Highlights to the 2025-2026 Edition

This year's update covers developments in a large number of areas. The proper interpretation of borrower or lender action in connection with language in the loan documents is a perennial issue. For example, in McDevitt v. Hill, 2025 WL 353071, at *3 (Tex. App. Jan. 30, 2025) [Section 4:21] the court decided that the question of whether a promissory note was a demand instrument should be sent to the jury when parol evidence suggested that the note would be repaid as certain liquidation events occurred as opposed to simply on demand. Other cases raise the issue of how signatures are made on guarantees, whether in an individual capacity or in a representative capacity and underscore why lenders and their counsel must insist on clarity when parties are signing documents. Aware Products LLC v. Epicure Medical LLC, 2025 WL 973801, at *14 (E.D. Mo. Mar. 31, 2025) [Section 4:18].

UCC financing statement issues arose in several different scenarios. One court was presented with the novel issue of whether a court order could substitute for a properly filed financing statement and decided against it. In re IYS Ventures, LLC, 662 B.R. 336, 343 (Bankr. N.D. Ill. 2024) [Section 4:3] Another issue for courts has been what to do about financing statements filed by parties who are disgruntled over their treatment by various state or federal officers. Some of these individuals subscribe to the "sovereign citizen" theory which rejects the authority of the courts over them. Likewise, some individuals will file unauthorized financing statements against lenders as a means of generating leverage. Courts have been flummoxed on exactly how to handle these types of situations. Some courts will issue injunctive relief First BanCorp v. Christopher, 2024 WL 4366961, at *12 (D.V.I. Sept. 30, 2024) while others suggest that the aggrieved party has sufficient relief under UCC-518(a) to have the offending filing expunged and thus do not need injunctive relief. United Servs. Auto. Ass'n v. Lions Share Tr., 2023 WL 2145418, at *3 (Del. Ch. Feb. 21, 2023)[Section 4:4] In any event, because people who follow this line of thinking have access to materials from like minded individuals on the internet, the issue is not one that will disappear any time soon and lenders need to be thinking in advance about how they are going to address it.

Following every recession when lending has tightened comes a loosening up period. In the tight credit period lenders require full guarantees. When things loosen up you begin seeing non-

recourse loans as competition for deals heats up. One of the results of the loosening up a of credit standards after the last real estate recession was the development of the "carve-out "or "bad-boy" guarantees where the loan is essentially non-recourse except for certain "bad boy" actions such as for fraud or misapplication of loan proceeds. Courts have no problem enforcing these types of guarantees. U.S. Bank Nat'l Ass'n as Tr. for Registered Holders of Wells Fargo Com. Mortg. Sec., Inc., Multifamily Mortg. Pass-Through Certificates, Series 2019-SB63 v. 1078 Whillmore LLC, 740 F. Supp. 3d 157, 172 (E.D.N.Y. 2024); Cerco Bridge Loans 6 LLC v. Schenker, 2025 WL 622608, at *9 (S.D.N.Y. Feb. 26, 2025) [Section 4:29].

This year, the Third Circuit mulled the solvent debtor exception in Chapter 11 bankruptcies. Ordinarily, a creditor is not entitled to interest that accrues post-petition on account of a prepetition unsecured claim. Some courts have recognized an exception to this general rule when a debtor becomes solvent during the bankruptcy. This year, the Third Circuit joined the Fifth and Ninth Circuits in recognizing the solvent debtor exception. Section 14:8 notes the Third Circuit's decision and the appropriate rate of interest the Third Circuit determined is due prepetition unsecured creditors in solvent debtor cases.

Five years after its passage, bankruptcy courts continue to divine the nuances of Small Business Reorganization Act. This year, courts considered who decides the appropriate period over which a debtor must fund plan payments to satisfy confirmation requirements in a Subchapter V bankruptcy. Section 14:13 notes that courts concluded that court determines whether payment period is appropriate and outlines the factors courts consider in assessing the adequacy of a plan's payment period.

Revised Article 9 introduced the concept of authenticated record. Under Revised Article 9, an authenticated record is a record that is signed or executed or otherwise contains a symbol, or is encrypted with the present intent of authenticating the record. This year, the Missouri Court of Appeals considered whether a notice to a debtor that was printed on letterhead inscribed with the creditor's name and included the creditor's address and phone number at the bottom of the page qualified as an authenticated record. Section 17:24 reveals the Missouri Court of Appeals' conclusion.

Before the adoption of Revised Article 9, several courts concluded that a creditor's commercially unreasonable disposition of collateral absolutely barred the creditor from obtaining a deficiency judgment against the debtor. The adoption of Revised

Article 9 was largely thought to replace the absolute bar with a rebuttable presumption that a commercially reasonable sale would leave no deficiency when a creditor disposed of collateral in a commercially unreasonable manner. This year, the Utah Court of Appeals decided the absolute bar rule is alive and well in certain circumstances. Section 17:32 notes the circumstances in which the Utah Court of Appeals found that the absolute bar rule still appropriate.