Highlights to the 2026-2027 Edition

This year's update covers developments in a large number of areas. As is oftentimes the case, many of the reported decisions involve contract interpretation. What was the scope of the security interest the lender was seeking? What did the parties understand when they began to enter into workout negotiations? Questions can arise from the initial drafting of the loan documents or form documents passed around during the workout phase. *Bank of Smithtown v. 264 West 124 LLC,* 105 AD2d 468, 469, 963 NYS 2d 176, 178 [Sec 1:14] dealt with the significance of a pre-negotiation letter. Lenders are pretty clear as to their expectations-we're going to have some conversations that may or may not result in a loan being modified or defaults waived. Borrowers are a bit more hopeful and may feel that an agreement has already been been reached. *Bank of Smithtown* is a reminder at that the lender's expectations are the correct one-simply agreeing to talk does not bind the bank to enter into any sort of modification.

A common issue involves the proper application of anti-waiver provisions in loan documents. Borrowers consistently believe that if a lender accepts a late payment after it has already accelerated the loan that the loan default has now been waived. Sadly for them, most loan documents contain an anti-waiver provision which allows a bank to exercise its loan collection rights in any order it so chooses. Accepting a late payment does not cure the problem. *Medley v. BMI Federal Credit Union,* 2026-Ohio -1525 § 15, 2026 WL 1146622 (Ohio Ct App. 16th District Franklin County). [Sec 2:15]

Another interesting case involving contract drafting and the selection of precise language was presented in *Burns v. Evergreen Design & Construction, LLC,* 2025 WL 388397, *1 (6th Cir 2025). [Sec 4:39] The documents in question called for "binding mediation." While the court pretty much assumed that the party drafting the document intended to require binding arbitration, the court was not going to rewrite the contract.

This year, in *United States v. Miller,* 604 U.S. 518 (2025), the Supreme Court resolved a circuit split on the scope of the Bankruptcy Code's waiver of sovereign under section 106 and non-bankruptcy law avoidance actions that the trustee or debtor-in-possession could bring against governmental units under section

544(b) of the Bankruptcy Code. The Court of Appeals for the Seventh Circuit had concluded that section 106 listing section 544 generally did not waive sovereign immunity for the non-bankruptcy law avoidance action. The Ninth and Tenth Circuit Court of Appeals had concluded the opposite. Section 13:44 reveals the Supreme Court's resolution of this circuit split and what bankruptcy trustees and debtors-in-possession must demonstrate to bring non-bankruptcy ;aw avoidance actions against governmental units.

Since shortly after its enactment in 2020, Courts have wrestled with the scope of an entity's Subchapter V discharge after completing plan payments under non-consensual Subchapter V plan. Many bankruptcy courts and the Ninth Circuit Bankruptcy Appellate Panel conclude that an entity's Subchapter V discharge includes debts that would be ordinarily be saved from an individual's discharge under section 523 of the Bankruptcy Code, consistent with a non-Subchapter V entity's discharge. The Courts of Appeals for the Fourth and Fifth Circuits have disagreed, concluding that an entity is not discharged from the debts listed in section 523 after completion of payments under a non-consnesual Subchapter V plan. This year, the Court of Appeals for the Eleventh Circuit considered this issue. Section 14:14 notes where the Eleventh Circuit sided.

Under the UCC, a creditor must not breach the peace when repossessing collateral using self-help. Over the years, a question arose whether a creditor having law enforcement present at a self-help repossession breached the peace. Some courts had concluded the mere presence of law enforcement during a self-help repossession did not breach the peace. This year, two courts disagreed. Section 16:17 notes those court's disagreement and their rationale.

This year, another court reminds us of the importance of creditors taking care to properly notify debtors and secondary obligors of a collateral's sale. In *Independent Bank v. Davis,* 118 U.C.C. Rep. Serv. 847 (Ala. Civ. App. 2025) [Sec. 17:24], the Alabama Court of Civil Appeals consider the adequacy of a sale notice to a secondary obligor where the secured creditor addressed the notice to the debtor and secondary obligor and sent the notice to the debtor's address. The Alabama Court of Civil Appeals deemed the notice inadequate because the debtor and secondary obligor lived at different addresses and the creditor could have easily verified the secondary obligor's location.