
2005 COMMERCIAL LAW

DEVELOPMENTS

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I. PERSONAL PROPERTY SECURED TRANSACTIONS*

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

1. *General*

- *In re Chris-Don, Inc.*, 57 UCC Rep Serv 2d 496, 367 F. Supp. 2d 696 (D.N.J. 2005) – Secured party did not have a security interest in a liquor license because under New Jersey law the liquor license was not personal “property.” The court rejected the view that Article 9 overruled the New Jersey’s Alcoholic Beverage Statute, because Article 9 only applies to “property.”
- *MP Star Financial v. Cleveland State Univ.*, 58 UCC Rep Serv 2d 191, 837 N.E.2d 758 (Ohio 2005) – Article 9 does not apply to an assignment of an account by an obligee on an account where the account debtor is a governmental entity. The decision is based on non-uniform 9-109(d)(14), which excludes “a transfer by a government, state, or governmental unit.” The Ohio Supreme Court held that the payment of the account by an account debtor that was part of the state “government” was a “transfer” within the purview of the exclusionary provision. As a consequence, the assignee’s claim under 9-406(a) against the account debtor, which made payment to the assignor despite notice of the assignment, was dismissed.

Comment: 9-109(a), Article 9’s scope provision, begins “Except as otherwise provided in subsections (c) and (d), this article applies to: . . .” Ohio’s exclusion of “transfers” by governmental agencies is in subsection (d), one of the subsections specifically mentioned in 9-109(a) as qualifying the reach of 9-109(a). The logical reading of the word “transfer” in the context of subsection (d) is by reference to the “transfers” covered by subsection (a). The only transfers covered by subsection (a) are those by debtors, not those by account debtors

* We would like to express our deep appreciation to the following for their important assistance in assembling these materials: John F. Hilson, Harry Sigman, and Lynn Soukup. We also miss our good friend Jeff Turner.

(such as the government in this case). See *Deal v. United States*, 508 U.S. 129, 132 (1993) (Scalia, J) (“Petitioner’s contention overlooks, we think, this fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used.”)

2. *Consignments*

- *In re Georgetown Steel Co., LLC*, 55 UCC Rep Serv 2d 475, 318 B.R. 352 (Bankr. D.S.C. 2004) – A manufacturer that acquired steel that it incorporated into other goods engaged in a “consignment” transaction and not a “purchase” transaction because the goods were purchased for sale.

Comment: The “consignment” rules should apply only when the person receiving the goods plans to sell them in substantially the same form. Otherwise, most every purchase by a person other than the end-user would be turned into an Article 9 transaction.

3. *Real Property*

- *In re Gregory*, 55 UCC Rep Serv 2d 96, 316 B.R. 82 (Bankr. W.D. Mich. 2004) – Because a manufactured home may be a “fixture” once attached to real property, a security interest can be created under real property law as well as Article 9. Thus a perfected real property lien was not subject to defeat by a trustee in bankruptcy. UCC § 9-317.

4. *Leasing*

- *In re Buehne Farms, Inc.*, 56 UCC Rep Serv 2d 142, 321 B.R. 239 (Bankr. S.D. Ill. 2005) - A lease of cows was a disguised sale and security interest where the lessee had the right to buy the cows for 6% of the total rental payments. In determining whether the option price was nominal, the court applied the well-worn test of whether “only a fool would fail to exercise the option.” UCC § 1-201(37).
- *In re Grubbs Construction Co.*, 55 UCC Rep Serv 2d 501, 319 B.R. 698 (Bankr. M.D. Fla. 2005) – A lessee under a lease had a range of choices in connection with the expiration of the lease: (i) terminate early and buy the equipment, (ii) purchase the equipment at the end of the lease, or (iii) renew the lease. When the alternatives were eco-

nomically analyzed, the only rational choice was to exercise the early termination option and purchase the equipment. There was also a “terminal rental adjustment clause” (TRAC) in the lease where the equipment was sold at the end of the lease. That term provides that any excess in value of the leased equipment at the end of the lease over an agreed value went to the lessee and the lessee had to make up any shortfall. The leases were not “true leases” and instead constituted “security agreements.” The “lessor’s” security interest was perfected by the filing of a financing statement under former Article 9 signed by the “lessor” under a power of attorney.

- *United Airlines, Inc. v. HSBC Bank USA, N.A.*, 416 F.3d 609 (7th Cir. 2005) – Court analyzed whether “lease” transactions were “true leases.” Municipality sold bonds and turned the proceeds over to the airline, which used the proceeds to build airport facilities on land that the airline already leased. The airline sub leases the land to the municipality for \$1 and the municipality subleases the land back to the airline for “rent” payments equal to payments on the bonds. As a matter of federal law, only a “true lease” is a “lease” for purposes of Bankruptcy Code § 365. State law then determines the question of whether a particular transaction is a “true lease.” Although the “lease” involved real property, the court noted the functional analysis of this question under UCC § 1-201(37). The court held that the “lease” was really a secured loan because (i) the “rent” payments were measured by the payments on the bonds and not by the market value of using the real property, (ii) at the end of the “lease” the airline ends up with exactly what it had at the beginning of the transactions, (iii) there was a balloon payment at the end of the “lease,” and (iv) if the airline prepays the “rent,” the two subleases end immediately, rather than the last sublease staying in place for its term.

5. *Sales*

- *Kipperman v. Netbank, FSB*, 566 UCC Rep Serv 2d 54, 2005 WL 1365055 (slip copy) (Bankr. S.D.Cal. 2005) – A “buyer” bought payment streams under equipment leases. If the payment streams were purchases and the buyer was a “buyer” the buyer would have automatic perfection of its purchase. UCC § 9-309(3). If the payment streams were chattel paper or were a loan secured by payment in-

tangibles, the “buyer” would have had to file a financing statement to perfect its rights. UCC § 9-310(a). The court first held that the asset purchased was “chattel paper” because the payment right was part of the “chattel paper.” The court concluded that the transaction was a “loan” because the “seller” would receive any “excess” collections and the “seller” had to indemnify the surety that issued bonds to guaranty the collections.

Comment: If in fact *all* that was “transferred” was *only* the payment stream (without any of the other lessor rights under the lease, such as the right to take back the equipment on default), the right would be a “payment intangible.” See 9-102, Comment 5(d) (“In classifying intangible collateral, a court should begin by identifying the particular rights that have been assigned. The account debtor (promisor) under a particular contract may owe several types of monetary obligations as well as other, nonmonetary obligations. If the promisee’s right to payment of money is assigned separately, the right is an account or payment intangible, depending on how the account debtor’s obligation arose. When all the promisee’s rights are assigned together, an account, a payment intangible, and a general intangible all may be involved, depending on the nature of the rights.”). The court cites another portion of this Comment, but does not cite this portion. The court is right that if the full lease is transferred, the embedded “payment intangible” remains part of the “chattel paper.” Even if solely the payment stream is assigned, and the right assigned is a “payment intangible,” if the seller later transfers the whole of the chattel paper to someone who takes possession under 9-330, the new transferee cuts off the payment intangible buyer.

B. *Security Agreement and Attachment of Security Interest*

- *Gasser v. Infanti Int’l., Inc.*, 55 UCC Rep Serv 2d 812, 353 F. Supp. 2d 342 (E.D.N.Y. 2005) - A security interest did not attach to a patent where the person that purported to grant the security interest in the patent did not have any “rights” in the patent nor the “power” to grant a security interest in the patent. UCC § 9-203.
- *In re Yantz*, 55 UCC Rep Serv 2d 19, 2004 WL 2280358 (Bankr. D. Vt. 2004) - A law firm did not have a security interest in an asset of its cli-

- ent where the client retainer letter did not refer to collateral. Notes taken by a paralegal for the lawyer (the purported secured party) referring to collateral did not suffice because the client (debtor) had not authenticated those notes nor did the authenticated retainer letter refer to those notes in any fashion. UCC § 9-203.
- *Jerke Construction, Inc. v. Home Federal Savings Bank*, 56 UCC Rep Serv 2d 125, 693 N.W.2d 59 (S.D. 2005) - A buyer entered into an agreement to buy equipment. The buyer took possession of the equipment and made some payments with funds provided by another person. The court concluded that the person who supplied the funds was the true buyer of the equipment and not the nominal buyer. Thus the nominal buyer had only “naked possession” of the equipment and did not have “rights in the collateral.” Thus the secured party of the nominal buyer did not have a security interest in the equipment. UCC § 9-203.
 - *Korea First Bank of New York v. Noah Enterprises, Ltd.*, 55 UCC Rep Serv 2d 366, 787 N.Y.S.2d 2, 2004 WL 2743515 (NY. App. Ct. 2004), leave to appeal denied, 830 N.E.2d 1145 (N.Y. May 3, 2005) – The signature of a corporate principal on a security agreement constituted an authentication of the security agreement even though the principal did not indicate that he was signing the security agreement on behalf of the corporation. The signature was over the corporation’s address, the individual was known to the secured party as the principal of the corporation, and the corporation submitted no evidence that the individual had signed the security agreement in his personal capacity. UCC § 9-203.
 - *Border State Bank of Greenbush v. Bagley Livestock Exchange*, 55 UCC Rep Serv 2d 397, 690 N.W.2d 326 (Minn. App. Ct. 2004) – A caretaker of cattle that had a right to a portion of the proceeds of the cattle upon the sale of the cattle might have “rights” in the collateral for purposes of creating a security interest in those rights. UCC § 9-203.

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

- *In re Management By Innovation, Inc.*, 56 UCC Rep Serv 2d 437, 321 B.R. 742, (Bankr. M.D. Fla. 2005) - A financing statement that (for the most

- part) described the collateral by Article 9 “types” (e.g. “general intangibles”) sufficiently described the collateral. UCC § 9-108.
- *Travelers Casualty and Surety Company of America v. Target Mechanical Systems, Inc.*, 55 UCC Rep Serv 2d 661, 800 N.Y.S.2d 358, 2004 WL 3050798 (N.Y. App. Div. 2004) – Collateral description that referred to equipment and related sums due adequately described the collateral. UCC §§ 9-108, 9-502.

D. *Perfection*

1. *Possession, Control and Other Perfection Methods*

- *Meskell v. Bertone*, 55 UCC Rep Serv 2d 179, 2004 WL 2451354 (Mass. Super. Ct. 2004) – A secured party had a PMSI in a boat. Generally, a secured party holding a PMSI in consumer goods has automatic perfection. The court held that that rule applied here, even though Article 9 says only that the filing of a financing statement is not necessary and does not dispense with registering the secured party’s name on a certificate of title where that is the method of perfection. UCC § 9-309(1), 9-310(b)(2), 9-311(b).
- *Blue Ridge Bank and Trust Co. v. Hart*, 55 UCC Rep Serv 2d 693, 152 S.W.3d 420 (Mo. App. Ct. 2005) – Security interest in vehicle held for sale by debtor was security interest in “inventory” and a security interest could be perfected only by filing of financing statement (or possession), but not by notation on certificate of title. UCC § 9-311(d).
- *Greenfield Commercial Credit, L.L.C. v. Comerica Bank*, 2005 Mich. App. LEXIS 1513 (Mich. Ct. App. 2005) – In the absence of special instructions regarding a deposit, “banks are not required to treat deposits as special deposits, despite the bank’s knowledge of the security interests of the third parties.” The court explained that knowledge by a bank of a security interest held by third parties does not affect the general priority rules for deposit accounts which provide that “a security interest held by the bank with which the deposit account is maintained has priority over a conflicting security interest held by another secured party.” Therefore, banks have the superior security interest over any funds that are deposited into the bank’s deposit

account without special instructions to hold the funds in trust for the benefit of a secured party. Consequently, the court held that the deposit bank did not violate the third-party creditor's security interest when the bank swept the funds held in debtor's business account to pay down an outstanding loan debtor had with the bank.

- *McFarland v. Brier*, 54 UCC Rep Serv 2d 74, 850 A.2d 965, 973-77 (R.I. 2004) – Under UCC § 9-102(a)(29) a certificate of deposit (“CD”) falls under the collateral classification of an “instrument” or a “deposit account.” If it’s an “instrument” the security interest is perfected by possession of the CD or by the filing of a financing statement. UCC § 9-312(a) and 9-313. If it’s a deposit account, then the only way to perfect the security interest is by obtaining control of the deposit account. UCC § 9-312(b). This case sheds additional light on the past confusion over the appropriate collateral classification under Article 9 for CDs, which ranged from classifying a CD as an “instrument” perfected by possession, a “deposit account” perfected by control, a “general intangible” perfected by filing a financing statement, or none of the above.
- *Union Planters Bank, N.A. v. Peninsula Bank*, 56 UCC Rep Serv 2d 356, 897 So. 2d 499 (Fla. Dist. Ct. App. 2005) - A rental company that sold cars after their use for rental purposes was not in the business of selling cars. Thus, even though holding cars to rent is holding them as inventory, the ability to perfect a security interest by the filing of a financing statement was not available because the statute allows that only for a person “in the business of selling goods of that kind.” UCC § 9-311(d). The court applied non-UCC rules in state law to conclude that the rental company was not in that business.

Comment: The court could also have cited UCC § 9-311, Comment 4 (“For example, if goods are subject to a certificate-of-title statute and the debtor is in the business of leasing but not of selling, goods of that kind, the other subsections of this section govern perfection of a security interest in the goods. The fact that the debtor eventually sells the goods does not, of itself, mean that the debtor ‘is in the business of selling goods of that kind.’”)

- *In re On-Line Services Ltd.*, 56 UCC Rep Serv 2d 702, 324 B.R. 342, 44 Bankr. Ct. Dec. (CRR) 113, (Bankr. 8th Cir. 2005) - An attorney had

“possession” of funds given to the attorney to secure payment of the attorneys fees and therefore had a perfected security interest in the funds by possession. UCC § 9-313.

Comment: It would have been more accurate for the court to conclude that the attorney had control of the funds in the attorney’s deposit account where the attorney was the customer under the deposit account. UCC §§ 9-104(a)(3), 9-314(a).

2. *Preparation of Financing Statement*

- *In re Sho-Me Nutraceuticals, Inc.*, 55 UCC Rep Serv 2d 745, 319 B.R. 273 (Bankr. M.D. Fla. 2005) – Financing statement did not properly name debtor when secured party knew that the original debtor was only a “nominal” debtor and that “real” debtor would immediately take the collateral.
- *In re Spearing Tool and Manufacturing Co.*, 56 UCC Rep Serv 2d 807, 412 F.3d 653 (6th Cir. 2005) – Test for IRS lien is whether “reasonable and diligent search would have revealed the existence of the notices of the federal tax liens under these names.”

3. *Filing of Financing Statement – Manner and Location, Lapse, Changes*

- *Planned Furniture Promotions, Inc. v. Benjamin S. Youngblood, Inc.*, 57 UCC Rep Serv 2d 678, 374 F. Supp. 2d 1227 (M.D. Ga. 2005) – A financing statement described the collateral as all assets located at a specific address. The description was sufficient to cover collateral located at that address for other furniture stores also located at that address. The debtors were originally individuals and the financing statement was properly filed against them in that capacity. The financing statement referred to “Benjamin Scott Youngblood.” They then “incorporated” the business under the name “Benjamin S. Youngblood, Inc.” The secured party did not file another financing statement. The court applied the name change rules and the standard search logic test of UCC § 9-506 and concluded that a search under the corporate name “would *almost* assuredly turn up” (emphasis added) the financing statement filed against the individual and that a “diligent” searcher would have found the old financing

statement so that the secured party remained perfected. See UCC § 9-507(c).

Comment: This is not a “name change” case, it is a transfer of collateral case. The secured party remained perfected in the collateral transferred to the corporation. UCC § 9-507(a). The financing statement is completely ineffective against the transferee as to after-acquired collateral unless the transferee is a “new debtor” and the debtor’s name is not “seriously misleading” when compared to the original debtor’s name. UCC § 9-508. Here a search under the standard search logic using the corporation’s name most assuredly would *not* have found the old financing statement because the search logic makes middle names and initials interchangeable only for individuals and not for corporations.

- *United States v. Orrego*, No. 04 CV 0008 SJ, 54 UCC Rep Serv 2d 145, 2004 U.S. Dist. LEXIS 12252, at *1 (E.D.N.Y. 2004) – A federal prisoner was not entitled to file UCC financing statements against a judge, prosecutor, and prison warden claiming liens in their real and personal property, solely because the officials used his name in official filings. In the absence of collateral being acquired, an agricultural lien or an authenticated security agreement, the court found the prisoner lacked the authority to file the financing statements.

E. *Priority*

1. *Priority – Set-Off, Claims of Unsecured Third Parties, Buyers, and Rights of Holders of Non-UCC Liens*

- *In re Aquamarine USA Inc.*, 56 UCC Rep Serv 2d 309, 319 B.R. 270 (Bankr. M.D. Fla. 2004) - An owner of goods “entrusted” them to a third party to sell and the third party agreed to pay the owner after the goods were sold. The third party sold the goods in ordinary course and the buyer took free of the owner’s rights because the third party had the power to transfer all of the owner’s rights. UCC § 2-403.

Comment: The court missed the fact that revised Article 9 treats these consignment transactions as a “security interest” (UCC § 1-201(37)) and that the buyer would have also taken free as a BIOCOP (UCC §

9-320) and as a buyer buying from a seller who had granted a security interest that was not perfected (UCC § 9-317(b)).

- *In re Iowa Oil Co.*, 55 UCC Rep Serv 2d 48, 2004 WL 2326377 (N.D. Iowa 2004) – A secured party’s filing of a financing statement did not constitute notice to an account debtor of the assignment of its obligation so that the account debtor’s set off rights were cut off. UCC § 9-404(a)(2).
- *Allan Nott Enterprises, Inc. v. Nicholas Starr Auto, LLC*, 56 UCC Rep Serv 2d 820, 2005 WL 696839 (Ohio Ct. App. 2005), appeal allowed, 832 N.E.2d 735 (Ohio 2005) – A buyer of goods who gave a dishonored check had a voidable title and could transfer good title to a good faith purchaser for value. UCC § 2-403.
- *Case Credit Corp. v. Barry Equipment Co., Inc.*, 56 UCC Rep Serv 2d 894, 19 Mass. L. Rptr. 88, 2005 WL 705113 (Mass. 2005) – A buyer with knowledge of an unperfected security interest took subject to the security interest where the buyer was not a BIOCOP. UCC § 9-317(b).
- *Conseco Loan Finance Co. v. Boswell*, 55 UCC Rep Serv 2d 67, 687 N.W.2d 646 (Minn. Ct. App. 2004) – A secured party’s perfected security interest in a manufactured home had priority over a landlord’s lien. A judicial sale conducted at the instance of the landlord did not cut off the senior security interest. UCC § 9-317.
- *Delacy Investments, Inc. v. Thurman*, 56 UCC Rep Serv 2d 84, 693 N.W.2d 479 (Minn. Ct. App. 2005) – Debtor assigned payment rights under a contract to a secured party. The secured party notified the account debtor of the assignment. The rights of the secured party were subject to defenses that accrued after the notice of the assignment because the claims arose “from the transaction that gave rise to the contract.” UCC § 9-404(a)(1).
- *Integrity Bank Plus v. Talking Sales, Inc.*, 56 UCC Rep Serv 2d 400, 2005 WL 419694 (D. Minn. 2005) – A buyer claiming to be a BIOCOP or person claiming through the buyer has the burden of proof to establish that the buyer met the requirements of that status. UCC § 9-320.

- *RFC Capital Corp. v. Earthlink, Inc.*, 55 UCC Rep Serv 2d 617, 2004 WL 2980402 (Ohio Ct. App. 2004), leave to appeal denied, 828 N.E.2d 117 (Ohio 2005) – A third party purchased collateral subject to a perfected security interest. The purchaser argued that the secured party had explicitly and implicitly released its security interest. One of the purchaser’s arguments was that a condition on a release was ineffective where satisfaction of the condition was outside purchaser’s control. Courts are split over whether by including conditions to a release, a secured party loses its ability to pursue the collateral after it is transferred to a third party. The decision holds that the conditions do not cut off the security interest but instead place a burden on the third-party purchaser to determine that the conditions were satisfied.
- *Tucker v Par Wholesale Auto, Inc.*, 329 B.R. 291 (Bankr. D. Ariz. 2005) – A secured party had a security interest in a debtor’s inventory. A seller of inventory to the debtor exercised its reclamation rights under UCC § 2-702. Those rights are subject to the rights of a “good-faith purchaser.” A secured party is a “purchaser” under the UCC. UCC § 1-201(32) and (33). The court held that the secured party was a “purchaser”, but not a “good-faith” purchaser because the secured party had not perfected its security interest.

Comment: UCC § 2-702 does not require the “purchaser” to have perfected its security interest. The UCC knows how to require perfection when perfection is a condition to the rights of a person.

- *Dalton Diversified, Inc. v. AmSouth Bank*, 605 S.E. 2d 892 (Ga. Ct. App. 2004) – Court permitted a secured creditor to exercise its rights with respect to contracts between the debtor and third parties in which the secured party had a perfected security interest. The court rejected claims that the secured party had tortiously interfered with the contracts because the secured party had a “legitimate economic interest” in them and thus acted with privilege. The court also concluded that the secured party was not liable for conversion or trespass for its actions relating to the debtor’s invoices, because the documents transferred title and possession of the invoices to the secured party.

- *Singer Asset Finance Co., L.L.C. v. Continental Casualty Co.*, 886 So. 2d 1004, 1006 (Fla. Dist. Ct. App. 2004) – Court held that the anti-assignment provision in a settlement agreement was valid and enforceable under applicable law, which therefore precluded a foreclosing secured party from raising a direct claim against the obligor of the improperly assigned settlement agreement.

2. *Priority – Competing Security Interests*

- *General Electric Capital Corp. v. Union Planters Bank*, 58 UCC Rep Serv 2d 46, 409 F.3d 1049 (8th Cir. 2005) – Under former Article 9, a secured party with a security interest in inventory allowed the proceeds of the inventory to be paid into a deposit account. Another secured party, unaware of the source of the funds, swept the account and applied the funds to the second secured party’s claims. The court applied the lowest intermediate balance test to trace the first secured party’s funds into the deposit account. Applying Comment 2(c) to former UCC § 9-306, the court held that the payments had been made in the “ordinary course of business” and that the second secured party took the funds free of the first party’s security interest.

Comment: The same result undoubtedly would have occurred under revised Article 9. UCC §§ 9-315, Comment 3 (as to use of lowest intermediate balance); 9-332(b) (transfer of funds from a deposit account).

- *Mims v. First Citizens Bank*, 56 UCC Rep Serv 2d 383, 913 So. 2d 1098 (Ala. Civ. App. 2005) - A secured party perfected its security interest by filing a financing statement. A few years later a second secured party obtained a security interest in the same collateral and perfected its security interest in the collateral by filing a financing statement. The first secured party later assigned its rights and the assignee filed a new financing statement. The assignee also took possession of the collateral before the first secured party’s financing statement lapsed. The court correctly held that the assignee had priority because its security interest had been the first to be filed and it had been continuously perfected through the possession. Former UCC §§ 9-303(2), 9-312(3). Had the assignee of the first secured party not taken possession of the collateral it would have had a junior security interest because the new financing statement that it had

filed did not “continue” the original financing statement filed by the first secured party and thus would not have “related back” for priority purposes.

Comment: The same result concerning continuous perfection would occur under revised Article 9. UCC § 9-308(c).

4. *Proceeds*

- *In re Tower Air, Inc.*, 56 UCC Rep Serv 2d 71, 397 F.3d 191 (3rd Cir. 2005) - A secured party had a security interest in goods. The goods were damaged and ultimately repaired. The secured party had a security interest in the repaired goods as well as the insurance. Former UCC § 9-306.
- *In re Wiersma*, 56 UCC Rep Serv 2d 452, 324 B.R. 92 (Bankr. 9th Cir. 2005) - A secured party had a security interest in cows. Due to the negligence of a contractor, the cows suffered electrical shocks and were injured. The owner of the cows had a commercial tort claim against the contractor. The claim was settled and the contractor owed the settlement amount to the owner. The secured party had a security interest in the settlement obligation both as proceeds of the cows and as a “payment intangible” covered by its security interest. UCC § 9-102, Comment 15 (amount owed in settlement of commercial tort claim is no longer a “commercial tort claim” and becomes a “payment intangible”), 9-322(b)(1), Example 5.
- *Van Diest Supply Co. v. Shelby County State Bank*, 425 F.3d 437 (7th Cir. 2005) - Secured party had a perfect security interest in the inventory that the secured party had sold to its buyer. Another secured party had a security interest in the buyer’s accounts. The second secured party collected the receivables. The first secured party was unable to “identify” its proceeds by tracing its security interest into specific accounts, so the second secured party was entitled to retain the collections on the accounts.

Comment: The court was applying former Article 9. Under revised Article 9, it should be noted that even if the first secured party could trace the funds, the second secured party might be in a position to

retain them. UCC §§ 3-306 (holder in due course), 9-330(d) (person in possession of instrument), 9-332 (transferee of money or funds).

F. *Default and Foreclosure*

1. *Default and Repossession of Collateral*

- *Case Corp. v. Gehrke*, 55 UCC Rep Serv 2d 1, 91 P.3d 362 (Ariz. Ct. App. 2004) – Secured party with security interest in proceeds of collateral had right, which it had not exercised, to require the debtor to segregate the proceeds of the collateral. When debtor used proceeds for other purposes, the court held that the secured party had a sufficient property right in the proceeds to bring a conversion claim.

Comment: Although usually a conversion claim against a debtor adds nothing to the claim on the debt, here it permitted the secured party to bring a claim against the principals of the debtor.

- *Motors Acceptance Corp. v. Rozier*, 54 UCC Rep 2d 31, 597 S.E.2d 367 (Ga. 2004) – Repossessed collateral remains property of the debtor until the secured party goes through additional steps to obtain ownership, such as selling the collateral or agreeing to retain it in satisfaction of the debt.

2. *Retention of the Collateral in Satisfaction of the Debt*

- *New Edge Network, Inc. v. Britsys, Inc.*, 55 UCC Rep Serv 2d 861, 2005 WL 103083 (Wash. Ct. App. 2005) - A wholesale provider of Internet access had an agreement with a retail provider, who in turn sold access to end-users. When the retail provider defaulted, the wholesale provider terminated the agreement with the retail provider and migrated the end-users to other retail providers. The termination of the agreement and the migration of the customers was not a “foreclosure” subject to UCC Article 9.

3. *Notice and Commercial Reasonableness of Foreclosure Sale*

- *Consumer Finance Corporation v. Reams*, 56 UCC Rep Serv 2d 163, 158 S.W.3d 792 (Mo. Ct. App. 2005) - Secured party did not carry its burden of proving commercial reasonableness of foreclosure sale by introducing bill of sale to foreclosure sale buyer and no other party. UCC § 9-610.

- *Miller v. Forge Mench Partnership Ltd.*, 55 UCC Rep Serv 2d 1022, 2005 WL 267551 (S.D.N.Y. 2005) - A buyer at a foreclosure sale could have successor liability for the debts of the debtor where the buyer had a *de facto* merger with the debtor and was a “mere continuation” of the debtor.
- *R&J of Tennessee, Inc. v. Blankenship-Melton Real Estate, Inc.*, 55 UCC Rep Serv 2d 278, 166 S.W.3d 195 (Tenn. Ct. App. 2004) - Although UCC § 9-611 requires only that the secured party “send” notice of a foreclosure sale to a secondary obligor, it was not commercially reasonable for a secured party to proceed with a sale ten days after sending the notice because the secured party had not received confirmation of the secondary obligor’s receipt of the notice.
- *U.S. Bancorp Equipment Finance, Inc. v. Ameriquest Holdings LLC*, 55 UCC Rep Serv 2d 423, 2004 WL 2801601 (D. Minn. 2004) - Secured party that held a security interest in an airplane was not required by commercial reasonableness requirement to allow the defaulting debtor to lease the planes to new lessees not contemplated by the original loan documents. UCC § 9-610.
- *Layne v. Bank One, Ky., N.A.*, 55 UCC Rep Serv 2d 704, 395 F.3d 271 (6th Cir. 2005) - A secured party’s sale of pledged stock on the NASDAQ market was commercially reasonable and the lender had no obligation to sell the pledged stock earlier solely due to a decline in the stock’s market value. UCC § 9-207.
- *State Street Bank and Trust Co. v. Inversiones Errazuriz Limitada*, 374 F.3d 158, 168-71 (2^d Cir. 2004), cert. denied, 125 S.Ct. 1309 (2005) - Court addressed whether under New York law a lender breached the covenant of good faith and fair dealing implied in all contracts by withholding its consent to a defaulting borrower’s proposed disposition of assets. In evaluating a lender’s duties in granting or withholding consents under a credit agreement, the court held that, regardless of the implied covenant, if a contract permits a lender to withhold consent for particular conduct and if such contract fails to set express restrictions on the lender’s right to do so, the lender is under no obligation to reasonably or unarbitrarily grant or withhold its consent.

- *ESL Federal Credit Union v. Bovee*, 56 UCC Rep Serv 2d 517, 801 N.Y.S. 2d 482, 2005 WL 1083669 (N.Y. Sup. Ct. 2005) – Repossession and sending of a notice of disposition followed by a reinstatement of the loan with a release of the security interest constituted a redemption under UCC § 9-623 implicating the requirement of commercial reasonableness. Court held that waiver of defense of impairment of collateral by a co-buyer of goods did not apply post-default. UCC § 3-606.

Comment: The court should not have applied UCC § 3-606 to the matter because it applies only to co-signers of an instrument subject to Article 3, which was not the case here. Further, there's no reason why a waiver could not apply post-default.

4. *Effect of Failure to Give Notice or to Conduct Commercially Reasonable Foreclosure Sale*

- *Brock v. Community Trust Bank*, 56 UCC Rep Serv 2d 105, 2005 WL 327146 (Ky. Ct. App. 2005) - Under former UCC § 9-506 (and revised UCC § 9-623) a debtor may redeem collateral until the earlier of the time the secured party has disposed of the collateral or entered into a contract for its disposition. Where the secured party contracted with an auctioneer for the disposition of the collateral three days before the actual disposition, the right to redeem terminated on the date of the contract with the auctioneer.
- *Glentel, Inc. v. Wireless Ventures, LLC*, 56 UCC Rep Serv 2d 685, 362 F. Supp. 2d 992 (N.D. Ind. 2005) - A foreclosure sale did not cleanse the assets from assertions of successor liability where the owners of the buyer at the sale were in large part also the owners of the debtor. UCC § 9-617.

G. *Transition*

- *In re Wilmington Hospitality LLC*, 56 UCC Rep Serv 2d 270, 320 B.R. 73, (Bankr. E.D. Pa. 2005) - Revised Article 9's foreclosure procedures apply to a transaction that closed before the effective date of revised Article 9 and where a foreclosure occurred after the effective date. Thus revised Article 9's rebuttable presumption rule applied when a secured

party did not follow the requirement of part 6 of revised Article 9.
UCC §§ 9-626, 9-701.

II. REAL PROPERTY SECURED TRANSACTIONS

- *Melendrez v. D & I Investment, Inc.*, 26 Cal. Rptr. 3d 413 (Cal. Ct. App. 2005) – A buyer at a deed of trust foreclosure sale was a *bona fide* purchaser, even if the secured lender violated a repayment agreement with the borrower by prematurely conducting the sale. The fact that the buyer at the foreclosure sale was an experience buyer at these sales who purchased the property for significantly less than its fair market value did not disqualify the buyer from being a BFP. In the absence of procedural irregularity, the buyer was entitled to retain the property.
- *Jones v. Union Bank of California*, 25 Cal. Rptr. 3d 783 (Cal. Ct. App. 2005) – A lender conducted a non-judicial foreclosure sale under a deed of trust. The borrower then attacked the sale and the lender won that dispute. Code of Civil Procedure § 580d’s anti-deficiency rule did not prevent the lender from obtaining its attorneys fees under the terms of the agreements. The attorneys fees were not part of an indebtedness satisfied at the sale.
- *Title Trust Deed Service Co. v. Pearson*, 33 Cal. Rptr. 3d 311 (Cal. Ct. App. 2005) – Declared homestead exemption applies to distribution of surplus proceeds arising from non-judicial foreclosure.
- *Barclays Invs., Inc. v. St. Croix Estates*, 399 F.3d 570 (3^d Cir. 2005) – Court interpreted a mortgage as not securing future advances.

III. GUARANTIES

- *Bizmark, Inc. Industrial Gas & Supply Co., Inc.*, 56 UCC Rep Serv 2d 538, 358 F.Supp.2d (W.D. Va. 2005) - A person that guarantied a note subject to Article 3 by signing a separate document was not a “party” to the instrument and thus Article 3 did not apply to the guarantor’s obligations and rights. UCC § 3-118.
- *Central Building, LLC v. Cooper*, 127 Cal. App. 4th 1053 (2005) - Guarantors of a lease agreed to pay all amounts due under the lease. The lease was later amended and the amendment was “made a part of” the guaranteed lease. There were further amendments and extensions. In all cases the amendments were treated as part of the lease. The court construed the contract language of the guaranty as a “continuing” guaranty that was irrevocable and applied to all of the amendments and extensions.
- *Marc Nelson Oil Products, Inc. v. Grim Logging Co.*, 110 P.3d 120 (Or. Ct. App. 2005), opinion adhered to as modified on reconsideration, 115 P.3d 935 (Or. Ct. App. 2005) - Surety was not obligated to pay an assignee of the beneficiary where there was no previous or simultaneous consent to the assignment of the guarantee and where lack of knowledge of the assignment prevented surety from protecting himself from liability.
- *Strather v. Detroit Discount Distributors, Inc.*, 56 UCC Rep Serv 2d 681, 2005 WL 625460 (Mich. Ct. App. 2005) - A person who signed a note to secure the reimbursement of the issuer of a letter of credit could not seek contribution from independent guarantors of the accommodated party’s debt because they were not “parties” to the instrument and thus no statutory right of reimbursement applied. UCC § 3-419. Nor was the maker of the note subrogated to any claims against the guarantors because the guaranties were not “collateral.”
- *Trust One Mortgage Corp., v. Invest America Mortgage Corp.*, 134 Cal. App. 4th 1302, 37 Cal. Rptr. 3rd 83 (2005) - An “indemnification” agreement from a person who is not the borrower is not subject to California anti-deficiency laws. California law applied to the foreclosure of Georgia real estate because of a California choice-of-law clause in the indemnification agreement. The court held that the *Gradsky* set of issues did not apply be-

cause the agreement was an “indemnification” agreement and not a “guaranty.”

Comment: The conclusion that the agreement was not a “guaranty” seems wrong with respect to the particular claim. Although the indemnification did cover some third party obligations, to the extent it covered making the lender whole for any deficiency on the loan, it was a “guaranty.”

- *Amwest Surety Insurance Co. v. Patriot Homes, Inc., et al.*, 135 Cal. App. 4th 82, 37 Cal. Rptr. 3rd 195, rehearing denied (2005) – A construction company obtained surety bonds in connection with its construction business. The company signed an indemnification agreement with the surety covering “any” bonds written by the surety. When the surety issued an appeal bond for the company, the court held that the indemnification agreement applied to the appeal bond as well as the bonds issued in connection with the construction business.
- *MBIA Ins. Corp. v. Royal Indemnity Co.*, 426 F.3d 204 (3d Cir. 2005) – Court enforced waivers of fraud as a defense to payment in several insurance policies insuring repayment of principal and interest on portfolios of student loans and ordered the insurer to perform under the policies. The court left open the question of whether the policies provided coverage where the student obligors had paid principal and interest but the payments had been diverted prior to receipt by the policies’ beneficiaries.

IV. FRAUDULENT TRANSFERS

- *B.E.L.T., Inc. v. Wachovia Corporation*, 403 F.3d 474 (7th Cir. 2005) – Borrower defrauded a lender and used borrowed funds to pay another lender. The second lender had no duty to alert regulatory authorities that something might be amiss at the common borrower. As a result, the first lender could not recover the payments made by the common borrower to the second lender. A bank had no duty to inform other creditors of a borrower’s financial problems. The court stated that, “[t]here is little good Samaritan tort liability in general, and none that requires businesses to assist their competitors.”
- *In re Sharp Int’l Corp.*, 403 F.3d 43 (2^d Cir. 2005) – Court reached a conclusion similar to *B.E.L.T.*, but left room for a lender liability claim where a lender assists or induces misconduct by the debtor.

V. FINANCIAL INSTITUTIONS

- A. *Regulatory and Tort Claims – Good Faith, Fiduciary Duties, Interference With Prospective Economic Advantage, Libel, Invasion of Privacy*
- *Persson v. Smart Inventions, Inc.*, 125 Cal. App. 4th 1141 (2005) – A corporation bought out one of its 50% shareholders. At the same time the corporation introduced a new product that was very successful. The remaining shareholder did not owe a fiduciary duty to the redeemed shareholder during their arms-length negotiations. However the remaining shareholder could be liable for fraud.
 - *In re OODC, LLC*, 321 B.R. 128 (Bankr. D. Del. 2005) – A lender in an LBO could be liable for aiding and abetting a breach of fiduciary duty by the borrower’s insiders. The court held that the lender could also be liable for improvident lending where it breached a duty of reasonable care not to lend when the borrower was not receiving adequate consideration.
 - *Casey v. U.S. Bank Nat’l Ass’n*, 127 Cal. App. 4th 1138 (2005) – Banks that handled ordinary banking transactions were not liable for aiding and abetting a fraudulent scheme in the absence of actual knowledge of the underlying wrong of the primary actor and giving substantial assistance to the wrongdoer. Performing ordinary business transactions can satisfy the second element. Actual knowledge of the wrongdoing involves “intentional participation with knowledge of the object to be obtained.”
 - *Oakland Raiders v. National Football League*, 131 Cal. App. 4th 621 (2005) – A football team asserted that the football league owed the team a fiduciary duty. The court noted that ordinarily neither a contract nor a debt creates a fiduciary duty. The court distinguished the fiduciary duty owed by majority shareholders not to use unfairly their control to the detriment of minority shareholders. Here the football league is an unincorporated association. The league is not a joint venture because there is no sharing of profits and losses. Nor did the commissioner of the league undertake fiduciary obligations where the league constitution expressly allowed the commissioner to undertake actions adverse to the interests of an individual team.

- *Berg & Berg Enterprises, LLC v. Sherwood Partners, Inc.*, 131 Cal. App. 4th 802 (2005) – Counsel for assignee for benefit of creditors does not owe a fiduciary duty to creditors of the assignor based on excessive fees received by counsel. Although the assignee itself owed a fiduciary duty to the creditors of the assignor, the duty does not extend to the assignee’s attorneys. The court followed decisions that hold that counsel to a trustee does not owe a fiduciary to the beneficiaries of the trust and distinguished some decisions that held that counsel to a bankruptcy trustee does owe a direct fiduciary duty to creditors.
- *Wells Fargo Bank N.A. v. Boutris*, 419 F.3d 949 (9th Cir. 2005) – National Bank Act preempts state exercise of investigative and licensing authority over “operating subsidiaries” of a national bank. Depository Institutions Deregulation and Monetary Control Act of 1980 (12 U.S.C. § 1735f-7a) does not preempt state *per diem* loan interest statute.
- *Smith v. Ajax Mannathermic Corp.*, 2005 WL 1767871 (6th Cir. 2005) – Lenders that allegedly took over management of a borrower could be liable for WARN Act (19 USC § 2101 *et seq.*). A lender that does no more than preserve its collateral does not become subject to the Act, but a lender that operates the borrower’s assets as a “business enterprise” may incur liability under the Act.
- *In re Global Serv. Group LLC*, 316 B.R. 451 (S.D.N.Y. 2004) – Under New York law the theory of “deepening insolvency” is not an independent tort and therefore a lender’s extension of credit to an insolvent entity will not give rise to liability unless the plaintiff can show that the lender “prolonged the company’s life in breach of a separate duty, or committed an actionable tort that contributed to the continued operation of a corporation and its increased debt.”
- *Wachovia Bank, Nat’l Ass’n v. Mortgage Lenders Network USA, Inc.*, No. 03 Civ. 8809 (NRB), 2005 WL 578942 (S.D.N.Y. 2005) – Bank had no duty to renew a borrower’s credit facility.
- *In re Enron Corp.*, 333 B.R. 205, 2005 Bankr. Lexis 2218 (Bankr. S.D.N.Y. 2005) – Court may subordinate a claim based on conduct unrelated to the claim itself. The subordination applies to transferees of the claim.

B. *Agent Banks*

- *Citadel Equity Fund, Ltd. v. Aquila, Inc.*, 371 F. Supp. 2d 510 (S.D.N.Y. 2005) – Court interpreted the terms of a credit agreement to determine whether “required lender” or “unanimous lender” consent was required to waive a mandatory prepayment provision. The credit agreement expressly required unanimous lender consent for any waiver extending the scheduled date of maturity, the scheduled date of a payment or expiration date of any lender commitment. The waiver caused the scheduled maturity date, scheduled payment dates and termination date to change and consequently unanimous lender consent was required. Borrower that did not defease debt thereby triggered mandatory prepayment clause. Lenders could not waive the prepayment obligation because it was for the benefit of both parties. Borrower was not in breach of covenant of good faith and fair dealing by not defeasing debt where it had a contractual right not to do so. If the waiver were effective, a prepayment would be optional and trigger a higher prepayment fee.
- *Dorel Industries, Inc., v. Jonathan Jackson III, et al.*, 134 Cal. App. 4th 1267, 36 Cal. Rptr. 3d 742, (2005) – Parent company of entity that may have committed a tort in California subject to California jurisdiction under “representative services” doctrine where the subsidiary performs services in the state that the parent would perform for itself if the subsidiary did not exist.

C. *Obligations Under Corporate Laws*

- *Schuster v Gardner*, 127 Cal. App. 4th 305 (2005) - An action for breach of fiduciary duty was a derivative action because the “gravamen” of the complaint was harm to the corporation. The corporation’s bankruptcy estate owned the claim and a shareholder could not bring it.
- *VantagePoint Venture Partners 1996 v. Examen, Inc.*, 871 A.2d 1108 (Del. Super. Ct. 2005) – As a matter of choice-of-law rules and the Commerce Clause of the Constitution, the internal affairs doctrine requires the application of the law of the state of a corporation’s state of incorporation to “internal affairs.”

- *Columbia Forest Products v. Firestone Plywood Corp.*, 799 N.Y.S.2d 159 (N.Y. Sup. Ct. 2004) – Unlike Delaware law, under New York law, corporate officers and directors do not have fiduciary duties to creditors.

Comment: The case is significant in part because in securitization transactions, SPV organizational documents frequently extend fiduciary duties to creditors to the maximum extent allowed by law.

- *Production Resources Group, L.L.C. v. NCT Group, Inc.*, 863 A.2d 772 (Del. Ch. 2004) – The court steps back from what many view as Delaware case law establishing that corporate directors have fiduciary duties to creditors in the “zone of insolvency”.
- *In re The Walt Disney Company Derivative Litigation*, 2005 Del. Ch. LEXIS 113 (Del. 2005) – Although actions of directors in approving compensation package “fell significantly short of the best practices of ideal corporate governance,” the directors did not breach their fiduciary duties or commit waste.

D. Securities Laws

- *Steed Finance LDC v. Nomura Securities International, Inc.*, 2004 WL 2072536 (S.D.N.Y. 2004), affirmed, 148 Fed. Appx. 66 (2d Cir. 2005) – Court granted the defendant’s motion for summary judgment, holding that an investor in beneficial interests in a trust fund of commercial mortgage loans failed to prove each of the elements required to sustain a claim of securities fraud under the federal securities laws. The court concluded that the investor failed to show misrepresentation of material facts on the part of the defendant in part because the defendant’s disclosures contained sufficient “red flags” to indicate to the investor, a sophisticated investor, to complete more due diligence and because the investor had ample access to information containing the appropriate disclosures.
- *SEC v. Mutual Benefits Corp.*, 408 F.3d 737 (11th Cir. 2005), petition for cert.. filed, 74 USCW 31 62 (Sept. 13, 2005) - Viatical settlement contracts are investment contracts under the Securities Act of 1933. The court did not agree with a previous DC Circuit case (*Life Partners*) that reached the opposite result.

- *Robert C. Friese v. John J. Moores, et al.*, 134 Cal.App.4th 693, 36 Cal. Rptr. 3d 558 (2005), *modified and reh'g denied*, 2005 Cal. App. LEXIS 1985 (2005), *and modified* 2006 Cal. App. LEXIS 66 (2006) – California securities insider trading laws apply to transactions in California involving securities issued by a non-California entity. The internal affairs doctrine does not prevent the application of California law.

VI. UCC - SALES AND PERSONAL PROPERTY LEASING

A. *Scope*

1. *General*

- *Erin Printing and Promotional Marketing, Inc. v. Convum, LLC*, 56 UCC Rep Serv 2d 566, 2005 WL 366895 (Tenn. Ct. App. 2005) - Under the “predominant factor” test, the fact that a contract is labor intensive does not make services the predominant factor. The predominant factor of a contract for producing and printing catalogues was the sale of “goods” and Article 2 applied to the contract. UCC § 2-102.
- *Grace Label, Inc. v. Kliff*, 56 UCC Rep Serv 2d 169, 355 F. Supp. 2d 965, (S.D. Iowa 2005) - UCC, and not Convention on Contracts for the International Sale of Goods, applied to a sale of goods between two U.S. entities, even though the goods were shipped to a third party in another county. Thus, the Article 2’s, and not CISG’s, course of dealing rules applied.

2. *Software and Other Intangibles*

- *Dealer Management Systems, Inc. v. Design Automotive Group, Inc.*, 55 UCC Rep Serv 2d 965, 822 N.E.2d 556 (Ill. App. Ct. 2005) – A “license” of software is a “sale” of “goods” where the “predominant” purpose of the transaction was the sale of goods and the software was off the rack.
- *Mortgage Plus, Inc. v. DocMagic, Inc.*, 55 UCC Rep Serv 2d 58, 2004 WL 2331918 (D. Kan. 2004) – Document preparation software provided as an incidental aspect of a services agreement to provide document preparation services was not subject to UCC Article 2 because the predominant purpose of the transaction was the provision of services.
- *Lamle v. Mattel, Inc.*, 55 UCC Rep Serv 2d 678, 394 F.3d 1355 (Fed. Cir. 2005) – Patent license was not sale of goods under UCC Article 2.

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

1. General

- *Arbitron, Inc. v. Tralyn Broadcasting, Inc.*, 56 UCC Rep Serv 2d 883, 400 F.3d 130 (2^d Cir. 2005) - A provision in an agreement that one party could change the price if certain events occurred did not render the contract unenforceable because the right to change the price was tied to particular events. UCC § 2-305.
- *Ewanchuk v. Mitchell*, 56 UCC Rep Serv 2d 261, 154 S.W.3d 476 (Mo. Ct. App. 2005) - An oral agreement to sell two puppies existed even without a writing where the party denying the existence of the agreement admitted it in pleadings. UCC § 2-201. Although the oral agreement lacked a delivery term, Article 2 supplied the missing delivery term as occurring within a “reasonable time.” UCC § 2-309.
- *Home Basket Co., LLC v. Pampered Chef, Ltd.*, 55 UCC Rep Serv 2d 792, 2005 WL 82136 (D. Kan. 2005) - Clicking “accept” button on web page constituted acceptance of referenced T’s + C’s.
- *International Casings Group, Inc. v. Premium Standard Farms, Inc.*, 56 UCC Rep Serv 2d 736, 358 F. Supp. 2d 863 (W.D. Mo. 2005) - A series of 17 e-mails could satisfy the statute of frauds and the requirement that the party to be bound have “signed” an agreement. UCC §§ 1-201, 2-201.
- *People v. Lopez*, 56 UCC Rep Serv 2d 331, 2005 WL 289067 (Cal. Ct. App. 2005) - A buyer of a car took possession, but never paid for the car. As a result, the buyer had a voidable title to the car because it was obtained by larceny. UCC § 2-403(1)(b). As a result, the buyer’s friend who took the car was criminally liable because the buyer had sufficient ownership of the car for the criminal law to apply.
- *R.F. Cunningham & Co. Inc. v. Driscoll*, 56 UCC Rep Serv 2d 237, 7 Misc. 3d 234, 790 N.Y.S.2d 368 (N.Y. City Ct. 2005) - A merchant seller that sent a “purchase confirmation” to a merchant buyer had an enforceable agreement from the buyer where the buyer did not object to the terms of the agreement within ten days. UCC § 2-201.

- *SST Bearing Corp. v. MTD Consumers Group, Inc.*, 55 UCC Rep Serv 2d 347, 2004 WL 2757601 (Oh. App. 2004), appeal not allowed, 825 N.E.2d 624 (2005) – A detailed price quotation could constitute an “offer” that the person receiving the quotation could “accept.”
- *Mulitex USA, Inc. v. Marvin Knitting Mills, Inc.*, 55 UCC Rep Serv 2d 455, 784 N.Y.S.2d 506 (N.Y.A.D. 2004) – Detailed invoices for goods delivered to buyer could satisfy statute of frauds where buyer failed to object within ten days. UCC § 2-201.
- *Pro Spice, Inc., v. Omni Trade Group, Inc.*, 55 UCC Rep Serv 2d 689 (3rd Cir. 2005) – Merchants exception to statute of frauds based on delivery of confirmation does not mean that person asserting that a contract exists does not have to establish an agreement.
- *Todd Heller, Inc. v. Indiana Department of Transportation*, 55 UCC Rep Serv 2d 464, 819 N.E.2d 140 (Ind. Ct. App. 2004), transfer denied, 831 N.E.2d 749 (Ind. 2005) – Usage of trade could supplement contract to indicate method of testing goods where contract did not provide for a testing method. UCC § 2-202.

2. Battle of the Forms

- *Crossley Construction Corp. v. NCI Building Systems, L.P.*, 56 UCC Rep Serv 2d 556, 123 Fed. Appx. 687, 2005 WL 361589 (6th Cir. 2005) - There was no “acceptance” of an offer when the recipient of the offer sent its own document that purported to incorporate the offer. UCC § 2-207.
- *Plastech Engineered Products v. Grand Haven Plastics, Inc.*, 56 UCC Rep Serv 2d 910, 2005 WL 736519 (Mich. Ct. App. 2005) - A “terminable at will” provision did not “knock out” a specific long-term price provision. UCC § 2-207.
- *Vanlab Corp v. Blossom Valley Foods Corp.*, 55 UCC Rep Serv 2d 765, 2005 WL 43772 (W.D. N.Y. 2005) – Forum selection clause is material modification that does not become part of agreement. UCC § 2-207.

C. Warranties and Products Liability

1. Warranties

VI. UCC - Sales and Personal Property Leasing

- *Adel v. Greensprings of Vermont, Inc.*, 56 UCC Rep Serv 2d 798, 363 F. Supp. 2d 692 (D. Vt. 2005) - A seller of water is a seller of “goods” and the supplier was a merchant and gave the implied warranty of merchantability. UCC § 2-314.
- *Computer Network, Inc. v. AM General Corp.*, 56 UCC Rep Serv 2d 425, 265 Mich. App. 309 (Mich. Ct. App. 2005) - A buyer of a car brought it in for repairs seventeen times over the first twenty one months of ownership. The selling dealer duly fixed the car each of those times. There was no breach of warranty where the seller had made good on its promise under the warranty to fix any defects. There was no independent breach of warranty arising out of the cumulative effect of all of the (fixed) problems.
- *Fagan v. AmerisourceBergen Corp.*, 56 UCC Rep Serv 2d 528, 356 F. Supp. 2d 198 (E.D.N.Y. 2004) - A lawful buyer of drugs could bring a claim for breach of the implied warranty of merchantability where the drugs were counterfeit and had only one-twentieth of the strength that they should have had.
- *Milicevic v. Fletcher Jones Imports, Ltd.*, 402 F.3d 912 (9th Cir. 2005) – Magnuson-Moss Warranty Act creates a private right of action for the seller’s failure to comply with the terms of a written warranty. The cause of action does not arise until the seller fails to correct the defective product.
- *Maxi Mover Express, Inc. v. Granning Air Suspensions*, 55 UCC Rep Serv 2d 176, 2004 WL 2413387 (Mich. Ct. App. 2004) – A seller’s promise to fix the goods if defective did not amount to an “explicit” promise of future performance that would extend the statute of limitations. UCC § 2-725.
- *Sharp v. Tom Wood East, Inc.*, 56 UCC Rep Serv 2d 101, 822 N.E.2d 173 (Ind. Ct. App. 2004) - A person bought a used car that had 64,669 miles on it. The buyer then drove the car an additional 22,000 miles. The buyer then brought an action for breach of the warranty of merchantability. The court held that given all of this driving, the car had been merchantable at the time of acceptance. UCC § 2-314.

- *Soto v. CarMax Auto Superstores, Inc.*, 56 UCC Rep Serv 2d 479, 611 S.E.2d 108 (Ga. Ct. App. 2005) - A buyer of goods bringing a warranty claim must show that the defect existed and that the warranty was breached at the time of sale. UCC § 2-314.
- *Wojcik v. Empire Forklift, Inc.*, 55 UCC Rep Serv 2d 190, 783 N.Y.S.2d 698 (N.Y.A.D. 2004) - Statements of quality in promotional literature that the buyer had not seen did not form part of the basis of the bargain and thus did not create an express warranty. UCC § 2-313.
- *Sharp v. Tamko Roofing Products, Inc.*, 55 UCC Rep Serv 2d 226, 2004 WL 2579638 (Iowa Ct. App. 2004) - Statements in product brochure did not form part of the basis of the bargain to create an express warranty where the buyers could not show that they had relied on the statements in the brochure.

2. Limitation of Liability

- *Rational Software Corporation v. Sterling Corporation*, 55 UCC Rep Serv 2d 759, 393 F.3d 276 (1st Cir. 2005) - Course of dealing could give rise to liability limitation.

3. “Economic Loss” Doctrine

- *Fireman’s Fund McGee Marine Underwriters a/s/o Hartung Brothers, Inc. v. A & B Welding & Mfg., Inc.*, 56 UCC Rep Serv 2d 752, 2005 WL 568055 (W.D. Wis. 2005) - Economic loss doctrine prevented assertion of tort claim where valve malfunctioned and destroyed system in which it had been installed. UCC Article 2 applied to the transaction because it was primarily for the sale of goods. Although the doctrine will not preclude a tort claim when “other property” is damaged by the defective goods, the system in which the defective goods were installed were not treated as “other property.” UCC § 2-314.
- *Robinson Helicopter Co., Inc. v. Dana Corp.*, 34 Cal. 4th 979 (2004) - The economic loss rule operates to prevent a purchaser of goods from recovering in tort, unless the purchaser can demonstrate that it incurred damages beyond those economic damages obtainable for breach of contract (e.g. inadequate value, costs of repair and replacement, loss of profits). The courts have applied the economic

loss rule to strict liability cases and to negligent breach of contract cases, but the Supreme Court refused to apply the limitation here, where a prima facie case of fraud had been made out by the buyer. The seller allegedly supplied a false certificate stating that the goods met the warranty requirements of the agreement between the parties. The severity and extent of the seller's alleged misrepresentations constituted a tortious act independent of the contractual breach. Here, the Court further noted, a public policy need was served by punishing the blameworthiness of an intentional fraud, and by deterring such egregious intentional misrepresentation in future contracts. The court argued that public policy of encouraging predictability in commercial contracts does not outweigh the need to ensure honesty, good faith and fair dealing in such transactions. The seller could have avoided the imposition of punitive damages by refusing to supply a certificate certifying that the parts conformed to the specifications; in that case, it might still have been liable for breach of contract damages, but would not have taken its actions into the realm of intentional and knowingly tortious conduct.

Comment: This is a significant decision, as it opens up the possibility for a buyer to recover non-economic damages in commercial transactions. The court emphasized that its holding was based on the delivery of the false certificate of compliance, which contained the misrepresentation that supported the claim of an intentional tort. Had the seller done no more than deliver non-complying goods, the economic loss rule would have precluded the recovery of non-economic damages (such as punitive damages) for breach of warranty. Once a recovery for tort damages based on an intentional misrepresentation is allowed, it seems unlikely that disclaimers and limitations on remedies and damages will be effective. See Civil Code § 1668 (“All contracts which have for their object, directly or indirectly, to exempt any one from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law.”)

- *Triton Environmental, Inc. v. Dalton Enterprises, Inc.*, 56 UCC Rep Serv 2d 601, 2005 WL 375331 (Conn. Super. Ct. 2005) - An alleged negligent misrepresentation by a party to a contract concerning its experience in the subject matter of the contract could not, under the economic loss doctrine, turn a contract claim into a tort claim.

D. *Performance, Breach and Damages*

- *Brisbin v. Superior Valve Company*, 56 UCC Rep Serv 2d 152, 398 F.3d 279 (3^d Cir. 2005) - A seller had “reasonable grounds for insecurity” and was entitled to demand “adequate assurances” of the buyer’s performance where the buyer had been quite dilatory in proceeding with its performance under the contract. The decision emphasized that its analysis was based on a “commercial” and “practical” evaluation of the business circumstances. UCC § 2-609.
- *Enron Power Marketing, Inc. v. Nevada Power Co.*, 55 UCC Rep Serv 2d 31, 2004 WL 2290486 (S.D. N.Y. 2004) – Right to demand reasonable assurance of performance was not automatically triggered by a downgrading of the credit of a party to the agreement where the contract had a general clause dealing with this issue. While the contract could have made express provision for that result, in the absence of an express provision, the court should evaluate the reasonableness of the demand in the circumstances.
- *Hines v. Mercedes-Benz USA, LLC*, 56 UCC Rep Serv 2d 110, 358 F. Supp. 2d 1222 (N.D. Ga. 2005) - A buyer of a car from a dealer could not revoke the buyer’s acceptance of the car from the remote manufacturer because the buyer was not in privity with the manufacturer.

Comment: The absence of privity would not prevent a remote buyer from bringing a warranty claim against the manufacturer if the manufacturer had made an express warranty to the buyer.

- *JWR Sales Company v. New Millennium Cinemas, LLC*, 55 UCC Rep Serv 2d 922, 607 S.E.2d 55 (N.C. Ct. App. 2005) - Stop-payment order on final check given to pay for goods was not a “rejection” of the goods. UCC § 2-602.

E. *Personal Property Leasing*

- *Fifth Third Bank v. Roberts*, 55 UCC Rep Serv 2d 378, 2004 WL 2785955 (Oh. Ct. App. 2004) – Lessor had no duty to act in good faith with respect to an express warranty where the lessor had not given any express warranty.

VI. UCC - Sales and Personal Property Leasing

- *Fillmore v. Leasecomm Corp.*, 55 UCC Rep Serv 2d 770, 18 Mass. L. Rptr. 560, 2004 WL 3091642 (Mass. 2004) - Agreement to pay monthly amount for Internet license was a finance lease under Article 2A.
- *Oaks v. Bank One Corporation*, 56 UCC Rep Serv 2d 133, 2005 WL 293677 (6th Cir. 2005) - In a true lease, the lessor's obligation to act in a commercially reasonable manner in exercising its remedies did not require the lessor to give the defaulting lessee notice of the disposition of the leased equipment. The court distinguished this from the notice rules applicable to a secured transaction under Article 9.
- *Eureka Broadband Corp. v. Wentworth Leasing Corp.*, 56 UCC Rep Serv 2d 762, 400 F.3d 62, (1st Cir. 2005) - Although a finance lessor ordinarily has no liability to the lessee for breaches of the lease, where the lessee relied on material misrepresentations by the finance lessor, the lessee could bring a claim. UCC § 2A-505(4).

VII. COMMERCIAL PAPER, ELECTRONIC FUNDS AND TRANSFERS

A. *Negotiable Instruments and Holder in Due Course*

- *Buckeye Check Cashing, Inc. v. Camp*, 56 UCC Rep Serv 2d 484, 825 N.E.2d 644 (Ohio Ct. App. 2005) - The modern definition of the duty of good faith (“honesty in fact and the observance of reasonable commercial standards of fair dealing”) required a check-cashing service to make inquiry about a post-dated check.
- *Carson Fischer, PLC v. Standard Federal Bank*, 56 UCC Rep Serv 2d 94, 2005 WL 292343 (Mich. Ct. App. 2005), appeal granted, 707 N.W.2d 590 (2005) - Drawee bank has strict liability for paying check that was not “properly payable.” UCC § 4-401.
- *In re Ames Dept. Stores, Inc.*, 56 UCC Rep Serv 2d 417, 2005 WL 433642 (Bank. S.D.N.Y. 2005) - A check named three payees by vertically “stacking” their names. The check was “ambiguous” as to whether the check was payable to the payees jointly or alternatively. As a result, the check was payable alternatively. UCC § 3-110(d) (“If an instrument payable to two or more persons is ambiguous as to whether it is payable to the persons alternatively, the instrument is payable to the persons alternatively.”)
- *In re Builders Capital and Services, Inc.*, 55 UCC Rep Serv 2d 447, 317 B.R. 603 (Bankr. W.D.N.Y. 2004) – Principals did not have an interest in notes where “agents” were named as payee and there was no evidence that agency relationship existed.
- *In re Danowski*, 56 UCC Rep Serv 2d 562, 320 B.R. 886 (Bankr. N.D. Ohio 2005) - Checks drawn pre-petition, but that have not cleared by the time of a bankruptcy petition, are post-petition transfers. UCC §§ 3-408, 3-409.
- *Terry McElroy, et al. v. Chase Manhattan Mortgage Corporation, et al.*, 134 Cal. App. 4th 388, 36 Cal. Rptr. 3d 176 (2005) – A bonded bill of exchange order was not a “negotiable instrument” as the U.S. Secretary of the Treasury had no obligation to pay it.

B. *Payment-in-Full Checks*

- *Brucato v. Ezenia! Inc.*, 55 UCC Rep Serv 2d 718, 351 F. Supp. 2d 464 (E.D. Va. 2004) – Statement at top of transmittal letter that check was sent as “payment-in-full” was conspicuous for purposes of binding payee to accord and satisfaction. UCC § 3-311.
- *Wallace v. Wallace*, 56 UCC Rep Serv 2d 653, 2005 WL 563990 (Ala. Civ. App. 2005) - An obligor acted in “good faith” in connection with a *bona fide* dispute in tendering a check as “payment-in-full.” Thus the payee’s crossing out of the payment-in-full language did not prevent the check from acting as an accord and satisfaction.

C. *Electronic Funds Transfer*

- *Bensman v. Citicorp Trust, N.A.*, 55 UCC Rep Serv 2d 956, 354 F. Supp. 2d 1330 (S.D.Fla. 2005) - Regulation J preempts claim under Article 4A based on an erroneous execution of a funds transfer.
- *Regatos v. North Fork Bank*, 55 UCC Rep Serv 2d 943, 396 F.3d 493 (2d Cir. 2005), answer to certified question conformed, 431 F.3d 394 (2d Cir. 2005) - Transaction subject to Article 4A not subject to “parallel” rules of Article 4.

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

A. *Letters of Credit*

- *Hendricks v. Bank of America*, 408 F.3d 1127 (9th Cir. 2005) – Court could enjoin the issuer of a letter of credit from honoring a draw under the letter of credit if the applicant could show material fraud. UCC § 5-109. The court was entitled to enter the injunction even if the fraud involved the underlying transaction (creating a fictitious right to draw) instead of the draw itself. The court reserved the question of whether the person seeking the injunction under UCC § 5-109 had to show irreparable harm, as would ordinarily be necessary for an injunction.
- *In re Tabernash Meadows, LLC*, 56 UCC Rep Serv 2d 622, 2005 WL 375660 (Bankr. D. Colo. 2005) - The independence principle did not prevent the issuance of an injunction against a beneficiary drawing under a letter of credit where the beneficiary did not perform its obligations under the underlying contract.
- *Middlesex Bank & Trust Co. v. Mark Equipment Corp.*, 56 UCC Rep Serv 2d 443, 2005 WL 446035 (Mass. 2005) - The issuer of a letter of credit properly honored the letter of credit under the strict compliance rule even though the draw request misstated the date of the issuance of the letter of credit. The court held that the strict compliance rule did not require a “hypertechnical” reading of the letter of credit where “there is no possibility that the documents could mislead the paying bank to its detriment.” UCC § 5-108, ISP 98, Rule 4.

B. *Investment Securities*

- *Ogdon v. Hoyt*, 55 UCC Rep Serv 2d 737, 2005 WL 66039 (N.D. Ill. 2005) – No statute of frauds applies to agreement to sell securities subject to Article 8. UCC § 8-113.

IX. CONTRACTS

A. *Formation, Scope, and Meaning of Agreement*

- *Falkowski v. Imation Corp.*, 132 Cal. App. 4th 499 (2005) – An employee stock option plan provided that the option lapsed if the employee ceased being an employee of the issuer or an affiliate of the issuer. An employee worked for a subsidiary and received options. The issuer sold the subsidiary. Although the employee remained employed by the former subsidiary, upon the sale of the subsidiary the employee was no longer employed by the issuer nor one of its affiliates. The court determined that the contract language was ambiguous, so it took parol evidence to determine what the parties had intended to say. The court construed the language of the option plan as a whole and reviewed the purposes of the plan in coming to its legal conclusion.
- *ASP Properties Group v. Fard, Inc.*, 133 Cal. App. 4th 1257, 35 Cal. Rptr. 3d 343 (2005) – Interpretation of lease term providing for tenant to maintain premises in “good and safe condition” takes into account the condition of the premises at the time the lease was entered into.

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

- *Kotler v. PacifiCare of California*, 126 Cal. App. 4th 950 (2005) – A medical provider could breach its implied duty to provide care within a reasonable time where six weeks went by before the insured obtained an appointment with an appropriate doctor.
- *Discover Bank v. Superior Court*, 36 Cal. 4th 148 (2005), on remand, 134 Cal. App. 4th 886 (2005) – Arbitration agreement that precluded class arbitration was unconscionable in the circumstances and the Federal Arbitration Act did not preempt California law in this area. Procedural unconscionability existed because the waiver of the right to bring a class action was included in a “bill stuffer.” The class action waiver could also function as an exculpation clause because the small amount of individual damages would discourage individual claims. The court referred back to the trial court the decision of whether a Delaware

choice-of-law clause was enforceable due to the possible conflict with a fundamental public policy of California law.

- *Trend Homes, Inc. v. Superior Court*, 131 Cal. App. 4th 950 (2005) – Term in home purchase agreements to resolve disputes by judicial reference was not unconscionable where there was neither procedural nor substantive unconscionability. There was no procedural unconscionability because the agreements were not adhesive, there was no evidence of the unavailability of alternative comparable housing, and the term was clearly written and conspicuous. There was no substantive unconscionability because the agreements were not so one-sided that they would “shock the conscience.” They did not limit the amount or type of relief, nor the types of claims that a homeowner could bring.
- *Villacreses v. Molinari*, 132 Cal. App. 4th 1223 (2005) – A contract contained the following disclaimer, required by a statute:

“ARBITRATION OF DISPUTES: ‘NOTICE: BY INITIALING IN THE SPACE BELOW, YOU ARE AGREEING TO HAVE NEUTRAL ARBITRATION OF ALL DISPUTES TO WHICH IT APPLIES AND YOU ARE GIVING UP ANY RIGHTS YOU MIGHT POSSESS TO HAVE THE DISPUTE LITIGATED IN A COURT OR JURY TRIAL. BY INITIALING IN THE SPACE BELOW, YOUR JUDICIAL RIGHTS TO DISCOVERY AND APPEAL ARE AFFECTED. IF YOU REFUSE TO SUBMIT TO ARBITRATION AFTER AGREEING TO THIS PROVISION, YOU MAY BE COMPELLED TO ARBITRATE UNDER THE AUTHORITY OF THE CALIFORNIA CODE OF CIVIL PROCEDURE. YOUR AGREEMENT TO THIS ARBITRATION PROVISION IS VOLUNTARY.’”

The court held that this disclaimer in itself did not constitute an agreement to arbitrate and that the word “it” in the first sentence referred to a separate agreement to arbitrate, which did not exist in this agreement.

Comment: The court admonished the parties to “Read the documents.”

C. *Jurisdiction, Choice of Law and Choice of Forum*

- *ABF Capital Corp. v. Grove Properties*, 126 Cal. App. 4th 204 (2005) – A contract provided for one party to pay attorneys fees in connection with the other party’s enforcement of the agreement. The provision was not reciprocal. The agreement also provided for the application of New York law. California Civil Code § 1717 provides that if a contract provides for attorneys fees the provision is made mutual as a matter of law in favor of the “prevailing party” in circumstances where the party named in the contract as entitled to payment of its attorneys fees would have a right to recover them. The court applied Restatement (Second) of Conflict of Laws § 187 and California case law applying the Restatement rule to consider whether the California Civil Code provision would apply in the face of the New York choice-of-law term of the contract. The court first concluded that New York had a “substantial” relationship to the transaction and that, as an initial matter, the choice-of-law term was enforceable. However, a choice-of-law term is not enforceable as to a particular provision if (i) the application of the term would be contrary to a “fundamental” public policy of the state whose law would apply in the absence of the choice-of-law term, and (ii) that state has a materially greater interest in applying its law on that issue than does the chosen-law state. The court concluded that (i) California law would apply in the absence of the choice-of-law clause, (ii) California Civil Code § 1717 represented a “fundamental” public policy of California, and (iii) California had a materially greater interest than did New York in applying its (California’s) law to this issue.
- *LLP Mortgage v. Bizar*, 126 Cal. App. 4th 773 (2005) – A note in favor of the SBA provided “this instrument is to be construed and (when SBA is the Holder or a party) in interest) [sic] enforced in accordance with applicable Federal law.” The SBA assigned the note. The new holder of the note was entitled to use the longer statute of limitations that applied to the SBA.
- *Grafton Partners L.P. v. Superior Court*, 36 Cal. 4th 944, 116 P.3d 479 (2005) – Under Code of Civil Procedure § 631, pre-dispute waiver of a jury trial is not enforceable. Conclusion is based on statutory analysis and not general Constitutional principles. Court does indicate that agreements to arbitrate and judicial reference, although having the ef-

- fect of waiving a jury, are enforceable because they are based on statutes, unlike the jury trial waiver.
- *Grecon Dimter, Inc. v. Horner Flooring Co., Inc.*, 55 UCC Rep Serv 2d 195, 2004 WL 2491576 (4th Cir. 2004) – German choice-of-law clause was enforceable under UCC § 1-105 where a principal component of the goods sold had been manufactured in Germany.
 - *Petters Company Inc. v. BLS Sales Inc.*, 2005 WL 2072109 (ND. Cal. 2005) – A note provided for the application of Minnesota law. The interest rate under the note was 3% a month, which exceeded California’s usury limit. The payee was located in Minnesota and under California’s choice-of-law rules, which follow the *Restatement (Second) Conflict of Laws*, § 187, this was a sufficient “substantial relationship” to the state whose law had been chosen. The interest rate did not violate a fundamental California public policy, so that the choice-of-law clause was enforceable.
 - *Marrone v. Meecorp Capital Mkts., LLC*, 2004 WL 2677175 (E.D. Pa. 2004) – Court upheld a forum selection clause, noting that absent inconvenience or fraud and given that parties to the case were located in the chosen forum state there was no reason to disregard the choice.
 - *Dana Klussman, et al. v. Cross County Bank, et al.*, 134 Cal. App. 4th 1283, 36 Cal. Rptr. 3d 728 (2005) – An arbitration clause in an agreement that provided for the application of the law of another state (Delaware) was subject to California law under the fundamental public policy exception to enforcing choice-of-law provisions with respect to evaluating the unconscionability of a term waiving the right to bring a class arbitration (which in the circumstances would be unconscionable under California law).

D. Arbitration

- *Provencio v. WMA Securities, Inc.*, 125 Cal. App. 4th 1028 (2005) – An arbitration agreement provided that disputes between a securities broker and a customer would be arbitrated under the NASD rules. The arbitration term was not enforceable where the securities broker was no longer a member of the NASD.

E. Damages

- *Baldwin Builders v. Coast Plastering, Corp.*, 125 Cal. App. 4th 1339 (2005) – California Civil Code 1717’s mutuality provision applied where an attorneys fees clause was not a part of the calculation of an indemnity claim, but instead applied to fees incurred in enforcing the agreement itself.
- *Paul v. Schoellkopf*, 128 Cal. App. 4th 147 (2005) – An escrow agreement provided for the payment of attorneys fees in connection with litigation by the escrow company to collect its escrow fees. Because the right to attorneys fees is a matter of contract, the attorneys fees provision did not extend to disputes over the sufficiency of services by the escrow company or to disputes between the seller and the buyer. Civil Code § 1717.
- *Delta Rault Energy 110 Veterans, L.L.C. v. GMAC Commercial Mortgage Corp.*, 2004 WL 1752859 (E.D. La. 2004) – Court upheld an “exit fee” provided for in a mortgage agreement as it found the “exit fee” to be either an additional fee or deferred interest added as consideration for making the loan.

X. OTHER LAWS AFFECTING COMMERCIAL TRANSACTIONS

A. *Bankruptcy Code*

1. *Automatic Stay*

- *United Airlines, Inv. v. U.S. Bank N.A.*, 406 F.3d 918 (7th Cir.), mandate enforced, 409 F.3d 812 (7th Cir.); cert. dismissed, 126 S. Ct. 508 (2005) – Under Bankruptcy Code § 1110(a), the Bankruptcy Court has no power to enjoin an aircraft lessor from recovering a plane where the lessee is in default.

2. *Substantive Consolidation*

- *In re Owens Corning*, 419 F.3d 195 (3rd Cir.), petition for cert. filed, 74 USLW 3395 (Dec. 23, 2005) – Court refused to order substantive consolidation among bankruptcy debtors over objection of secured creditor that had made loans to affiliates and obtained guaranties from affiliates. The court held that, if an objecting creditor relied on the separateness of the entities, it was not sufficient for the proponent to show that the benefits of consolidation “heavily” outweigh the harm to the objecting creditor. The court emphasized that the analysis should not mechanically apply a set of factors and instead should give particular weight to key factors, such as whether (i) the debtor entities “disregarded separateness so significantly their creditors relied on the breakdown of entity borders and treated them as one legal entity,” or (ii) post-petition, the assets and liabilities are so “scrambled that separating them is prohibitive and hurts all creditors.” Further courts should generally recognize the separateness of entities.
- *Gray v. O’Neill Properties Group, L.P. (In re Dehon, Inc.)*, 2004 WL 2181669 (Bankr. D. Mass. 2004) – Court found that, if the facts alleged were true, the plan administrator could be able to make out a sufficient case for the substantive consolidation of the debtor and its affiliates. The court focused on the fact the affiliates appeared to have been financially inseparable from the debtor and under its complete control. If substantive consolidation is established at trial,

the plan administrator could file a complaint regarding a property sale that would have otherwise been untimely.

3. Claims

- *In re A.G. Fin. Serv. Ctr., Inc.*, 395 F.3d 410 (7th Cir. 2005) – Court has opened the door for punitive damages in bankruptcy proceedings noting, however, that they may equitably be subordinated on a case-by-case basis. The court wrote that “if state law allows punitive awards against insolvent parties, there is no federal bar.”
- *In re Hayes Lemmerz International, Inc.*, 313 B.R. 189 (Bankr. D. Del. 2004) – Discussed critical vendors and their ongoing exposure in bankruptcy to prepetition preference claims.

4. Bankruptcy Estate

- *Rousey v. Jacoway*, 544 U.S. 320 (2005) – IRAs are exempt from inclusion in bankruptcy estate. Bankruptcy Code § 522(d)(10)(e).
- *JP Morgan Chase Bank v. Altos Hornos de Mexico, S.A.*, 412 F.3d 418 (2^d Cir. 2005) – Court affirmed holding deferring to foreign bankruptcy proceedings.

5. Secured Parties, Set Off, Leases

- *Meyer Medical Physicians Group, Ltd. v. Health Care Service Corporation*, 385 F.3d 1039 (7th Cir. 2004) – Court evaluated the mutuality requirements for setoff under Section 553(a) of the Bankruptcy Code. The court held that, regardless of the character of the debt and regardless of whether the offsetting obligations arose from different transactions, setoff was appropriate because the offsetting obligations arose under the same right and between the same parties standing in the same capacity as obligor and obligee.
- *In re Midway Airlines Corp.*, 406 F.3d 229 (4th Cir. 2005) – Court held that a personal property lessor was entitled to an administrative expense for payments due under the lease for 13 months but that immediate payment was not required.

Comment: The case is potentially important with respect to treatment of personal property lessors post-petition.

6. *Avoidance Actions*

- *Sherwood Partners, Inc. v Lycos, Inc.*, 394 F.3d 1198 (9th Cir.), cert. denied, 126 S. Ct. 397 (2005) – The Bankruptcy Code preempted a state statute that would allow an assignee for the benefit of creditors to avoid a transfer that unsecured creditors themselves could not avoid.
- *In re Enterprise Acquisition Partners, Inc.*, 319 B.R. 626 (9th Cir. 2004) – A security interest was perfected more than 90 days, but less than one year, before the filing of bankruptcy by the debtor. The secured party was married to the president of the debtor. The secured party was not an “insider” because he was not an “insider” as to the debtor, although he was an “insider” as to its president. The court could not use *alter ego* doctrine to treat the president as the true “debtor” to make the secured party an insider in the absence of inequitable conduct.
- *In re Computrex, Inc.*, 403 F.3d 807 (6th Cir. 2005), rehearing en banc denied by 2005 U.S. App. LEXIS 20863 – Case involved a disbursing agent that processed freight charges and that commingled client funds. Even though the disbursing agent exercised some discretion in which payments it sent out first, the payments were not preferential payments by the disbursing agent prior to the disbursing agent’s bankruptcy.

B. *Consumer*

- *Dunlap v. Credit Protection Association, L.P.*, 419 F.3d 1011 (9th Cir. 2005) – Applying the “least sophisticated debtor” test under the Fair Debt Collection Practices Act, 15 U.S.C. § 1692e, the collection agency’s name did not mislead a debtor into thinking that failure to pay a *de minimis* debt would result in damage to his credit.
- *Rita Camacho v. Bridgeport Financial Inc.*, 430 F.3d 1078 (9th Cir. 2005) – Debt collector violated Fair Debt Collection Practices Act by telling a consumer that the consumer’s dispute of the debt must be in writing.

C. Professionals

- *Chicago Truck Drivers, Helpers & Warehouse Workers Union Pension Fund v. Brotherhood Labor Leasing*, 406 F.3d 955 (8th Cir. 2005), cert. denied, 126 S. Ct. 1143 (2006) – An order to pay money to a pension fund is an “injunction” and court could impose contempt sanctions on a financially distressed debtor, its principal and its attorneys for failure to pay. On counsel’s advice, the debtor used its available funds to pay legal bills and other expenses rather than complying with a court order to make payments to the pension fund.
- *Tom Frame, et al. v. PricewaterhouseCoopers LLP*, 2005 Cal. App. LEXIS 1978 (Cal. App. 1st Dist. Dec. 28, 2005) – Accounting firm could be liable for aiding and abetting the fraud of another if it could be shown that accounting firm had actual knowledge of the fraud of the other person and the accounting firm provided “substantial assistance” to the fraud.