided no evidence that it had bought this particular account and, as a secured party, the factor was not an "assignee" of the account within the meaning of § 9-406.
142. *Durham Commercial Capital Corp. v. Select Portfolio Servicing, Inc.*,  
2018 WL 2017531 (M.D. Fla. 2018)  
Even though a purchaser of accounts has no private right of action under § 9-406 if the account debtor pays the debtor after being instructed to pay the purchaser, the purchaser does have a claim based on the purchased account.

143. *FPP Sandbox, LLC v. Redstone Communications Group, Inc.*,  
[2018 WL 4259841](#) (D. Neb. 2018)

An accounts financier that purchased some of the debtor's accounts and had a backup security interest in all of them stated a cause of action against an account debtor for breach of contract based on the account debtor's failure to pay the financier after receiving instruction to do so. The financier did not have a claim under § 9-406 because that provision does not create an independent cause of action.

144. *United Capital Funding Corp. v. Ericsson Inc.*,  
[728 F. App'x 682](#) (9th Cir. 2018)

Although Washington state courts have held that a secured party's instruction to an account debtor to pay the secured party pay must identify the accounts it covers, and a statement that "all" accounts have been assigned does not reasonably identify the covered accounts, because the account debtor in this case followed the instruction and paid \$3.4 million to the secured party over the course of a year, the account debtor might have conceded that the notice was effective and waived any challenges thereto.

145. *Magnolia Financial Group v. Antos*,  
[310 F. Supp. 3d 764](#) (E.D. La. 2018)

Summary judgment was not appropriate on whether an account debtor that continued to pay the debtor after being instructed by the secured party to make payment directly to the secured party had discharged its obligation. The account debtor had requested proof of the assignment before making payment and while the secured party had provided a copy of the note and security agreement, the account debtor demanded a court order acknowledging the secured party's right to payment. Because the assignment was not effective until the debtor defaulted, the request for proof of default was a request for proof of the assignment, and the reasonableness of the request remained in dispute.

146. *IstSource Bank v. Zerteck, Inc.*,  
[2018 WL 3500091](#) (N.D. Ind. 2018)

A floor plan lender to an RV manufacturer was not entitled to summary judgment on its claims against the dealerships that, shortly before the manufacturer ceased operations, purchased but did not pay for 21 RVs because the lender failed to provide evidence that it filed a financing statement and therefore cannot show that it had a security interest in the RVs and because the dealerships raised defenses and setoff rights relating to warranties and rebates.

147. *In re Argon Credit, LLC*,  
[2018 WL 4562542](#) (Bankr. N.D. Ill. 2018)

An indirect assignee of a security interest in a bankruptcy debtor's right to payment on numerous consumer loans, and the loan servicer that the debtor had hired, were required to arbitrate the claims brought by consumer borrowers that their loan contracts were void due to the debtor's failure to comply with California consumer lending law due, and seeking monetary recovery for illegal collection activity. The arbitration covered all disputes relating to the loan agreements and expressly covered "assigns." Moreover, a secured party is subject to the terms of the agreement between the debtor and an account debtor.

– **Acceptance of Collateral**

148. *Bennett v. Bascom*,  
[2018 WL 1473798](#) (E.D. Ky. 2018)

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

– **Statute of Limitations**

149. *Besaw v. Giroux*,  
[2018 WL 6714805](#) (Vt. 2018)

The statute of limitations on enforcement of a security agreement begins to run when a party's right to sue accrues. In this case, because the note required no payments until after a declaration of default and expiration of a 45-day cure period, and the security agreement defined default as under the note, the right to sue for return of the collateral did not accrue the cure period expired.

150. *Volvo Financial Services v. Williamson*,  
[910 F.3d 208](#) (5th Cir. 2018)

The one-year statute of limitations on a secured party's deficiency actions on eight secured truck loans, each of which was cross collateralized, did not begin to run until the last item of collateral was disposed of. The cross-collateralization clauses did not violate the statutory prohibition against contractually increasing the applicable limitations period and the secured party's sale of some collateral did not render the cross-collateralization clauses ineffective.

151. *Kaiser v. Cascade Capital LLC*,

[2018 WL 1521892](#) (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). However, the debt collector could be not liable under the Fair Debt Collection Practices Act for demanding payment or filing the collection action because it had a good-faith basis to believe that the debt was time-barred and it had no obligation to inform the debtor that the debt might be time barred.

152. *In re Gouletas*,

[590 B.R. 494](#) (Bankr. N.D. Ill. 2018)

A secured party that had a security interest in the membership interests of the LLC debtor – and an irrevocable power of attorney and proxy to vote the membership interests in the debtor after default – and which, after exercising those rights, obtained a judgment against the former manager for breach of fiduciary duty, could continue to control the LLC more than 10 years after the initial default so as to object to the former manager's bankruptcy discharge. Even if the statute of limitations had run on the secured obligation, so that judicial enforcement would be unavailable, the debt survived and a secured party in possession of collateral need not return it until the debt is paid. Thus, the security interest remained enforceable.

153. *Bioveris Corp. v. Meso Scale Diagnostics, LLC*,

[2018 WL 5045714](#) (Del. Ch. Ct. 2018)

Although a secured party might be able to foreclose its security interest even though the limitations period for actions on the secured obligation has expired, it cannot do so through a lawsuit that requires a court to determine that the debtors have defaulted. The statute of limitations has barred the court's ability to determine whether the debtors are in default, and therefore the court cannot grant the secured party's requested remedy of foreclosure.

**– Other**

154. *Cheniere Energy, Inc. v. Parallax Enterprises, LLC*,

[2018 WL 6836924](#) (Tex. Ct. App. 2018)

A debtor that claimed that obligation it promised to repay was really an equity contribution, not debt, was not entitled to a preliminary injunction prohibiting a putative secured party from foreclosing on the putative collateral: the debtor's ownership interest in a subsidiary. Although the trial court concluded that the debtor had demonstrated a likelihood of success on the merits, the debtor had not shown that it would suffer irreparable injury if the injunction were not issued. The subsidiary's only assets were claims against the secured party, which the secured party planned to nonsuit after taking control of the subsidiary, but those claims could be valued and the debtor also had and could pursue such claims.

155. *Modern Pharmacy, LLC v. McKesson Corp.*,  
[2018 WL 3413037](#) (S.D. Fla. 2018)

A debtor was not entitled to a preliminary injunction prohibiting the secured party from disposing of the collateral because the debtor had not established a likelihood of success on the merits. The contract between the parties gave the secured party the right to change payment terms, such as by discontinuing a discount, and thus there was a substantial possibility that the debtor was in default.

156. *HH Cincinnati Textile L.P. v. Acres Capital Servicing LLC*,  
[2018 WL 3056919](#) (N.Y. Sup. Ct. 2018)

The limited partnerships that provided a mortgage on real property to secure the loan, which was also secured by equity interests in the borrowers, were not entitled to a preliminary injunction against the lender conducting a UCC disposition of the equity interests. The disposition would not clog or otherwise interfere with the borrowers' equitable right of redemption in the real property because the borrowers [actually, the owners of the equity] retained their UCC rights to redeem the pledged equity interests any time prior to sale and to participate in any UCC [public] sale of the equity interests.

157. *Opacmare USA, LLC v. Lazzara Custom Yachts, LLC*,  
[314 F. Supp. 3d 1276](#) (M.D. Fla. 2018)

A judgment creditor that purported to receive a judicial assignment of the debtor's trademark had no basis for challenging the earlier sale by which the debtor's secured party sold the trademark to a good faith purchaser. The judgment creditor had no standing to challenge the adequacy of the pre-sale notification of the sale, which was apparently sent by an entity related to the secured party, and in any event improper notification does not affect the efficacy of the sale. Even if the sale was a commercially unreasonable private disposition to secured party, which is prohibited by § 9-610(c)(2), there would be no basis for setting aside the sale, it would merely affect the secured party's right to a deficiency. And even if there some legal deficiency prevented title from transferring to the secured party, title still transferred to the subsequent buyer which acted in good faith; despite the language in the sale documents, the transaction was always intended to be a private sale to that buyer.

158. *Missouri Credit Union v. Diaz*,  
[545 S.W.3d 856](#) (Mo. Ct. App. 2018)

A secured party failed to send to consumer debtors a proper surplus/deficiency explanation under § 9-616 because the explanation sent, after stating the current amount of the deficiency, referred only to a single circumstance that would alter the deficiency balance in the future – the accrual of interest at the rate of \$1.27 per day – when in fact the deficiency was reduced by was reduced by a GAP refund and an extended warranty rebate, and increased by a detail fee and attorney's fees.

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159. *BMO Harris Bank v. Smith*,  
[2018 WL 4691212](#) (D. Kan. 2018)  
A bank that conducted a disposition of numerous tractors in which it had a security interest was not required to send an explanation of how it calculated the resulting deficiency because § 9-616 imposes a duty to send such an explanation only when the collateral is consumer goods, which the tractors were not.
160. *U.S. Bank v. Fuladian*,  
[714 F. App'x 755](#) (9th Cir. 2018)  
A lender with a security interest in the debtor's shares in a cooperative apartment was entitled to a judgment against the debtor for the amount of the secured obligation even though, after the debtor defaulted on both the secured obligation and the lease, the cooperative had evicted the debtor, thereby terminating her shares. The secured lender was not responsible for the eviction merely because it had not cured the default under the lease, and was therefore not barred from recover by California's one-action rule.
161. *SFG Commercial Aircraft Leasing, Inc. v. Montgomery Equipment Co.*,  
[2018 WL 452361](#) (N.D. Ind. 2018)  
A secured party was entitled to summary judgment on its claim against the debtor and guarantor for the total amount of the secured obligation, which included amounts incurred to store and repair the collateral and for litigation expenses, even though the secured party had not yet sold the collateral.
162. *Janeke v. Allen*,  
[2018 WL 4958864](#) (Cal. Ct. App. 2018)  
A secured party was not required to exhaust its security interest in patents before seeking a judgment against the debtor for the amount of the secured obligation.
163. *Ist Source Bank v. Neto*,  
[2018 WL 571941](#) (N.D. Ind. 2018)  
A secured party was entitled to summary judgment on its claim against the debtor and a guarantor for the amount of the secured obligation even though the collateral – and airplane – had been seized by Brazilian authorities. Although, under Indiana law, a guarantor can have a defense based on the secured party's impairment of the collateral, the guarantor did not identify any action by the secured party that influenced the seizure of the airplane and the secured party had no right to obtain possession of the airplane after it was seized.
164. *Koby v. ARS National Services, Inc.*,  
[2018 WL 707805](#) (S.D. Cal. 2018)  
Although a *purchaser* of a credit card debt would be entitled to enforce an arbitration clause included in the credit card contract, a mere assignee of the debt for the purposes of collection only – a transaction excluded from the scope of Article 9 by § 9-109(d)(5) – would not be. Because it was unclear whether the defendant was a purchaser or mere assignee, the motion to compel arbitration would be denied pending further discovery.

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165. *Fuentes v. TMCSF, Inc.*,  
[237 Cal. Rptr. 3d 256](#) (Ct. App. 2018)  
A motorcycle dealer that had no arbitration clause in its sales agreement with a customer could not, in connection with the customer's class action against the dealer for negligence, false advertising, unfair competition, and violations of the Consumers Legal Remedies Act, invoke the arbitration clause in the customer's agreement with the lender that financed the purchase. The arbitration clause did not mention the dealer and while the clause did mention the lender's agents, the dealer was not the lender's agent and, even if it were, the customer's claims were made against the dealer in its own capacity, not in its supposed capacity as the lender's agent.
166. *Temsa Ulasim Araclari Sanayi Ve Ticaret A.S. v. CH Bus Sales, LLC*,  
[2018 WL 4905593](#) (D. Del. 2018)  
Even though the security agreement between a manufacturer and its exclusive distributor contained no arbitration clause – instead, it expressly provided for judicial resolution of disputes between the parties – because the distribution agreement contained an arbitration clause calling for arbitration pursuant to AAA rules, it was for the arbitrator to determine in the first instance whether the pending dispute was subject to arbitration.
167. *Patel v. The Prudential Insurance Company of America*,  
[2018 WL 1449400](#) (S.D. Fla. 2018)  
A bank with a security interest in a life insurance policy was entitled to the proceeds of policy over the designated beneficiary even though the bank had not declared the secured obligation to be in default. The beneficiary was also not subrogated to the bank's secured position to as to be come a co-secured party.
168. *Arrow Enterprise Computing Solutions, Inc. v. Blueally, LLC*,  
[2018 WL 2944414](#) (E.D.N.C. 2018)  
The fact that a secured creditor filed continuation statements after entering into forbearance agreement did not show an intent not to forbear and was not relevant to whether the promise to forebear was consideration for the debtor's reciprocal promise, which it was. The secured party agreed to forbear, not to release its lien.
169. *Heritage Bank v. Stortenbecker*,  
[2018 WL 4558321](#) (Minn. Ct. App. 2018)  
A bank with a security interest in a farmer's cattle and farm equipment could repossess and dispose of the collateral. The bank was not subject to the mediation provisions of the state's Farmer-Lender Mediation Act because a debtor who fraudulently conceals, removes, or transfers collateral is ineligible for mediation and the debtor had, in violation of the security agreement, sold collateral without the bank's permission and failed to remit the proceeds to the bank.



**Liability Issues****– of the Secured Party**

170. *Wells Fargo Securities, LLC v. LJM Investment Fund, L.P.*,  
[2018 WL 4335512](#) (S.D.N.Y. 2018)

A client of a futures commission merchant had no claim against the merchant for ordering the client to liquidate the client's account when the client failed to meet a margin call, even though that allegedly resulted in losses of \$266 million, which was \$115 million more than the client would have suffered if the client's trading procedures were followed. There was no breach of contract because the agreement expressly authorized the merchant's actions. It also gave the merchant a security interest in the assets credited to the account and gave the merchant broad rights to protect and preserve its security interest, including the right to instruct the client to conduct an immediate bulk sale. Given the extreme volatility at the time, the court would not second guess the reasonableness of the merchant's instructions.

171. *Foster v. Parker Community Bank*,  
[915 N.W.2d 730](#) (Wis. Ct. App. 2018)

A bank with a security interest in a boat did not act unconscionably or violate the state consumer protection act by obtaining and billing the debtors for retroactive gap insurance for the period when the boat was uninsured due to the debtors' failure to maintain continuous coverage. Even though the debtors were unaware of any damage to the boat during the gap in coverage, the possibility remained that damage might be discovered and attributed to some event that occurred during the gap period.

172. *The Florida Bar v. Parrish*,  
[241 So. 3d 66](#) (Fla. 2018)

A lawyer who acquired a security interest in a client's Lamborghini to secure payment of past and future legal fees thereby entered into a business transaction with the client that was not an ordinary fee agreement because the transaction enabled the lawyer to obtain funds from the sale of the Lamborghini that would constitute an excessive fee. Because the lawyer did not comply with the rules of professional responsibility relating to such transactions, he was subject to discipline.

173. *McCarthy Improvement Co. v. Manning & Sons Trucking & Utilities, LLC*,  
[2018 WL 3009021](#) (D.S.C. 2018)  
[2018 WL 3008990](#) (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.

174. *Tracy v. Minne,*

[2018 WL 6583911](#) (N.D. Ind. 2018)

Even though the bylaws of a corporate debtor did not create an office of vice president, yet the security agreement by which the corporation purported to grant a security interest to the corporation's president was signed by a person acting as vice president, the president committed no tort of deception in seeking to enforce the security agreement. The person serving as vice president had been elected to that position by the shareholders and had been serving in that capacity for more than a year before signing the agreement. He therefore had apparent authority to serve as vice president. Moreover, the plaintiff, who was one of the shareholders who had elected the vice president, was estopped from claiming otherwise. However, the president breached his fiduciary duty to the other shareholders by failing to inform them of his security interest for several years because, if they had known, they might have obtained a security interest to protect their loans to the corporation.

175. *Smart v. Emerald City Recovery, LLC,*

[2018 WL 3569873](#) (W.D. Wash. 2018)

A secured party could not be vicariously liable in conversion even though the repossession company it hired repossessed a car that was not collateral and belong to someone other than the debtor. The repossession company was an independent contractor, and while the duty not to breach the peace might be non-delegable, there was no breach of the peace merely because the repossession occurred at 1:15 am and woke a neighbor. The secured party also had no liability to the car owner under § 9-625 because the car owner was not the debtor.

176. *Abele Tractor & Equipment Co., Inc. v. Schaeffer,*

[91 N.Y.S.3d 548](#) (App. Div. 2018)

Although the secured party was entitled to repossess the collateral from the debtor, even the vehicles as to which the security interest was unperfected, summary judgment was properly denied on a buyer's claim against the secured party for intentional interference with its contract to purchase the collateral because it was unclear what control, if any, the secured party had over the repossession agent, who had allegedly indicated that he would release the property if the buyer sold him one of the vehicles.

177. *Washington v. City Title Loan, LLC,*

[2018 WL 4005447](#) (C.D. Cal. 2018)

A lender that repossessed the putative collateral was liable for compensatory damages, including pain and suffering, to the owner of the property who was the victim of identity theft and had not in fact borrowed funds or granted a security interest in the collateral. The lender was also liable for \$30,000 in statutory damages for violation of the California Identity Theft Act because the owner had notified the lender of the identify theft but the lender failed to investigate and refused to return the collateral.

178. *CSX Transportation, Inc. v. Five Star Enterprise of Illinois, Inc.*,  
[2018 WL 6735705](#) (N.D. Ill. 2018)

A rail carrier had no liability to a shipper for conversion based on the carrier's refusal to return five trailers after allowing the shipper's customers to retrieve their goods inside the trailers because the shipper had granted the carrier a security interest in the trailers to secure freight charges and the shipper had defaulted in payment.

179. *Jackie's Enterprises, Inc. v. Belleville*,  
[87 N.Y.S.3d 124](#) (Sup. Ct. App. Div. 2018)

The individuals who retained a security interest in the assets of a lingerie shop that had they sold to a buyer, and who later obtained an order permitting them to seize the collateral after the buyer's successor defaulted, were not liable under any of several claims made by the successor, who had opened a competing shop a quarter-mile away. The successor's allegations that the secured parties told the successor's customers and suppliers that the successor's business was not legitimate was too nonspecific to be actionable defamation; there was no allegation of what was said to whom. The individuals' actions to take control of the shop's vendor accounts and inventory were not tortious interference with business relations because they were undertaken pursuant to court order. The individuals' efforts to access the successor's Facebook and Yelp! online accounts and web pages were not actionable trespass because those things belonged to the shop – not the successor – and were part of the collateral.

180. *Dakota Utility Contractors, Inc. v. Sterling Commercial Credit, LLC*,  
[2018 WL 4144201](#) (Tex. Ct. App. 2018)

A factor that purchased a contractor's accounts was not liable to an unpaid subcontractor under the Texas Construction Trust Fund Act for misappropriation of trust funds because the factor was not a "trustee" within the meaning of the Act.

181. *Dixon v. General Motors Finance Corp.*,  
[2018 WL 4464900](#) (E.D. La. 2018)

The assignee of a lessor's interest in a motor vehicle lease was the creditor under the lease, not a debtor collector, and thus could have no liability under the Fair Debt Collection Practices Act for allegedly repossession the vehicle when the debtor was not in default. The assignee also had no liability under the Louisiana Unfair Trade Practices Act because the un rebutted evidence showed that the debtor was in default.

182. *Gill v. Board of the National Credit Union Administration*,  
[2018 WL 5045755](#) (E.D.N.Y. 2018)

A credit union had no liability for not returning the personal property of the debtor that was in his vehicle at the time the vehicle was repossessed because the security agreement expressly provided that "the Credit Union will not be responsible for any of [debtor's] property not covered by this Agreement that you leave inside the collateral" and, in any event, the debtor failed to provide any evidence of the value of the papers, band aids, scissors, tools, books, tokens, radio, and vouchers that were allegedly in the vehicle.

183. *In re Dixon*,

[2018 WL 6737528](#) (Bankr. D.C. 2018)

A mortgagee that had a lien on the debtor's real property and fixtures was not be liable under §§ 9-210 and 9-625(f) for failing to provide an accounting of the secured obligation because the lien of the real property is not governed by Article 9 and the debtor's request for an accounting referenced only the real property, not the fixtures. Moreover, it appears that the debtor's request was to confirm that there was no balance owed, rather than for an accounting, and the debtor well knew that the mortgagee was claiming that it was owed a substantial amount.

**– of the Debtor**

184. *U.S. Bank Equipment Finance v. J.W. Jones Co.*,

[2018 WL 5312905](#) (S.D. Ind. 2018)

Because the security agreement between an equipment dealer and a bank expressly provided that the dealer held proceeds of equipment sales in trust for the bank and made the proceeds the "property of" the bank until paid to the bank, the agreement created an express trust with fiduciary duties, even though the agreement did not require that the proceeds be segregated. Accordingly, the dealer was liable for breach of fiduciary duty for failing to remit the proceeds to the bank and that liability would be nondischargeable under § 523(a)(4) and (6) if the debtor files for bankruptcy.

185. *DZ Bank AG Deutsche Zentral-Genossenschaftsbank v. McCranie*,

[720 F. App'x 576](#) (11th Cir. 2018)

An individual who bought an insurance agency franchise with funding from an entity related to the seller, and who gave the lender a security interest in the agency's assets, had no defense to payment on the note, now owned by an assignee, based on the fact that the seller allegedly breached the franchise agreement. Even though the note referenced several other contract documents, and was therefore not a negotiable instrument, it nevertheless represented a separate obligation so that claims or defenses arising from the purchase were not a defense to payment on the note.

186. *Liberty Bell Bank v. Rogers*,

[726 F. App'x 147](#) (3d Cir. 2018)

The principal operator of several equipment leasing companies that borrowed funds from a bank and purported to grant a security interest in equipment leases, but in fact many of the leases had been cancelled, were for equipment that the debtor never purchased, or were pledged to multiple lenders, and that used a check kiting scheme to conceal the fraudulent activity, was liable under RICO for treble damages.

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187. *Williams v. American Honda Finance Corp.*,  
[98 N.E.3d 169](#) (Mass. 2018)  
Under Massachusetts law, the deficiency on a car loan is to be calculated based on the car's fair market value, rather than the foreclosure sale price or, as the debtor argued, fair *retail* market value.
188. *Plasterer Equipment Co. v. Regional Orthopedic Associates, P.C.*,  
[2018 WL 2728891](#) (Pa. Super. Ct. 2018)  
A debtor that sold a collateralized front loader to a dealer, allegedly "free and clear of all security interests," breached the sales contract and was liable to the dealer for the cost of discharging the existing security interest.
189. *Eddy's Motors, LLC v. Santander Consumer USA, Inc.*,  
[2018 WL 3629108](#) (Tex. Ct. App. 2018)  
A car dealership that sold a retail installment contract to a lender, and which pursuant to the sales agreement was obligated to "file and/or record all documents necessary to reflect a valid and enforceable first priority security interest" in the vehicle sold, breached that obligation by failing to perfect the security interest even though there was no other lien on the vehicle. Pursuant to the sales agreement, the dealership was therefore obligated to repurchase the installment contract. Damages would not be reduced by the amount that might be recovered by foreclosing on the vehicle, although the lender would be required to assign the contract back to the dealership upon payment.
190. *BMO Harris Bank v. A & M Trucking, Inc.*,  
[2018 WL 3999836](#) (D. Haw. 2018)  
Although a secured party was entitled to a default judgment against the debtor for the amount of the debt and, pursuant to the security agreement, for the attorney's fees incurred in enforcement, the secured party could not recover the attorney's fees of its national counsel that drafted the complaint but failed to be admitted *pro hac vice* or to appear and participate in the local action. The court relied on cases dealing with an award of attorney's fees authorized by state statute, not by contract.
191. *Sterling National Bank v. Secure Logistics, Inc.*,  
[2018 WL 4005203](#) (N.D. Ill. 2018)  
A secured party was entitled to summary judgment on its claim against the debtor and guarantor for the accelerated debt even though the defendants' answers denied the factual allegations in the complaint because the defendants failed to raise an issue of material fact.
192. *BMO Harris Bank v. ICS 1 Ltd.*,  
[2018 WL 4680583](#) (S.D. Ohio 2018)  
A secured party that foreclosed its security interest in vehicles by conducting a disposition was entitled to summary judgment on its action for the deficiency against the debtor and a guarantor. There was no dispute as to the amount of the secured obligation remaining due.

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– of Others

193. *Juniata Terminal Co. Inc. v. Gifis*,  
[2018 WL 4148467](#) (D.N.J. 2018)  
A principal of the debtor who allegedly masterminded its double pledging of collateral was not liable to the initial secured party for fraud absent allegations that he disregarded the priority rules and permitted the second secured party to exercise its right to the collateral before the initial secured party, which presumably had and continues to have priority.
194. *Genesis Merchant Partners, L.P. v. Gilbride, Tusa, Last & Spellane, LLC*,  
[69 N.Y.S.3d 30](#) (N.Y. Sup. Ct. 2018)  
Summary judgment could not be granted on a secured party's malpractice claim against the law firm that helped document a transaction secured by insurance policies but which failed to perfect the security interest. Although the firm filed a financing statement, which was effective to perfect the security interest in other collateral but not in the insurance policies, a factual issue remained about the scope of the firm's representation and whether it undertook the duty to perfect the security interest in the policies.
195. *United Bank v. Buckingham*.  
[301 F. Supp. 3d 561](#) (D. Md. 2018), *Appeal filed*, (4th Cir. April 13, 2018)  
A bank whose security interest in life insurance policies was void, because the bank had negotiated for the interest with a man the bank knew lacked mental capacity and because some of the man's signatures on the transaction documents were forged by the man's son, did not act with clean hands. Accordingly, the bank would not be permitted to challenge under fraudulent transfer law the later changes in the ownership and beneficiary designation of the policies.
196. *Thermo Credit, LLC v. DCA Services, Inc.*,  
[2018 WL 5503337](#) (6th Cir. 2018)  
A creditor with a security interest in a bankruptcy debtor's cash collateral had no fraudulent transfer claim against the management company that received a portion of the cash collateral in payment of its fees because property is not an "asset" within the meaning of the Uniform Fraudulent Transfer Act to the extent it is encumbered by a lien, and thus there was no transfer of assets to the management company. Even though the management company took payment free of the security interest under § 9-332, the cash was encumbered at the time of the payment.
197. *Veritas Steel, LLC v. Lunda Construction Co.*,  
[2018 WL 6132330](#) (Wis. Ct. App. 2018)  
A transfer of collateral pursuant to a strict foreclosure could not be a constructively fraudulent transfer because Wisconsin law exempts from avoidance the enforcement of a security interest in compliance with Article 9.

198. *Parent Petroleum Inc. v. State Farm Life Insurance Co.*,  
[2018 WL 3064616](#) (Ill. Ct. App. 2018)

A creditor that received an assignment of the debtor's life insurance policy had no cause of action against the insurer for denying coverage because the policy was never issued; the insurer merely provided a 60-day binder but refused to issue the policy after discovering the debtor's medical history. Even if the assignment had been delivered to the insurer before the binder expired, the insurer had no duty to notify the assignee of the refusal to issue the policy.

199. *Mercedes-Benz Financial Services USA, LLC v. Allstate Insurance Co.*,  
[77 N.Y.S.3d 782](#) (N.Y. App. Div. 2018)

A secured party's claim against an insurer for denying a claim for theft of collateral due to the debtor's non-cooperation was not barred by the statute of limitations, as shortened by the insurance contract. Although the contract required actions to be commenced within one year of the "date of loss," that phrase could mean either the date of the theft or the date that the insurer denied the claim, and insurance contracts are interpreted against the insurer.

200. *Bilbija v. Lane*,  
[2018 WL 2183967](#) (S.D. Ind. 2018)

A married couple that loaned money to a retired baseball player with the understanding that the promissory note would be secured by the borrower's MLB pension stated a cause of action against the lawyer who drafted the note while representing both them and the borrower because, after the borrower defaulted, they learned that the pension did not secure the note.

201. *UC Funding I, LP v. Berkowitz, Trager & Trager, LLC*,  
[2018 WL 2023485](#) (D. Conn. 2018)

The negligent misrepresentation claim brought by a mezzanine lender – after discovering that the borrower did not own all the relevant collateral – against the law firm that had issued an opinion letter to the lender that the loan documents created valid obligations of the borrower, had to be dismissed because the lender failed to allege that it had reasonably relied on the opinion letter.

202. *IstSource Bank v. Zerteck, Inc.*,  
[2018 WL 3500091](#) (N.D. Ind. 2018)

A bank that provided floor plan financing to RV dealerships had no liability to the lender that financed the manufacturer from which the dealerships purchased – but did not pay for – 21 RVs. Even though the bank approved of the purchases, its approval was merely to confirm to that the dealerships' line of credit was sufficient to cover the invoice price; the bank made no promise of payment and thus could not be liable under a theory of promissory estoppel. There was no claim for conversion against the bank because the bank never received possession of the RVs.

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203. *Tracy v. Minne*,  
[2018 WL 835387](#) (N.D. Ind. 2018)  
Minority owners of a business stated a claim against the business's president for violation of fiduciary duty by alleging, in part, that the president claimed a security interest in corporate assets despite the fact that the security agreement was signed by the vice president and the corporate bylaws require all instruments to be signed by the president unless otherwise provided by the board of directors.
204. *Exclusive Motor-Sport, LLC v. Westlake Flooring Co.*,  
[2018 WL 1415915](#) (N.Y. Sup. Ct. 2018)  
Debtor failed to state a cause of action against a town or its police department by alleging merely that they did not verify that if the vehicles listed in the repossession order were vehicles taken. Neither the town nor police department has a duty to safeguard the debtor against the risk that the secured party would repossess vehicles in which it they did not have a security interest.
205. *Ally Financial, Inc. v. Hillside Auto Body & Service, Inc.*,  
[2018 WL 3466921](#) (Ill. Ct. App. 2018)  
A secured party with a perfected security interest in a vehicle stated a claim for replevin and conversion against the company that towed the vehicle at the direction of police and then sold the vehicle to itself allegedly free and clear of liens because the secured party alleged that the towing company failed to provide the notification required by the state Vehicle Code.
206. *Citadel Federal Credit Union v. New Jersey Motor Vehicle Commission*,  
[2018 WL 2293198](#) (N.J. Super. Ct. 2018)  
A credit union with a security interest in a vehicle had no cause of action against the state motor vehicle commission for issuing a duplicate certificate of title to the debtor, perhaps after the debtor presented a forged letter falsely indicating that the loan was paid off. The commission was entitled to governmental immunity because the matter related to its ministerial functions.
207. *Duncan v. Asset Recovery Specialists, Inc.*,  
[907 F.3d 1016](#) (7th Cir. 2018)  
A debtor had no claim against a repossession company under the Fair Debt Collection Practices Act for allegedly demanding that the debtor pay a \$100 administrative fee to retrieve her personal property that was in her repossessed vehicle because the evidence demonstrated that the repossession company billed the secured party, not the debtor, for the fee.



208. *Ronnoco Coffee, LLC v. Westfeldt Brothers, Inc.*,  
[2018 WL 902202](#) (E.D. Mo. 2018)

The newly formed entity that purchased substantially all of the debtor's assets at a private disposition conducted by the secured party and that, for a few months, employed the debtor's principals did not have successor liability as a mere continuation of debtor because there was no continuity of ownership. It did not matter that, immediately before the sale, the buyer exercised substantial control over the debtor.

209. *Odjaghian v. Engagepoint, Inc.*,  
[2018 WL 3329617](#) (D. Md. 2018)

The entity, controlled by the secured party, that the bought all the assets of the debtor at a foreclosure sale, did not have successor liability to the debtor's employees. It was not a mere continuation of the debtor because it gave fair consideration for the assets, there was no common ownership, and the debtor continued to operate.

210. *Veritas Steel, LLC v. Lunda Construction Co.*,  
[2018 WL 6132330](#) (Wis. Ct. App. 2018)

An entity formed by a secured party to conduct a partial strict foreclosure after receiving an assignment of the secured loans did not have successor liability under either the "de facto merger" or "mere continuation" doctrines because there was no continuity of ownership. Although the new entity operated the same business, employed the same work force, pursued many of the same projects, and had two of the same officers, the key element of a de factor merger is the transfer of ownership for stock, not cash, and the key element of mere continuation is a common identity of stockholders.

211. *Wells Fargo Vendor Financial Services, LLC v. Nationwide Learning LLC*,  
[429 P.3d 221](#) (Kan. Ct. App. 2018)

An entity formed by a secured party to receive and operate the assets of the debtor after the secured party acquired the assets by credit bid at a foreclosure sale had successor liability for the obligations of the debtor. The entity operated the same business by producing the same product, albeit in a different manner, in the same facilities, with the same employees, and selling them to the same customers. There was commonality of leadership and ownership because two voting members of the debtor's board of directors became directors of the new entity and the secured party, which owned 21% of the debtor, owned 94% of the new entity. The new entity held itself out as a continuation of the debtor by using the same brand name and trademark, the same telephone and fax numbers, and the same website. And, the new entity paid over \$1 million of the debtor's obligations to critical vendors to maintain the business.

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212. *Intuitive Surgical Operations, Inc. v. Midbrook, LLC*,  
[2018 WL 3109587](#) (E.D. Mich. 2018)  
A buyer of a corporation's assets, other than those relating to its medical division, assumed the corporation's debt incurred to finance the medical division because the purchase agreement disclaimed assumption of liability except for "any executory obligations of [the corporation's] continued performance arising in the ordinary course of business under any contracts and commitments that become performable or payable on or after the Closing Date." The loan was an "executory obligation," even though it might not be an "executory contract." The loan, although incurred before the closing, involved "continued performance" due to the corporation's continuing obligation to pay and the fact that the loan became due eleven days after the closing.
213. *Stavinsky v. Prof-2013-S3 Legal Title Trust by U.S. Bank*,  
[77 N.Y.S.3d 287](#) (N.Y. Sup. Ct. 2018)  
The buyer of shares of stock in a cooperative apartment at a foreclosure sale was obligated to pay the \$87,000 in outstanding maintenance fees that accrued both before the sale and after the sale but before the buyer obtained possession of the apartment because the terms of the auction sale expressly so provided. It did not matter that § 9-615(a) provides that the proceeds of the sale are to be used to pay down the secured obligation because that provision may be modified by agreement. The terms of the sale might not have been standard, but the buyer failed to [submit] that the terms made the sale commercially unreasonable and the terms were not unconscionable.
214. *In re Melrose Credit Union*,  
[76 N.Y.S.3d 579](#) (N.Y. Sup. Ct. 2018)  
A credit union with security interests in 1,432 taxicab medallions to secure more than \$722 million in loans did not have standing to challenge regulations that treat the use of apps, such as Uber, as making a prearrangement for transportation services, rather than a street hail, even though the regulations allegedly severely diminished the value of the collateral.
215. *Magnolia Financial Group v. Antos*,  
[2018 WL 2192247](#) (E.D. La. 2018)  
A individual who borrowed \$2 million with the debtor and who knew that the debtor had secured the debt with the debtor's rights to payment under a settlement agreement, but who after default arranged for the account debtor to make payments due to the secured party to the individual's own benefit, was liable to the secured party for fraud.
216. *LVG-Ogden marketing, LLC v. Bingham*,  
[2018 WL 6435711](#) (W.D. Wash. 2018)  
Assets serving as collateral for a loan from a spendthrift trust to the sole beneficiary, which after default the trust received in satisfaction of the debt, were not thereby imbued with spendthrift protection; instead the assets were essentially self-settled trust property. The assets were therefore subject to the claims of the beneficiary's judgment creditor.

**BANKRUPTCY*****Property of the Estate***

217. *In re Doud*,

[2018 WL 3098687](#) (Bankr. E.D. Ky. 2018)

The gap insurance acquired in connection with the debtor's financed purchase of a vehicle – which insurance covers the difference between the value of the vehicle and the amount of the debt – that was paid to the financier after when the car was destroyed, some two years after the debtor's Chapter 13 plan was confirmed, was not property of the estate and was not recoverable by the trustee even though the lender's security interest in the vehicle was not timely perfected and was avoided. The financier was the named payee on the gap insurance policy and gap insurance proceeds are not proceeds of the vehicle.

218. *In re Shelton*,

[2018 WL 5098814](#) (Bankr. N.D. Ohio 2018)

Because a transfer of real property executed by a power of attorney to the attorney-in-fact is void under Alabama law unless the power of attorney expressly authorizes the attorney-in-fact to transfer the principal's real property to herself, the bankruptcy estate of attorney-in-fact did not include the real property. Moreover, because this defect was apparent from the recorded documents, the trustee could not use her status of a bona fide purchaser of real property to acquire title.

***Claims & Expenses***

219. *In re Caesars Entertainment Operating Co.*,

[588 B.R. 32](#) (Bankr. N.D. Ill. 2018)

Because the purchase agreement pursuant to which a university acquired real property subject to a use restriction, was non-assignable, the university's claim for breach for failing to get the restriction removed was not assignable. Thus, the claim filed by the entity that subsequently purchased the real property from the university and purported to receive an assignment of the breach of contract claim was disallowed.

220. *In re McCormick*,

[894 F.3d 953](#) (8th Cir. 2018)

A creditor that was contractually entitled to recover attorney's fees was entitled to include postpetition attorney's fees in its oversecured claim even though the bulk of the security arose from a judgment lien, rather than from the contract that provided for recovery of attorney's fees.

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221. *In re Pioneer Carriers, LLC*,  
[581 B.R. 809](#) (Bankr. S.D. Tex. 2018)  
An undersecured creditor has an allowed claim for post-petition attorney's fees, as provided for under its agreement with the debtor, and because the creditor made the § 1111(b) election, that claim is treated as a secured claim.
222. *In re Amko Fishing Co.*,  
[2018 WL 3748820](#) (9th Cir. BAP 2018)  
Even if suppliers had a maritime lien on a vessel owned by the debtor when the bankruptcy case commenced, and on the fishing license associated with the vessel, they did not have a lien on the proceeds of the trustee's fraudulent transfer case against the transferee of the debtor's fishing license. A maritime lien does not necessarily attach to proceeds and, in any event, the trustee did not sell the fishing license, the trustee merely settled the fraudulent transfer action. If the suppliers had a lien on the fishing license, it remains in place.
223. *In re EPD Investment Co., LLC*,  
[2018 WL 947636](#) (Bankr. C.D. Cal. 2018)  
Even if a creditor had a prepetition security interest in the debtor's assets, that security interest did not encumber the trustee's recoveries pursuant to settlements of preference and fraudulent transfer claims.
224. *In re Connolly Geaney Ablitt & Willard P.C.*,  
[585 B.R. 644](#) (Bankr. D. Mass. 2018)  
A secured party's prepetition security interest in the debtor's general intangibles does not attach to the trustee's avoidance actions or the proceeds thereof.
225. *Whirlpool Corp. v. Wells Fargo Bank*,  
[2018 WL 4853568](#) (S.D. Ind. 2018)  
An unpaid supplier's reclamation rights were cut off by the rights of the debtor's pre-petition and post-petition lenders, each of which had a perfected security interest, by § 546(c). It did not matter that under non-bankruptcy law a supplier's reclamation rights under § 2-702 are subject to the rights of the buyer's secured party only if the secured party acted in good faith; § 546(c) has no such qualification.
226. *In re Kuper*,  
[586 B.R. 309](#) (Bankr. N.D. Iowa 2018)  
An agricultural cooperative that owed the debtor \$60,700 in dividends but which the debtor owed \$72,800 was entitled to a secured claim based on its setoff rights even though the dividends were not yet due. The cooperative's bylaws give it broad discretion and a right of setoff for all indebtedness, "whether then due or to become due," and this language essentially allows the Coop to deem the debts that it owes to Debtor "due" for setoff purposes.

227. *In re Washington,*

[587 B.R. 349](#) (Bankr. C.D. Cal. 2018)

A mortgagee with a completely under water mortgage was entitled to an unsecured claim in the debtor's Chapter 13 bankruptcy, even though the debtor's personal liability for the debt was discharged in a previous Chapter 7 case, because the debtor had elected to use § 1322(b)(2) to avoid the lien.

228. *In re Singh,*

[588 B.R. 136](#) (Bankr. E.D. N.Y. 2018)

The obligation of an individual who guaranteed a corporate debt was not contingent when the individual filed for bankruptcy protection because the guaranty provided that the commencement of any bankruptcy proceeding by or against the guarantor was an event of default. Consequently, the obligation had to be considered when applying the debt limits for Chapter 13 eligibility.

229. *In re Spiech Farms, LLC,*

[592 B.R. 1522018 WL 5255296](#) (Bankr. W.D. Mich. 2018)

Transactions through which a financier purported to buy produce from the debtor and consign the produce back to the debtor for sales to the debtor's existing customers did not give rise to a PACA claim by the financier because the goods were identified to the contract with the financier after they were already delivered to the debtor's customers. Accordingly, title to the goods passed to the debtor's customers, leaving no rights in the goods to pass to the financier. The financier was therefore not a seller or supplier of produce to the debtor. To the extent that the transaction between the debtor and the financier was a transaction in receivables, it was not a true sale because the debtor retained all the risks associated with the receivables.

### ***Automatic Stay & Injunctions***

230. *In re Adams,*

[589 B.R. 211](#) (Bankr. M.D. Ga. 2018)

A bank's retention of a voluntary post-petition payment by the debtor or non-estate assets, despite demand for return thereof, did not violate the automatic stay.

231. *In re Patriot National, Inc,*

[592 B.R. 560](#) (Bankr. D. Del. 2018)

The debtor adequately alleged its former CEO and her new employer violated the automatic stay by their postpetition use of the debtor's trade secrets and proprietary information, including customer lists, in violation of her non-interference agreement. Such conduct would constitute exercising control over property of the estate.

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232. *Denby-Peterson v. NU2U Auto World*,  
[2018 WL 5729907](#) (D.N.J. 2018), *appeal filed* (3d Cir. Nov. 25, 2018)  
Pursuant to the minority rule, a secured party that repossessed the collateral prepetition does not violate the stay simply by failing to return it postpetition. Preserving the status quo is not an act to exercise control over property of the estate.
233. *In re Chamberlayne Auto Sales & Repair, Inc.*,  
[585 B.R. 116](#) (Bankr. E.D. Va. 2018)  
The bankruptcy trustee stated a claim for violation of the automatic stay against the debtor's floor plan financier by alleging that the financier refused to release possession of title certificates to coerce the debtor into making payments.
234. *In re Brodgen*,  
[588 B.R. 625](#) (Bankr. M.D. Ala. 2018)  
A car dealership that had a "lease" with the debtor that purported to prohibit the debtor from listing the vehicle on the debtor's bankruptcy schedules, called the debtor over 100 times postpetition to demand payment, and extracted a \$703 payment postpetition after blocking the debtor's exit from the dealership, willfully violated the automatic stay and was liable for \$11,600 in compensatory damages, \$23,000 in punitive damages, and attorney's fees.
235. *In re Peake*,  
[588 B.R. 811](#) (Bankr. N.D. Ill. 2018)  
A city that prepetition had impounded a vehicle for unpaid tickets and postpetition refused to release the vehicle to the Chapter 13 debtor until confirmation of a plan treating the city as a fully secured claimant violated the automatic stay. Although the city did have an interest in the vehicle and that interest would become unperfected if the city relinquished possession, the city's conduct was not excepted from the stay by § 362(b)(3). Retention of the vehicle is not an act to continue or maintain the perfection of its interest in the vehicle because section 362(b)(3) contemplates a definite, positive act to continue or maintain perfection, such as filing a continuation statement under the Uniform Commercial Code.
236. *In re Shannon*,  
[590 B.R. 467](#) (Bankr. N.D. Ill.), *appeal filed*, (7th Cir. Sept. 20, 2018)  
A city that prepetition had impounded a vehicle for unpaid tickets and refused to release the vehicle even after confirmation of the Chapter 13 debtor's plan violated the automatic stay. Although the plan treated the city's claim as unsecured (based on the original proof of claim the city had filed), the city's lien nevertheless survived confirmation of the plan. Nevertheless, the city could not ignore the confirmed plan even though it had filed an amended claim asserting secured status. The city's conduct was not excepted from the stay by § 362(b)(3) because the trustee could not avoid the city's lien, given that the lien was perfected when the petition was filed. The city's conduct was not excepted from the stay by § 362(b)(4) because the city was acting as creditor, and, in any event, that provision is not an exception to § 362(a)(4).

237. *In re Madden,*

[2018 WL 1229692](#) (Bank. M.D. Ga. 2018)

A secured party that prompted a repossession company to repossess the debtor's car prepetition did not violate the stay by refusing to return the car because the secured party did not have possession and had promptly instructed the repossession company to release the car to the debtor. There was no evidence that the secured party had caused the repossession company to insist that the debtor sign a waiver of liability before it would release the car.

238. *In re Smiley,*

[2018 WL 385374](#) (Bankr. N.D. Ill. 2018)

A judgment creditor that obtained a prepetition freeze on the judgment debtor's bank accounts pursuant to a citation lien did not violate the stay by refusing to release the freeze after the judgment debtor filed under Chapter 13 because that would require the creditor to release its lien.

239. *In re Kunkel,*

[582 B.R. 184](#) (Bankr. W.D. Mich. 2018)

A credit union was entitled to relief from the stay to exercise whatever setoff rights it might have against the Chapter 13 debtor's certificates of deposit, which were jointly titled in her and her minor children's names. If, as the debtor alleged, the CDs belonged to the children, then the CD's could not possibly be necessary to a successful reorganization. Although the co-debtor stay of § 1301 would apply even if the children were not personally liable for the debtor's debts, due to the fact that their property secures such a debt, because the debtor's plan did not treat the credit union as secured claimant and provided for only a minimal distribution on its claim, relief from stay was appropriate.

240. *In re Kalabat,*

[592 B.R. 134](#) (Bankr. E.D. Mich. 2018)

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

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***Executory Contracts & Unexpired Leases***241. *In re Tempnology LLC,*

879 F.3d 389 (1st Cir. 2018)

The debtor's rejection of an executory contract under which the debtor granted a nonexclusive patent license, an exclusive license to distribute products manufactured under the patent, and a nonexclusive license of its trademarks terminated the licensee's exclusive distribution rights despite the licensee's election under § 365(n). Because trademarks are not within the Bankruptcy Code's definition of "intellectual property," rejection of the contract also terminated the trademark license.

242. *In re Provider Meds, LLC,*

907 F.3d 845 (5th Cir. 2018)

The debtors' ongoing obligations under a patent license to file quarterly reports and to not discuss a settled infringement action were material obligations which, along with patent holder's ongoing obligation not to sue debtors for infringement, made the license an executory contract. The license was deemed rejected when the Chapter 7 trustee failed to assume it within the 60-day statutory period, despite the debtor's failure to schedule the license as asset of estate. Because the rejected license was not part of bankruptcy estate, the trustee lacked authority to sell it.

***Sales of Assets***243. *Illinois Department of Revenue v. Hanmi Bank,*

895 F.3d 465 (7th Cir. 2018)

A taxing authority, which under nonbankruptcy law is entitled to collect taxes due from a buyer in bulk of the taxpayers assets, was not entitled to any portion of the proceeds of a § 363 sale of the debtor's assets, which were otherwise fully encumbered. Even assuming that the authority's right against a bulk purchaser was an "interest" in the debtor's assets, and that the sale proceeds were enhanced by the bankruptcy court order insulating the buyer from liability, there is no reason to believe that the authority necessarily would have recovered 100 percent of the tax delinquency from an informed purchaser, especially since the secured parties could have resisted any significant reduction by conducting a foreclosure sale, which would not trigger successor liability. Because the authority offered no evidence to establish what its potential recovery might have been, the lower courts properly awarded nothing.



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***Discharge, Dischargeability & Dismissal***

244. *In re Dukes*,

[909 F.3d 1306](#) (11th Cir. 2018)

A debtor whose confirmed and completed Chapter 13 plan stated that the debtor would make payments to a mortgagee directly but did not specify repayment terms or make any changes to the mortgage's terms did not "provide for" the mortgage debt within the meaning of § 1328(a). Accordingly, the debtor's liability was not discharged and the mortgagee could pursue the debtor for a deficiency after foreclosing the mortgage. Even if the plan provided for payment of the debt, discharging the debt would constitute a modification of the mortgagee's rights, and thus violate § 1322(b)(2).

245. *In re Shaffer*,

[585 B.R. 224](#) (Bankr. W.D. Va. 2018)

The debtors' contingent liability on their prepetition, continuing guaranty of an LLC's obligations to its supplier did not arise, when debtors signed the continuing guaranty, but only when each credit purchase was made. Consequently, their guaranty liability with respect to postpetition purchases was not discharged in bankruptcy.

246. *In re Tegeler*,

[586 B.R. 598](#) (Bankr. S.D. Tex. 2018)

The guaranty obligations of the debtors were nondischargeable under § 523(a)(2)(A) and (6) because the debtors made numerous misrepresentations in the loan application, loan documents, and borrowing base certificate, including that the borrower owned the collateral when in fact all of the borrower's assets had been transferred to one of the debtors.

247. *Knoxville TVA Employees Credit Union v. Houghton*,

[2018 WL 3381506](#) (E.D. Tenn. 2018)

The debtor's obligation to a bank was nondischargeable under § 523(a)(2) because he misrepresented that his company owned the boat that was to serve as collateral and that he would be using the loaned funds to buy the boat. Although the company did, several months later, purchase the boat, it never transferred the boat to the debtor and he never intended that it would.

248. *In re Harris*,

[898 F.3d 834](#) (8th Cir. 2018)

The personal obligation of the CEO of an employer, who had authorized the use for other purposes of funds withheld from employees paychecks for their health insurance plan, was nondischargeable under § 523(a)(4) as a defalcation.

249. *In re Arthur,*

[589 B.R. 761](#) (Bankr. S.D. Fla. 2018)

A debtor's liability to a commodity supplier was not rendered nondischargeable under § 523(a)(4) due to the debtor's breach of the PACA statutory trust because even though PACA might impose fiduciary duties on a produce dealer, the dealer does not act in a "fiduciary capacity."

250. *In re Williams,*

[2018 WL 1684306](#) (Bankr. W.D. Ky. 2018)

The obligation of an individual farmer who knew he was contractually obligated to protect a secured party's interest in collateralized farm equipment but who nevertheless sold the equipment and used the proceeds to buy feed for the farmer's his cattle was nondischargeable under § 523(a)(6). Although the farmer hoped to pay the secured party, he nevertheless acted maliciously and in conscious disregard of the secured party's interest in the collateral.

251. *In re French,*

[2018 WL 1413758](#) (Bankr. S.D.W. Va. 2018)

A secured party sufficiently alleged facts to make a guarantor's obligation nondischargeable under § 523(a)(6) by claiming that the guarantor: (1) knew of the security interest and that the secured party had demanded the turnover of the collateral; (2) knew the members of the debtor were diverting and converting the collateral for their own and the guarantor's benefit in violation of a court order; (3) knowingly did nothing to prevent the conversion; and (4) converted some collateral for her own benefit, thereby causing injury to the secured party.

252. *In re Nix,*

[2018 WL 3339620](#) (Bankr. N.D. Ala. 2018)

A physician's debt incurred to purchase membership units in a limited partnership was nondischargeable under § 523(a)(6) because the physician sold the units without informing the lender or remitting any of the proceeds to the lender, but did repeatedly misrepresent to the buyer that the units were unencumbered. It did not matter that the lender's security interest in the units was unperfected or that the physician continued to make interest payments on the debt for four years.

253. *In re Robertus,*

[588 B.R. 253](#) (Bankr. D. Mont. 2018)

The debt of farmers who sold collateralized crop and did not remit the proceeds to the secured party, but instead used them to funds further farming operations, were not nondischargeable under § 523(a)(6) because they lacked a subjective motive to inflict injury on the secured party or believed that injury was substantially certain to occur. At that time, the debtors were still expecting that the proceeds of other crops would be available to pay the secured party, and they did not anticipate the complete loss of their corn crop or that their crop insurance claim would be denied.

254. *Westlake Flooring Co. v. Staggs*,

[2018 WL 3752383](#) (N.D. Ala. 2018)

The debt of the owner of a car dealership who had guaranteed the dealership's obligations to its floor plan lender was not excepted from discharge under § 523(a)(6) due to the dealership's sale of vehicles out of trust because, even though the owner worked in the dealership as a bookkeeper, her husband ran the business and was responsible for decision not to remit car sales proceeds to the lender; the owner did not actively participate in the actions that caused the lender harm.

255. *In re Simons*,

[2018 WL 4362193](#) (Bankr. E.D. Cal. 2018)

The debtor's obligation to a lender with a security interest in the debtor's car was nondischargeable under § 523(a)(6) because the debtor sold the car after fraudulently getting the DMV to reissue the certificate of title without the security interest noted thereon.

256. *Bobka v. Toyota Motor Credit Corp.*,

[586 B.R. 470](#) (S.D. Cal. 2018), *appeal filed*, (9th Cir. May 30, 2018)

A lease of personal property that an individual Chapter 7 assumes under § 365(p) remains enforceable against the debtor even if the obligations are not reaffirmed under § 524(c).

### ***Avoidance Powers***

#### **– Preferences**

257. *In re Price*,

[589 B.R. 690](#) (D. Haw. 2018), *appeal filed* (9th Cir. Aug. 9, 2018)

A transfer of \$123,000 of the proceeds from the sale of the debtor's real property to an individual with a contingent right to a portion of the profits occurred when the payment was made to the individual, which was inside the preference period, not earlier when the proceeds were placed in escrow. The escrow instructions preserved the status quo. Accordingly, placing the funds in escrow did not so diminish the debtor's rights in the proceeds so as to make the later payment to the individual an act that did not deprive the estate of an asset of value.

258. *USAA Federal Savings Bank v. Hope*,

[589 B.R. 914](#) (M.D. Ga.), *appeal filed*, (11th Cir. July 24, 2018)

A security deed granted as part of a loan refinancing was deemed to be transferred when recorded, not when the original security deed was cancelled. Because this was 52 days after the debtors executed the security deed in return for the refinancing loan, it was not substantially contemporaneous with the loan even though the delay in recording was not intended.

259. *In re Dependable Auto Shippers, Inc.*,

[2018 WL 4348049](#) (Bankr. N.D. Tex. 2018)

An accounts financier that, one day before the debtor filed for bankruptcy, was paid off with funds loaned to the debtor by another lender two days earlier did not receive an avoidable preference because the funds were earmarked for payment to the accounts financier, and thus were not property of the debtor. Although the loan documents lacked a provision expressly stating that the loaned funds were to be used to pay the accounts financier, contained a merger clause, and declared that there were no third-party beneficiaries, extrinsic evidence – including the need for the accounts financier to be paid off so that it would release its existing security interest, thereby allowing the new lender to have a first-priority security interest – demonstrated that the debtor was obligated to use the loaned funds to pay the accounts financier.

260. *In re The Truland Group, Inc.*,

[2018 WL 333865](#) (Bankr. E.D. Va. 2018)

A supplier that delivered goods worth \$2.2 million to the debtor-subcontractor shortly before and after entering into an agreement with the general contractor for future payments to be made jointly to the supplier and debtor, and that later, within the preference period, received a jointly-payable check that had been endorsed by the debtor, was liable for the amount received. The check was not property held in trust for the supplier because the subcontract did not require that the debtor segregated property, and even if the joint-check agreement caused the check not to be property of the debtor, the agreement itself was entered into within the preference period, thereby ensuring that payment was preferential. The supplier had no preference defense under § 547(c)(1) because the delivery of the equipment – 44 days and 23 days before payment was made – was not substantially contemporaneous with the payment.

261. *In re Turner Grain Merchandising, Inc.*,

[2018 WL 7082063](#) (Bankr. E.D. Ark. 2018)

Because the bank with a perfected security interest in a seller's crops failed to strictly comply with the Food Security Act, the buyer took free of the bank's security interest at the time of deliver, not later when the bank received the buyer's payment (which was less than 90 days after the buyer filed for bankruptcy protection). Therefore, the bank had not shown that the buyer's payment was a contemporaneous exchange for new value within the meaning of § 547(c)(1).

262. *In re Turner Grain Merchandising, Inc.*,

[595 B.R. 295](#) (Bankr. E.D. Ark. 2018)

A grower failed to show that the prepetition payments it received from the debtor during the preference period for wheat previously delivered were made according to ordinary business terms within the meaning of § 547(c)(2) because the grower failed to establish what the relevant industry was.

263. *In re Social Networking Technology, Inc.*,

[2018 WL 6492694](#) (Bankr. D. Kan. 2018)

A trustee's action under §§ 544, 548, and 548 to avoid the prepetition filing of financing statements would not be dismissed for failure to state a claim even though there was no security agreement and thus no security interest under Article 9 of the U.C.C. The financing statements might remain the basis for a "charge against or interest in property to secure payment," and thus constitute a "lien" under the Bankruptcy Code.

264. *In re Power*,

[2018 WL 1887318](#) (Bankr. D. Idaho 2018)

Because a lender that refinanced the debtors' existing car loan did not perfect its security interest until at least 40 days after the loan was made, due in part to the debtors' error in completing the original title application and in part to the lender's own dilatory actions, the grant of the security interest was not substantially contemporaneous with the loan and was avoidable as a preference.

265. *In re Hill*,

[589 B.R. 614](#) (Bankr. N.D. Ill. 2018)

A transaction in which a financier "bought" a merchant's accounts receivable for a discounted amount, with the expectation of taking a pre-determined percentage of the merchant's future receipts until the MCA company is paid in full, was a sale, not a secured loan, for the purposes of the New York usury statute. The payments to the merchant within the preference period was protected from avoidance by § 547(c)(2) because the obligation was incurred in the ordinary course of the business of both the merchant and the financier, and the payments were made in the ordinary course of the merchant's business even though some of the amounts paid came from loans made by others to the merchant, rather than from proceeds of accounts receivable.

266. *In re Price*,

[589 B.R. 690](#) (D. Haw. 2018), *appeal filed* (9th Cir. Aug. 9, 2018)

An individual who terminated his right to purchase real property in exchange for a right to half the net profit if the property were resold under specified circumstances, who later recorded with the Bureau of Conveyances an Affidavit of Adverse Claim to the property, then released the Affidavit to facilitate a sale of the property and placement of the net proceeds in escrow, and finally received payment of a portion of the escrowed proceeds during the preference period, was liable for the preferential transfer. The transfer occurred when the payment was made, not earlier. The agreement creating the right to proceeds did not create a security interest in the property because the creation of a security interest requires the intent to transfer a lien, and the agreement did not exhibit such an intent. The filing of the affidavit (the equivalent of a *lis pendens*) did not create a lien because a *lis pendens* is effective only to give notice of a claim to real property; it is ineffective to secure a claim against the owner of the property. Finally, placing the proceeds in escrow did not terminate the debtor's rights to the funds or create a security interest in favor of the individual because nothing in the escrow instructions purported to do either of those things.

267. *In re BFW Liquidation, LLC*,

[899 F.3d 1178](#) (11th Cir. 2018)

The court's statement in 1988 that the § 547(c)(4) defense requires the new value to remain unpaid was dictum and is incorrect.

268. *In re Dearborn Bancorp, Inc.*,

[583 B.R. 395](#) (Bankr. E.D. Mich. 2018)

Although periodic payments made under consulting agreements might, for the purposes of the § 547(c)(1) and (c)(4) defenses, normally be presumed to be equal to the value of the services provided, no such presumption is appropriate when the payments are made to insiders, as they were in this case. Consequently, the preference defendants had the burden of proving the value of the services they provided, which they failed to do.

269. *In re Davis*,

[584 B.R. 230](#) (Bankr. E.D. Tenn. 2018)

The debtor's freedom – that is, avoidance of incarceration – was not “new value” and thus could not support a contemporaneous exchange for new value defense under § 547(c)(1) with respect to a preference claim regarding a restitutionary payment that the debtor made to former employer from whom the debtor had embezzled funds.

#### – Strong-Arm Powers

270. *In re Jaghab*,

[584 B.R. 472](#) (Bankr. E.D.N.Y. 2018)

The bankruptcy trustee, who held 50% of the stock in a corporation, could not recover under bankruptcy law a payment made to the other stockholder on a promissory note owned by the corporation. Because the corporation – not its shareholders – owned the note, the trustee had no direct action on the note or against the other shareholder for an accounting. If the other shareholder owed an accounting, it was to the corporation, not the trustee as a shareholder. The trustee could, however, pursue whatever rights the trustee might have under nonbankruptcy law.

#### – Fraudulent Transfers

271. *In re Montreal, Maine & Atlantic Railway, Ltd.*,

[888 F.3d 1](#) (1st Cir. 2018)

The debtor's prepetition payment to an insider creditor from escrowed funds derived from the sale of collateral was not a transfer of property of the debtor – and hence not an avoidable fraudulent transfer – because the proceeds were less than the total debt to the senior lienor, which had waived its lien on the condition that the proceeds be distributed to a specified waterfall. The debtor could not have put the funds to any other use.

272. *Bash v. Textron Financial Corp.*,  
[592 B.R. 819](#) (N.D. Ohio 2018)

Material facts remained in dispute about whether the debtor and secured party structured their refinancing agreement so that it was a novation, despite testimony from the debtor's counsel that the purpose of the opinion he gave at the time of the refinancing was to confirm that the security interest related back to the original financing and testimony from others that everyone understood that the refinancing was an amendment to the existing credit facility. Because a novation would have extinguished the existing security interest and created a new one, and the creation of the new security interest would have related to unencumbered assets and thus constituted a "transfer" under the Uniform Fraudulent Transfer Act, the secured party was not entitled to summary judgment on the trustee's avoidance action.

273. *In re Mongelluzzi*,  
[587 B.R. 392](#) (Bankr. M.D. Fla. 2018)

A bank that applied deposits to outstanding loans made to related entities was not entitled to the § 550(b)(1) good-faith defense to fraudulent transfer liability because the bank's internal communications reveal that the bank knew of the debtors' check-kiting scheme and was on inquiry notice of debtors' possible insolvency at it applied the deposits.

274. *In re Evergreen International Aviation, Inc.*,  
[2018 WL 4042662](#) (Bankr. D. Del. 2018)

Although a corporate parent might not, if its subsidiaries are all insolvent, indirectly benefit from credit extended to its subsidiaries, and thus not receive reasonably equivalent value in exchange for its downstream guaranty of the subsidiaries's obligations, the trustee submitted evidence that only some of the subsidiaries were insolvent. Consequently, the trustee was not entitled to summary judgment.

275. *In re Sterman*,  
[2018 WL 6333588](#) (Bankr. S.D.N.Y. 2018)

While the debtors did receive reasonably equivalent value for the tuition and other education-related payments they made so that their daughter could attend a private liberal arts college while the daughter was a minor, they did not receive reasonably equivalent value for similar payments made after the daughter became an adult. It did not matter that the payments allegedly benefitted the debtors by increasing the likelihood that the daughter would become self-sufficient or by providing assurance that the daughter would have a roof over her head and food to eat while in college.

#### – Liens Impairing Exemptions

276. *United States v. Copley*,  
[591 B.R. 263](#) (E.D. Va. 2018)

A couple's exemption of their right to a federal tax refund takes priority over the setoff rights of the IRS.

277. *In re Taylor*,

[899 F.3d 1126](#) (10th Cir. 2018)

In determining whether a judicial lien impairs the debtor's exemption under § 522(f), the calculation must, when deducting other liens, use an amount that corresponds to the debtor's percentage of ownership (*i.e.*, the total lien amount times the fraction equal to the debtor's percentage of ownership of the property).

#### – Protection for Settlement Payments

278. *Merit Management Group, LP v. FTI Consulting, Inc.*,

[138 S. Ct. 883](#) (2018)

The protection from avoidance for settlement payments by or to a financial institution does not protect a transfer that is conducted through a financial institution that is neither the debtor nor the transferee, but merely a conduit. Thus, when determining whether the protection for settlement payments saves from avoidance a transfer conducted in several stages, courts must look at the transfer that the trustee seeks to avoid – the whole transfer – not at each of its stages. Accordingly, a settlement payment the debtor made for the purchase of securities, which was handled by a bank as an escrow agent, was not protected and could be avoided as a fraudulent transfer to the seller of the securities.

#### *Equitable Subordination*

279. *In re Lister-Petter Americas, Inc.*,

[2018 WL 4623338](#) (Bankr. D. Kan. 2018)

The remote parent company of the debtor, which shortly before bankruptcy purchased at a substantial discount the main secured claim against the debtor, was not entitled to summary judgment on the trustee's effort to equitable subordinate the claim. The remote parent and the debtor were controlled by the same individuals, one of whom was also a guarantor of the debt, and a reasonable fact finder could conclude that the individuals violated their fiduciary duties as directors of the debtor when they caused the remote parent to acquire the secured claim because doing so deprived the debtor of the opportunity to satisfy the debt at a substantial discount and thereby salvage its reorganization efforts.

#### *Reorganization Plans*

280. *In re Transwest Resort Properties*,

[881 F.3d 724](#) (9th Cir. 2018)

The requirement for cramdown that at least one impaired creditor class accept the plan applies in jointly administered Chapter 11 cases on a per-plan basis, not a per-debtor basis.



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281. *In re Tribune Media Co.*,  
[587 B.R. 606](#) (D. Del. 2018)  
A bankruptcy court could cram down a plan that did not comply with a prepetition subordination agreement.
282. *In re National Truck Funding LLC*,  
[588 B.R. 175](#) (Bankr. S.D. Miss. 2018)  
A Chapter 11 debtor can satisfy § 1129(b)(2)(A) by surrendering some collateral and providing for deferred cash payments with a present value equal to the value of the remaining collateral, even though the secured claimant's claim was cross-collateralized.
283. *In re Fagerdala USA—Lompoc, Inc.*,  
[891 F.3d 848](#) (9th Cir. 2018)  
A bankruptcy court erred in designating the vote of a secured creditor that purchased enough unsecured claims to block confirmation. While a court may designate the vote of a creditor that acts in bad faith, purchasing claims for the purpose of blocking confirmation is not bad faith unless the creditor has an ulterior motive unrelated to protecting its rights as a creditor. It did not matter that the creditor did not offer to purchase all the claims in the class, and instead selectively purchased a majority in number but only about 10% of the total amount of the claims, so as to acquire a blocking position for the lowest possible purchase price. Good faith was not to be determined by the effect on the claim holders of the remaining claims, but on whether the creditor had an ulterior motive.
284. *In re Singh*,  
[588 B.R. 136](#) (Bankr. E.D.N.Y. 2018)  
Although the debtor's liability on a \$1.6 million guaranty was contingent on the date of the petition because, at that time there was no default, and thus the liability did not make the debtor ineligible for Chapter 13 relief, the debt became contingent on filing due to a default-on-filing clause. Thus, the debtor's proposed Chapter 13 plan, which provided for full payment on other unsecured claims but no payment on the guaranty, could not be confirmed even though the borrower was current in making payment.
285. *In re Brown*,  
[2018 WL 739414](#) (Bankr. N.D. Ohio 2018)  
A Chapter 13 debtor's plan could modify a claim secured by a mechanic's lien on the debtor's principal residence because the anti-modification rule of § 1322(b)(2) applies only to a claim secured by a security interest in the debtor's principal residence, and a mechanic's lien is not a security interest.

286. *In re Thompson*,

[581 B.R. 1](#) (Bankr. D. Mass. 2018)

Although a Chapter 13 debtor need not physically deliver the collateral to the secured claimant, and may continue to use or occupy the collateral until the secured claimant seeks to exercise its rights to the collateral, a debtor cannot, under the guise of surrendering the collateral, retain the collateral for a substantial period of time against the wishes of the secured claimant, even if the debtor makes periodic payments on the secured claim.

287. *In re Barragan-Flores*,

[585 B.R. 397](#) (W.D. Tex. 2018)

Even though a lender that made two secured, cross-collateralized vehicle loans to the debtor might have two claims in bankruptcy, the debtor could not, under Chapter 13 choose to surrender one vehicle while paying over time the incurred to acquire the other. The debtor must either surrender all the collateral or cram down the entire debt.

288. *In re Helmeid*,

[2018 WL 2324203](#) (Bankr. E.D.N.C. 2018)

Although the debtors could amend their confirmed Chapter 13 plan to surrender a vehicle that had become unreliable and to alter the schedule of payments to the creditor whose claim was secured by the vehicle, the debtors could not reclassify the creditor's deficiency claim as an unsecured claim because the debtors purchased the vehicle within 910 days before they filed the petition, and thus the entire amount of the creditor's claim had to be treated as a secured claim.

### ***Other Bankruptcy Matters***

289. *In re Wagabaza*,

[582 B.R. 486](#) (Bankr. C.D. Cal. 2018)

Although the California statute codifying the principle of estoppel by deed apparently means that a junior lien, which was wiped out when a senior lienor foreclosed after receiving relief from the stay, reattaches if the debtor reacquires the property, the junior lien could not reattach because the debtor had already received a discharge of the obligation owed to the junior lienor and because § 552 prevents a lien from attaching to post-petition property.

290. *In re Williams*,

[2018 WL 832894](#) (Bankr. W.D. Va. 2018)

Lawyers who knew of and participated in scheme to have their fees paid by a third party that towed a car that the debtor was prepared to surrender to the secured lender to a state with a laws that allowed a statutory lien for towing and storage charges to prime a perfected security interest, and which charged excessive towing and storage fees for services that were completely unnecessary, would have to disgorge the fees received and would be suspended from practicing before the court. *See also In re White*, [2018 WL 1902491](#) (Bankr. N.D. Ala. 2018) (involving similar sanctions against others involved in the scheme).

291. *In re Lane*,

[589 B.R. 399](#) (9th Cir. BAP), *appeal filed*, (9th Cir. Oct. 18, 2018)

Although a Chapter 13 debtor's successful objection to a proof of a secured claim, based on ground that claimant lacked standing to enforce the deed of trust note, was not merely a procedural objection, the debtor could not strip off the lien pursuant to § 506(d) on the ground that the lien did not secure an allowed secured claim. Section 506(d) applies only when a claim disallowance addresses the merits of the underlying debt.

## GUARANTIES & RELATED MATTERS

292. *Jenzack Partners, LLC v. Stoneridge Associates, LLC*,

[192 A.3d 455](#) (Conn. Ct. App. 2018)

The assignee of a loan had standing to enforce the limited guaranty of the loan and the mortgage securing the guaranty because, under the common law, assignment of a loan carries with it the assignment of any secondary obligations related thereto (no discussion of § 9-203(f)). However, the assignee was not entitled to summary judgment on the amount due; even though the assignee's business records were admissible to show the payments received and interest that accrued after the assignment, only inadmissible hearsay evidence, created by the assignor, was offered to show the balance due at the time of the assignment.

293. *Colonial Oil Industries, Inc. v. Lynchar, Inc.*,

[815 S.E.2d 917](#) (Ga. 2018)

A guaranty that identified the principal obligor only by its trade name nevertheless satisfied the statute of frauds and was enforceable.

294. *Succession of Shaw*,

[254 So. 3d 756](#) (La. Ct. App. 2018)

Because a deceased guarantor of an LLC's debts had promised, in the guaranty agreement, to refrain from attempting to collect or enforce the guarantor's own claims against the LLC until the debt to the lender was paid in full, the lender was entitled to prevent the estate of the decedent from seeking to enforce obligation of the LLC under the membership agreement to repurchased the decedent's membership interest.

295. *Comerica Bank v. Pars Ice Cream Co.*,

[2018 WL 6625171](#) (Mich. Ct. App. 2018)

An individual's guaranty of "of all existing and future indebtedness" to a Bank of a specified LLC included the LLC's subsequent liability to the bank on the LLC's guaranty of a corporation's liability on its guaranty of another LLC's debt. It did not matter that the individual's guaranty designated the specified LLC as "Borrower." That designation was used merely to identify the entity, not to limit the capacity in which it incurred liability.

296. *ACP GP, LLC v. United Home Care, Inc.*,  
[2018 WL 4693969](#) (D.N.J. 2018)

Two lenders sufficiently alleged breach of a validity guaranty by claiming that the guarantor personally compromised the validity of the security interest in the collateral by misappropriating the borrowers' funds and continuing to seek advances on behalf of borrowers despite knowledge of their inability to repay, and by failing to indemnify the creditor for losses caused by the guarantor's own fraud and deceit as an officer, employee, or agent of the borrowers. The fact that the guaranty was in the form of a letter did not make it unenforceable. The lenders alleged that they manifested acceptance of the guaranty by executing the loan and security agreement and making advances to the borrowers. The guaranty was supported by consideration because the guaranty itself acknowledged the that promises and representations it contained were made to "induce [the lenders] to make financial accommodations available to" the borrowers.

297. *BMO Harris Bank v. Smith*,  
[2018 WL 4691212](#) (D. Kan. 2018)

A bank that received an assignment of eight secured loans guaranteed by a single guaranty could enforce the guaranty with respect to those loans even though the guaranty also covered an additional loan that the original creditor had previously assigned to a different party. The notification of the first assignment was expressly "to the extent any such Guaranty relates to the Assigned Account and the transaction contemplated thereby," and thus the original creditor retained an interest in the guaranty that it could and did later assign to the bank.

298. *Bowers v. Today's Bank*,  
[820 S.E.2d 459](#) (Ga. Ct. App. 2018)

A guarantor's springing liability on a nonrecourse debt, which was to ripen if the collateral became subject to a "voluntary bankruptcy or insolvency proceeding," did not ripen when the debtor consented to the lender's receivership proceeding. The term "voluntary" modified both "bankruptcy" and "insolvency proceeding" and the debtor's consent to the lender's actions did not make the proceeding a voluntary one.

299. *Hartley v. Hynes*,  
[2018 WL 5093975](#) (Pa. Super. Ct. 2018)

Guarantors who had waived any requirement that the creditor proceed first against the collateral and "any and all rights or defenses based on suretyship or impairment of collateral" could not assert a defense based on impairment of the collateral in the creditor's possession. The duties imposed by § 9-207(a) on a secured party in possession of collateral are not included in the list of nonwaivable obligations in § 9-602, and thus the guarantors did waive their rights under § 9-207. This conclusion is supported by § 3-605(f), which expressly allows secondary obligors to waive an impairment of collateral defense.

300. *Lindsay International Sales & Service, LLC v. Wegener*,  
[917 N.W.2d 133](#) (Neb. 2018)

Two guarantors of a limited liability company's debts had no defense based on the creditor's impairment of the collateral because the obligation of the LLC was unsecured.

#### LENDING, CONTRACTING & COMMERCIAL LITIGATION

301. *Community & Southern Bank v. First Bank of Dalton*,  
[811 S.E.2d 490](#) (Ga. Ct. App. 2018)

The proceeds of a foreclosure on real property that secured multiple loans was to be distributed pro rata among the entities that acquired participation interests in the loans.

302. *In re Energy Future Holdings Corp.*,  
[585 B.R. 341](#) (D. Del. 2018), *appeal filed*, (3d Cir. May 8, 2018)

The holders of the highest tranche of first-lien debt – the whole of which was undersecured – were not entitled to post-petition interest out of the adequate protection payments and plan distributions allocated to the lower tranches because the waterfall in the intercreditor agreement dealt only with payments out of the proceeds of collateral. The plan distributions of stock in a spin-off do not constitute proceeds of collateral because no sale or disposition occurred. The adequate protection payments were not distributions of cash collateral because the cash was generated post-petition and no effort was made to trace the cash to a sale of pre-petition collateral. Moreover, neither amounts resulted from the exercise of remedies under the loan documents.

303. *In re MPM Silicones, LLC*,  
[2018 WL 6324842](#) (S.D.N.Y. 2018), *opinion amended*, [2019 WL 121003](#) (2019)

Contractually subordinated and massively undersecured junior lienors did not breach the intercreditor agreement by voting in favor of the plan of reorganization because the agreement unambiguously restricted the junior creditors only to the extent they were enforcing rights as a secured party, not to the extent they were acting as unsecured creditors. The creditors also did not breach the intercreditor agreement by receiving equity in the reorganized debtor because that equity was not proceeds of joint collateral.

304. *Viridis Corp. v. TCA Global Credit Master Funds, LP*,  
[721 F. App'x 865](#) (11th Cir. 2018)

A term in each of several amendments to a credit agreement by which the debtor and guarantors released the lender from “any and all . . . claims . . . of any kind whatsoever,” was effective to waive claims for usury and for breach or tortious interference with contract arising from conduct occurring before the date of the last amendment. However, the language was not effective to release claims arising from conduct occurring after the date of the last amendment. Nor was it effective to release claims based on fraudulent misrepresentations because it did not expressly indicate that it was incontestable on the ground of fraud.

305. *Sierra Equipment, Inc. v. Lexington Insurance Co.*,  
[721 F. App'x 865](#) (5th Cir. 2018)

A lessor of equipment was not entitled under Texas law to an equitable lien on the proceeds of insurance payable to the lessee and arising from damage to and destruction of the equipment because, even though the lease required the lessee to insure the equipment, it did not require that the policy list the lessor as an additional insured or as a loss payee.

306. *Lucas v. Deutsche Bank*,  
[2018 WL 300393](#) (Cal. Ct. App. 2018)

The terms in a note and deed of trust that provided for attorney's fees incurred by the mortgagee in defending its rights to the property or in connection with default to become part of the secured obligation did not authorize a court award of attorney's fees to the mortgagee in connection with its successful defense against the mortgagor's various claims. A term providing for attorney's fees to become part of the debt is not the same as a term authorizing a court award of fees.

307. *In re Formosa*,  
[582 B.R. 423](#) (Bankr. E.D. Mich. 2018)

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

308. *Helena Chemical Co. v. Torian*,  
[2018 WL 1972703](#) (E.D. Ark. 2018)

A clause in a settlement agreement providing for a security interest and for the secured party's expenses and reasonable attorney's fees in "retaking, holding, preparing for sale, selling and the like" did not cover attorney's fees incurred in seeking payment of the debt.

309. *In re England*,  
[586 B.R. 795](#) (Bankr. M.D. Ala. 2018)

A clause in mortgage providing for the mortgagor to pay the attorney's fees incurred by the mortgagee in a foreclosure proceeding initiated under the power of sale did not cover fees incurred in connection with the mortgagor's bankruptcy proceeding.

310. *Dugan v. Vlcko*,  
[307 F. Supp. 3d 684](#) (E.D. Mich. 2018)

A negotiable promissory note sent by email was issued and delivered to the payee, who was therefore a holder. Because the note was usurious, no interest on the note was owing and the holder had no equitable estoppel claim for the interest based on the fact that the maker drafted the note. However, the holder might have a claim for fraud based on the maker's representation that the note was not usurious.

311. *David H. Russell Family L.P. v. Dernick*,  
[2018 WL 1604989](#) (S.D. Tex. 2018)

Promissory notes that: (i) required the creditor to look first to the debtor's interest in a limited liability company; (ii) stated that, upon maturity, "any outstanding principal and accrued interest shall be automatically converted into additional member interests" in the LLC; and (iii) provided a mechanism for appraising the LLC for the purpose of this conversion, did not mean that the obligations were fully discharged by conversion even though the LLC was valueless at the time the notes matured. The parties had expressly recognized that the membership interests might not be sufficient to satisfy all remaining amounts due and included a sentence providing that insufficient payment would not limit other remedies.

312. *MHS Captial LLC v. Goggin*,  
[2018 WL 2149718](#) (Del. Ch. Ct. 2018)

An exculpatory provision in the membership agreement for an LLC, which provides that the manager "shall not be liable . . . for breach of such person's duty as Manager" but which also requires the manager to "discharge his . . . duties in good faith, with the care an ordinarily prudent person in a like position would exercise under similar circumstances, and in a manner [he] reasonably believes to be in the best interests of the Company," did not prevent a contract claim against the manager for diverting LLC assets to himself and his friends.

313. *Lynch v. North American Company for Life and Health Insurance*,  
[300 F. Supp. 3d 1158](#) (D. Idaho 2018)

An insurer was not entitled to summary judgment on whether it properly terminated a life insurance policy. Although the policy required merely that advance notification of termination be sent, not that it be received, the insurer's evidence of its customary practices was insufficient to remove a factual issue about whether notification was properly sent to the policy owner in this case, who submitted evidence that no notification was received. There were no computer logs or other records to confirm that the insurer's customary practices were actually followed in this case and the notification was not sent by certified mail.

314. *In re Lyondell Chemical Co.*,  
[585 B.R. 41](#) (S.D.N.Y. 2018)

Although a lender breached a \$750 million revolving credit facility by failing to lend, the lender was insulated from liability by a term in the credit facility disclaiming consequential damages. Such clauses are enforceable under New York law except to the extent that they cover claims for gross negligence or intentional wrongdoing or are unconscionable, and there was no claim that any of those exceptions applies. However, the clause did not bar restitutionary damages, and thus the lender had to return the \$12 million commitment fee paid by the borrower. While the lender would be entitled to deduct from that amount the value of its partial performance, arising from an earlier loan it made under the credit facility, the lender failed to prove the value of that performance.

315. *Firestone Financial LLC v. Meyer*,  
[881 F.3d 545](#) (7th Cir. 2017)

A guarantor had no promissory estoppel defense based on the lender's failure to fulfill its alleged promise to finance all equipment that the debtor needed on the "same" and "identical terms" to the first two loans. Such an alleged promise did not make sense given that the first two loans had different principal amounts and interest rates, and the third had a different principal amount and term. Moreover, the guarantor could not have relied on the alleged promise when guarantying the first loans because they preceded the alleged promise, and he guarantied the fourth after the lender's CEO told the guarantor that it would make no more loans to the debtor.

316. *Melrose Credit Union v. Ulysse*,  
[2018 WL 3118644](#) (N.Y. Sup. Ct. 2018)

A credit union was entitled to summary judgment on its action on a balloon note despite the debtor's assertion that the loan had regularly been renewed for over 25 years. The note expressly provides that the credit union has no obligation to refinance the loan, and thus the debtor could not have reasonably relied on any alleged oral promise to renew. Similarly, the debtor had no defense based on the credit union's refusal to renew the loan unless the debtor provided a home mortgage to secure the debt because note expressly provided that the credit union could demand additional collateral even during the term of the loan.

317. *Blok Builders, LLC v. Katryniok*,  
[2018 WL 637399](#) (Fla. Dist. Ct. App. 2018)

A subcontractor on an excavation project that agreed to indemnify the contractor and its agents for any loss or damage resulting from the subcontractor's work was not obligated to indemnify the owner even though: (i) the contractor's agreement with the owner required the contractor to indemnify the owner; and (ii) that agreement was incorporated by reference into the subcontract.

318. *Travelers Casualty and Surety Co. of America v. Paderta*,  
[315 F. Supp. 3d 1096](#) (N.D. Ill. 2018)

A surety company that had issued performance bonds for a general contractor, in connection with which the contractor promise to indemnify the surety and hold funds received on bonded projects in trust, was entitled to funds from bonded projects that had been deposited into the contractor's deposit account and then swept by the depository bank in the exercise of setoff rights. The bank had constructive knowledge that the funds were held in trust, and thus had no setoff rights in such funds.

319. *In re Rychman Creek Resources, LLC*,  
[2018 WL 4178692](#) (Bankr. D. Del. 2018)

The owner of 80% of the equity in a reorganized LLC, which sent notification that it was exercising its call option with respect to the remaining 20%, could not withdraw that "offer" merely because it mistakenly thought the purchase price was \$1.5 million rather than \$11 million. The option itself was an offer and the owner's notification was an acceptance.



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320. *HSBC Bank USA v. Buset*,  
[241 So. 3d 882](#) (Fla. Dist. Ct. App. 2018)  
The fact that a promissory note was secured by and referenced a mortgage that purportedly limited transferability did not prevent the note from being negotiable because the note did not incorporate the terms of the mortgage.
321. *OneWest Bank v. FMCDH Realty, Inc.*,  
[83 N.Y.S.3d 612](#) (App. Div. 2018)  
A Cash Account Agreement that created an open-end (*i.e.*, revolving) line of credit for up to \$806,152 was not a negotiable instrument because it did not state a sum certain. Therefore the entity that had possession of the agreement, and which had received an assignment of the mortgage securing the debt, could not establish its standing to foreclose the mortgage merely by showing that it possessed the original Cash Account Agreement, indorsed in blank, on the date this action was commenced.
322. *U.S. Bank Trust for LSF9 Master Participation Trust v. Spurgeon*,  
[99 N.E.3d 671](#) (Ind. Ct. App. 2018)  
A mortgage executed by a trust and covering real property owned by the trust that was intended to secure a debt of an individual but which erroneously defined the “Borrower” as the trust was nevertheless enforceable because it described the secured note with the correct dollar amount and date.
323. *Baynes v. Santander Consumer USA*,  
[2018 WL 623582](#) (W.D. Pa. 2018)  
The debtor in a secured transaction was required to arbitrate claims against the repossession company that allegedly breached the peace during repossession and the law enforcement personnel who assisted because the security agreement included an arbitration clause covering “all claims arising out of, in connection with, or relating to the Contract” against all persons “who may be jointly or severally liable.”
324. *Helena Chemical Co. v. Holthaus*,  
[2018 WL 623593](#) (D. Kan. 2018)  
A secured party that brought an action against the debtor and guarantors on the secured obligation and for replevin was not required to arbitrate the claim. Although the security agreement contained a clause requiring arbitration of any dispute “arising out of or relating to this Agreement,” there was no dispute about the extent or scope of the Security Agreement. Instead, the claim related solely to the debt but the loan agreement did not contain an arbitration clause.

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325. *Hewitt v. Auto Showcase of Bel Air*,  
[2018 WL 2437240](#) (Md. Ct. Spec. App. 2018)  
An arbitration clause in a retail installment contract for a motor vehicle – and another separately signed agreement to arbitrate – survived cancellation of the contract when third party financing fell through. The mutual promises to arbitrate provide consideration for each other. Accordingly, the buyer had to arbitrate his class action alleging violation of the state Spot Delivery Law.
326. *Jorja Trading, Inc. v. Automatic Auto Finance, Inc.*,  
[2018 WL 6187737](#) (Ark. Ct. App. 2018)  
An arbitration agreement made in connection with retail installment contract for the purchase of a motor vehicle lacked mutuality of obligation, and was therefore unenforceable, because it applied only to the borrower’s claims. Although it stated that each party retained “the right to self-help remedies,” only the creditor had such rights. The fact that the agreement also waived each party’s right to class action arbitration did not provide the necessary mutuality.
327. *Unison Co. v. Jul Energy Development, Inc.*,  
[2018 WL 4426204](#) (D. Minn. 2018)  
An arbitration panel that ordered rescission of the parties’ contract and restitution in excess of \$400,000 did not exceed its authority. Even though the parties’ contract provided that “in no event shall [the aggrieved party] . . . be liable . . . for damages . . . in excess of ten percent (10%) of the Contract Price, regardless of whether such liability arises out of breach of contract, guarantee or warranty, tort, product liability, indemnity, contribution, strict liability, or any other legal theory,” because rescission is the complete undoing of the contract, the Panel’s determination on how to restore the parties to their pre-contractual positions was not constrained by any contractual provision.
328. *Ronnoco Coffee, LLC v. Westfeldt Brothers, Inc.*,  
[2018 WL 902202](#) (E.D. Mo. 2018)  
The newly formed entity that was about to purchase substantially all of the debtor’s assets at a private disposition conducted by the secured party and that, shortly before the purchase instructed the debtor to stop payment on a check to a supplier, with the result that the supplier shipped goods under the mistaken belief it would receive payment, had no liability to the supplier for fraud, unfair trade practices, conversion, or unjust enrichment because it was the debtor, not the buyer, that stopped payment and received the goods.
329. *In re Rienzi & Sons, Inc.*,  
[2018 WL 1157821](#) (E.D.N.Y. 2018)  
A bankruptcy debtor’s court-approved stipulation that modified a confirmed plan to resolve a dispute about a secured creditor’s entitlement to attorney’s fees, and which provided that if the debtor failed to make specified other payments by February 28, 2017, then the debtor would “owe” \$186,000, did not mean that the debtor had to pay that amount on March 1. There is a difference between “owing” and “paying,” and the debtor was instead obligated merely to pay the amount over the life of the loan.

330. *NY Capital Asset Corp. v. F & B Fuel Oil Co.*,  
[2018 WL 1310218](#) (N.Y. Sup. Ct. 2018)

A transaction purporting to be a sale of \$87,000 of future receipts for \$60,000 was a true sale, not a loan, and thus not subject to state usury law, because the buyer took the risk that future receipts would be less than \$87,000, the agreement did not have a finite term, and the agreement contained a reconciliation provisions that allowed the seller to seek an adjustment to the amounts paid daily based on its actual cash flow.

331. *Foursome Properties, LLC v. Rite Aid of Kentucky, Inc.*,  
[2018 WL 1439830](#) (Ky. Ct. App. 2018)

The trial court did not err in ruling that a lease that provided that “the Landlord shall not, either directly or indirectly, . . . authorize or permit the operation of any other . . . pharmacy” should be interpreted to restrict not only the landlord, but also the landlord’s owners and their other entities, in part because the clause included an express exception for a tenant of one of those other entities.

332. *Guterman Partners Energy, LLC v. Bridgeview Bank Group*,  
[105 N.E.3d 91](#) (Ill. Ct. App. 2018)

A financier that contracted to purchase mortgage loans from a bank was not entitled to return of its deposit after the transaction never closed. The conditions to closing were satisfied and the bank had not breached its representations and warranties because the bank had promised merely to sell its rights in the loans “as is,” and thus it did not matter whether the bank had full ownership of the loans. The bank had possession of the loan documents – including the promissory notes – and was ready, willing, and able to deliver them to the financier.

333. *Cain v. Price*,  
[415 P.3d 25](#) (Nev. 2017)

A term in a settlement agreement between two parties in which one of them “hereby fully and forever releases” a third party from liability, was rendered unenforceable when the other party to the agreement materially breached by not paying the agreed-upon amount.

334. *Rescap Liquidating Trust v. First California Mortgage Co.*,  
[2018 WL 5310795](#) (N.D. Cal. 2018)

A mortgage loan buyer that had, in connection with the settlement of an action against the seller for misrepresentation and breach of warranties, released the seller and related parties of “all manner of claims . . . relating to the Subject Loans” did not thereby release the seller and related parties of liability for intentional fraudulent transfers, of which the buyer was not then aware, that raided the seller of more \$15 million and rendered it insolvent.

335. *Ticer v. Reed Migraine Centers of Texas, PLLC*,  
[2018 WL 6322167](#) (Tex. Ct. App. 2018)

A settlement agreement that provided that a lawyer “hereby releases” specified parties but also that the pending lawsuit would be dismissed “following the receipt” of the payments called for in the agreement, was ambiguous as to whether the release was effective even though payment had not been made.

336. *Nist v. Hall*,  
[234 Cal. Rptr. 3d 47](#) (Ct. App. 2018)

The owner of good in a storage unit had no cause of action for conversion against the good faith purchaser who acquired the goods when the owner of the storage facility conducted a lien sale of them. It did not matter that the storage agreement was oral, and therefore in violation of state law. The buyer did not get void title under U.C.C. § 2-403 because that provision applies only to voluntary transactions, not to an involuntary lien foreclosure.

337. *Mellen, Inc. v. Biltmore Loan and Jewelry-Scottsdale LLC*,  
[726 F. App'x 635](#) (9th Cir. 2018)

The buyer of a four-carat diamond did not take free under the entrustment rule of § 2-403(2) because: (i) the seller’s agent, with whom the buyer contracted, was not a dealer in diamonds; and (ii) the buyer did not purchase in the ordinary course of business because it first acquired only a security interest in the diamond and later when it purchased the diamond at a foreclosure sale it did so in satisfaction of a money debt.

338. *AltEnergy Cyber, LLC v. Blackridge Tech. Holdings, Inc.*,  
[2018 WL 1954963](#) (Conn. Super. Ct. 2018)

A senior lender that signed an intercreditor agreement contemporaneously with making the loan and receiving a promissory note and security agreement was bound by the terms of the intercreditor agreement that allowed the agent for the lenders to extend the time for payment with approval of lenders holding at least 75% of the senior debt. It did not matter that the promissory note did not expressly reference the intercreditor agreement.

339. *In re La Paloma Generating Co.*,  
[595 B.R. 466](#) (Bank. D. Del. 2018)

An intercreditor agreement that prohibited the junior lienors from retaining any payment received in connection with the exercise of any right or remedy before the senior lienor was paid in full remained binding even though the senior lienor’s financing statement lapsed and its security interest became unperfected, because the intercreditor agreement expressly so provided. Bankruptcy distributions on account of the junior lienor’s claims were in connection with a remedy because the intercreditor agreement explicitly included filing a proof of claim as an “exercise of remedies.”

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340. *In re Phoenix Heliparts Inc.*,  
[2018 WL 2107796](#) (9th Cir. BAP 2018)  
A helicopter for which the buyer had partially paid, which was not airworthy and little more than a shell at the time the sales agreement was executed, but which the sales agreement referred to by make, model, serial number, and airframe hours, was an existing good identified to the contract. Consequently, the buyer acquired a special property in the helicopter. Whether the buyer's rights were superior to other interests in the helicopter had to be determined on remand.
341. *South Pointe Wholesale, Inc. v. Vilordi*,  
[2018 WL 2770438](#) (W.D. Ky. 2018)  
Even though the merger clause in a loan agreement stated that all the related "Loan Documents" comprised the entire agreement of the parties, it did not absorb all the other documents into the loan agreement, so as to make them interdependent, particularly given the existence of a severability clause. Therefore, a subordination agreement, by which an insider promised not to accept payment until the senior loan was fully paid, was not rendered unenforceable by the expiration of the loan agreement and the maturity of the loan.
342. *Foundation Capital Resources, Inc. v. Prayer Tabernacle Church of Love, Inc.*,  
[2018 WL 4697281](#) (D. Conn. 2018)  
Under Delaware law, while a standard merger clause will not bar parol evidence of a fraudulent inducement claim, a clear anti-reliance clause – one that expressly states that no oral representations have been relied upon – will. However, under Connecticut law evidence of fraud is not made inadmissible by the parol evidence rule even if the parties' agreement contains an express disclaimer of oral representations.
343. *Rivers v. Revington Glen Investments, LLC*,  
[816 S.E.2d 406](#) (Ga. Ct. App. 2018)  
A seller of real property who warranted he had complied with all applicable environmental laws and who represented that, to his knowledge, no hazardous substance was stored on the property did not have liability under either term even though, unbeknownst to him, a prior owner had buried old tires and other debris on the property.
344. *Pluciennik v. Vandenberg*,  
[2018 WL 3045661](#) (Ill. Ct. App. 2018)  
The trial court erred in dismissing a fraudulent transfer complaint merely because the properties were each sold for less than the amount of the outstanding debt they secured because the plaintiff claimed that the properties had a fair market value in excess of the amount of the secured obligations, which would make each property an "asset" within the meaning of the Uniform Fraudulent Transfer Act.

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345. *In re Western Slopes Farms Partnership*,  
[2018 WL 4348048](#) (Bankr. N.D. Iowa 2018)  
An undersecured creditor had no fraudulent transfer claim against the buyer of the collateral because fully encumbered property is not an “asset” within the meaning of the Uniform Voidable Transactions Act.
346. *United States v. Allahyari*,  
[2018 WL 4357487](#) (W.D. Wash. 2018)  
The interest of a taxpayer’s father, who obtained and recorded a deed of trust on real property of the taxpayer after the IRS obtained a tax lien, was junior to the IRS’s lien because the father knew that the taxpayer owed substantial sums to the IRS and because the deed of trust secured a pre-existing debt rather than a contemporaneous loan. Moreover, the grant of the deed of trust was avoidable as an intentionally fraudulent transfer.
347. *Englander Capital Corp. v. Zises*,  
[79 N.Y.S.3d 502](#) (Sup. Ct. 2018)  
An unsecured creditor had no cause of action against the insiders who made a secured loan to the debtor and who later conducted an acceptance of the collateral. Although an insolvent debtor’s transfer of property to an insider to satisfy an antecedent debt is presumed to lack good faith and thus be constructively fraudulent, there is an exception if the insider is a secured creditor. The transfer was not actually fraudulent despite the relationship between the insiders and the debtors because the insiders had loaned funds to the debtor and contemporaneously taken a valid security interest, the debtor had consistently made payments to the insiders even before the unsecured creditor’s action was commenced, and the consideration was adequate.
348. *Dunkel v. Signal Medical Corp.*,  
[2018 WL 3039916](#) (Mich. Ct. App. 2018)  
A note holder’s agreement to extend the maturity date was supported by consideration because the note holder received the benefit of collecting further interest on the loan. Consequently, the extension was enforceable and the note holder’s action was brought within the applicable limitations period.
349. *Whitney Bank v. SMI Companies Global, Inc.*,  
[2018 WL 3027021](#) (W.D. La. 2018)  
A bank was not entitled to summary judgment on its action to collect on two promissory notes because the debtor alleged facts sufficient to make out a defense based on the bank’s breach of its commitment to make advances under a line of credit.

350. *Fannie Mae v. Las Colinas Apartments, LLC*,  
[815 S.E.2d 334](#) (Ga. Ct. App. 2018)

A term in a nonrecourse promissory note that provided for the obligation to become recourse if the mortgaged property becomes encumbered by a mechanic's lien that is not discharged within 30 days after its creation was enforceable. The term was not ambiguous and despite the trial court's statement that this would create a windfall for the lender, parties are free to choose the terms they desire in a contract unless prohibited by statute or public policy. The guaranty of the note maker's liability similarly became enforceable when the lender acquired recourse against the maker of the note.

351. *In re WM Distribution, Inc.*,  
[591 B.R. 52](#) (Bankr. D.N.M. 2018)

A term in a \$1.3 million promissory note, issued in connection with a settlement agreement, which provided that an additional \$600,000 would become due upon default, was not enforceable. Although the payee argued that she was poised to recover \$1.9 million on her claim if the litigation had not been settled, and that the \$600,000 was a discount for timely performance, the settlement agreement contained no such term. It called for payment of only \$1.3 million. The \$600,000 term was therefore a liquidated damages clause and it was invalid as a penalty. It did not provide compensation for anticipated attorney's fees and costs of collection because those damages were covered by other provisions of the note.

352. *Bank of the West v. Prince*,  
[2018 WL 3868796](#) (W.D. La. 2018)

Although a lessor of goods that repossessed and sold the goods could not recover (in addition to the back-due rent) the full amount of future rent even if the lease provides for that as liquidated damages, the lessor was entitled (in addition to back rent due) to an amount equal to the future rent, discounted to present value, minus the proceeds received from the sale of the goods.

353. *In re Altadena Lincoln Crossing LLC*,  
[2018 WL 3244502](#) (Bankr. C.D. Cal. 2018)

A term in the agreements for two loans totaling \$26 million, which provided for a 5% increase in the interest rate after default, was an unenforceable penalty even though there was evidence that a 5% increase was customary in the industry and even though the debtor acknowledged in several forbearance agreements the amount due, including interest calculated using the default rate. The increase could not be liquidated damages designed to compensate for the cost of collection because other provisions in the agreements obligated the borrower to pay such costs, along with a fee for any late or missed payments. Although there was testimony that the increase was designed to compensate the lender for the increased risk of nonpayment, increased loan loss reserves, staff and senior management time devoted to managing and reporting on the loan and dealing with increased regulatory oversight, there was no evidence that the lender considered these things when making the loan and many of these expenses have little or no relationship to the size of the loan.

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354. *Sweely Holdings, LLC v. Suntrust Bank*,  
[820 S.E.2d 596](#) (Va. 2018)  
A borrower had no cause of action against a lender for fraud in connection with the parties' workout agreement merely because the lender allegedly claimed to have appraisals of the collateral showing that the lender was undersecured, and would thereby be able to obtain relief from the automatic stay if the borrower sought bankruptcy protection. The borrower could not have justifiably relied on this alleged misrepresentation given that it had asked for the appraisals but the lender refused to provide them and a principal purpose of the workout was to avoid bankruptcy.
355. *ING Bank v. M/V TEMARA*,  
[892 F.3d 511](#) (2d Cir. 2018)  
The assignee of the entity that contracted to supply fuel bunkers to a ship was entitled to a maritime lien on the ship supplied, even though the entity subcontracted with an intermediary that further subcontracted with a fuel company to provide the bunkers. The fuel company was not entitled to a maritime lien because it did not act on the order of the ship owner or a person authorized by the owner. *See also* *ING Bank v. M/V Voge Fiesta*, [2018 WL 3359610](#) (2d Cir. 2018); *ING Bank v. JAWOR M/V*, [2018 WL 3359673](#) (2d Cir. 2018) (each ruling similarly).
356. *Schoonover v. Hallwood Financial Ltd.*,  
[590 B.R. 134](#) (W.D. La. 2018)  
A businessman that, after obtaining the agreement of an existing secured party to subordinate its interest in \$1 million of accounts, continued to make further loans to the debtor, had no promissory estoppel claim against the existing secured party because the businessman could not have reasonably relied on any promise of additional subordination given that all the parties to the discussions agreed that any binding agreement had to be formalized in writing, the parties had not resolved several material details of any alleged deal, and the businessman inexplicably failed to draft an agreement for more than five months, despite repeated requests therefor, and yet during that period his lawyers delivered term sheets that expressly stated that they were non-binding.
357. *Can Financial, LLC v. Krazmien*,  
[253 So. 3d 8](#) (Fla. Ct. App. 2018)  
The statute of limitations on a mortgagee's foreclosure action began to run with each missed payment, not earlier when the mortgagor's personal liability was discharged in bankruptcy.
358. *PNC Bank v. MB Wholesale, Inc.*,  
[2018 WL 3708076](#) (E.D. Mich. 2018)  
A transaction consisting of a \$1.1 million line of credit for a business, a security interest in the assets of the business, and a guaranty by the owner of the business, was not unconscionable even though the terms were harsh.



359. *Tepper v. Amos Financial, LLC*,  
[898 F.3d 364](#) (3d Cir. 2018)

Although a debt buyer, whose sole business is purchasing and collecting defaulted debts, does not qualify as a “debt collector” under the Fair Debt Collection Practices Act as someone who regularly collects or attempts to collect debts owed or due another, it is a “debt collector” as someone whose “principal purpose . . . is the collection of any debts.”

360. *Fuller Landau Advisory Services Inc. v. Gerber Finance Inc.*,  
[333 F. Supp. 3d 307](#) (S.D.N.Y. 2018)

An investment banking advisory service that found a buyer for a client and was therefore entitled to a success fee based on the purchase price and the amount of any debt “assumed” by the buyer, was not entitled to have the amount of debt that the buyer guaranteed included in the calculation. To “assume” a debt is to take on primary liability for it, not to guarantee it.

361. *Park Bank v. U.S. Bank Trust*,  
[2018 WL 3954162](#) (W.D. Wis. 2018)

A mortgagee that recorded first but had knowledge of a prior mortgage, and therefore took subject to the prior mortgage under the state’s race-notice recording statute, also took subject to the later mortgage to the extent that it refinanced the prior mortgage. The refinancing lender was subrogated to the prior mortgage.

362. *Murphy v. Stupar, Schuster & Bartell, SC*,  
[2018 WL 3978108](#) (W.D. Wis. 2018)

A debtor whose debt was discharged in bankruptcy because the reaffirmation agreement lacked the required Part D disclosure had a cause of action under the Fair Debt Collection Practices Act against the law firm that filed a complaint to collect the debt. There is no defense for good faith legal error and, even if there were, the state court of appeals had already ruled in a similar case that a reaffirmation agreement lacking the disclosure was not enforceable.

363. *Colon v. Porsche of Roslyn*,  
[79 N.Y.S.3d 561](#) (Sup. Ct. App. Div. 2018)

A automobile lessor that repossessed the vehicle after default the lessee’s second default did not violate the state Personal Property Law even though the notification the lessor sent to the lessee after the first default incorrectly stated that the lessee had 12 days to cure the default instead of the statutorily mandated 25. The lessor had permitted the lessee to cure the first default 34 days after default and the statute does not give a right to cure after a later default.

364. *Bryner v. Cardon Outreach, LLC*,  
[428 P.3d 1096](#) (Utah 2018)

Under Utah's Hospital Lien Statute, a hospital that provides treatment to an individual injured in an accident is entitled to a lien on the full amount of a patient's settlement of a claim relating to the accident, less the attorney's fees incurred to obtain the settlement. The hospital's lien is not limited by a proportionate share of other attorney's fees.

365. *International Fidelity Insurance Co. v. Americaribe-Moriarty JV*,  
[906 F.3d 1329](#) (11th Cir. 2018)

A surety that successfully sought a judicial declaration that it was not liable to a general contractor on a performance bond was not entitled to an award of attorney's fees based on a combination of the indemnification clause in the subcontract covered by the performance bond, which made the subcontractor liable for the contractor's losses caused by the subcontractor's breach, and Fla. Stat. § 57.105(7), which makes attorney's fees clauses reciprocal. Because the indemnity clause of the subcontract would not allow the contractor to recover attorney's fees in an action against the subcontractor (even though it might cover attorney's fees incurred in connection with actions by or against third parties), it was not a unilateral attorney's fees clause and did not come within the scope of the statute.

366. *Ferrari v. Aetna Life Insurance Co.*,  
[2018 WL 5870038](#) (5th Cir. 2018)

A contractual clause between a physician and an insurer limiting each party's liability to "actual damages" and waiving the right to "indirect, incidental, punitive, exemplary, special or consequential damages of any kind whatsoever" did not prevent an award of attorney's fees pursuant to a statute authorizing such an award because attorney's fees are not "incidental" damages.

367. *Moore v. Fischer*,  
[2018 WL 4868289](#) (N.J. Super. Ct. 2018)

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

368. *HV & Canal, LLC v. Upper Iowa University*,  
[2018 WL 4500942](#) (Ariz. Ct. App. 2018)

A tenant that was contractually required to provide – and had provided – the landlord with a letter of credit to secure the tenant’s obligation to pay rent had no right to substitute an LOC issued by a different bank. Therefore, the landlord did not breach by refusing the substitution due to stated concerns about the creditworthiness of the proposed substitute issuer and, instead, the tenant breached when it vacated the leasehold and stopped paying rent.

369. *De La Torre v. CashCall, Inc.*,  
[422 P.3d 1004](#) (Cal. 2018)

The interest rate on a consumer loan of \$2,500 or more can render the loan unconscionable, even though the state usury statute does not apply to such loans.

370. *GEPMC 2006-C1 Complex 400, LLC, v. RP 400 Urban Renewal, LLC*,  
[2018 WL 6055672](#) (N.J. Super. Ct. 2018)

A default rate of interest on promissory notes between commercial parties that was 5% higher than the stated interest rate and retroactive to the date of default was an enforceable liquidated damages clause, and not unconscionable.

371. *FTC v. MOBE Ltd.*,  
[2018 WL 4960232](#) (M.D. Fla. 2018)

A merchant for which a credit card processor maintained a reserve account for potential charge backs was the owner of the funds credited to the account, not the processor or the bank where the account was maintained. This was evidenced in part by the fact that the contracts among the parties purported to have the merchant grant the bank a security interest in the account and to authorize setoff against the account. Accordingly, a receiver for the merchant was entitled to the funds.

372. *KnighTek, LLC v. Jive Communications, LLC*,  
[2018 WL 5802519](#) (Del. Super. Ct. 2018)

The seller of a business, whose right to receive deferred payment was to accelerate upon a change in control, had no claim against the buyer for failing to disclose, before the seller agreed to discharge the future right to payment in return for a current payment at a substantially discounted rate, an imminent transaction that resulted in a change in control. The agreements establish an arms-length, commercial relationship between sophisticated parties; they did not establish a fiduciary relationship or impose on the buyer any duty to make affirmative disclosures on issues about which the seller did not ask.

373. *Spectrum Stamford, LLC v. 400 Atlantic Title, LLC*,  
[2018 WL 5797819](#) (Conn. Super. Ct. 2018)

Because a signed term sheet for a mortgage loan modification expressly indicated that it was a “preliminary proposal for discussion purposes only” and not a commitment or offer, there could be no claim for breach of a duty to negotiate the modification in good faith.

374. *Lucy v. Platinum Services, Inc.*,

[2018 WL 5840801](#) (Iowa Ct. App. 2018)

An employee who owned 10% of the shares in his corporate employer and whose stock redemption agreement included a covenant not to compete was entitled to full payment for his shares despite breach of the covenant because he sold the shares to the corporation's principal shareholder pursuant to a stock purchase agreement, not to the corporation pursuant to the redemption agreement. The stock purchase agreement did not incorporate the covenant not to compete or other terms of the redemption agreement.

375. *Woodhaven Dr. 1401 Land Trust v. Citibank*,

[2018 WL 6629586](#) (Tex. Ct. App. 2018)

A homeowner's association lien, which was subordinate to a "first mortgage or deed of trust for purchase money or home improvement purposes, including without limitation [any mortgage held by a bank]" was subordinate to a bank's first mortgage regardless of whether the indebtedness it secured was for purchase-money or home improvement purposes.

376. *Innovation Ventures, LLC v. Custom Nutrition Laboratories*,

[2018 WL 6695875](#) (6th Cir. 2018)

An asset purchase agreement that provided "the formula for energy drinks manufactured by [seller] and certain related trademark and copyright matters are limited by the settlement agreement between [seller] and [third party] and the related consent judgments contained in Schedule 4.2(h)," and which then in Schedule 4.2(h) listed a settlement agreement between the seller and a third party, were sufficient to bind the purchaser to the restrictions in the settlement agreement on how energy drinks could be manufactured.

377. *Rexing Quality Eggs v. Rembrandt Enterprises, Inc.*,

[2018 WL 6728039](#) (S.D. Ind. 2018)

An egg broker that contracted to purchase 3.2 million eggs per week for a year at a fixed price had no right to cancel the contract based on the seller's delivery of non-Grade A eggs because, even though the seller's promise to provide Grade A eggs was an express warranty, the broker had not demonstrated that the breach substantially impaired the value of the contract, as required by § 2-612. The contract's limitation of remedies to a reduction in the purchase price did not fail or its essential purpose. The broker also had no right to cancel under the contract's force majeure clause, or pursuant to the doctrines of impracticability or frustration of purpose, merely because the demand for eggs had dropped. A change in demand for a product – even a substantial change – is a foreseeable part of doing business and hence is a risk that a sales contract necessarily allocates.

378. *Atlantic Trustee Services, L.L.C. v. Cortez*,  
[2018 WL 6795069](#) (Va. Cir. Ct. 2018)

A mortgagee that contractually subordinated its \$415,000 senior lien to its \$250,000 junior lien did not thereby unintentionally elevate the \$220,000 intermediate lien of a different mortgagee. Instead, the intermediate mortgagee was unaffected by the subordination agreement. As a result, the lien priority was as follows: the junior lien was first, followed by the senior lien to the extent of \$165,000 (\$415,00 – \$250,000), then the intermediate lien, and finally the \$250,000 remainder of the senior lien. Because a foreclosure does not discharge a senior lien and foreclosure proceeds go only to the holder of the foreclosing lien and junior liens, the proceeds of the intermediate mortgagee's foreclosure would be used first to pay the intermediate lien and then to pay the subordinated portion of the senior lien. Consequently, the \$250,000 junior lien and \$165,000 of the senior lien continue to encumber the property.