

EQUIPMENT LEASING UPDATE

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2018 Equipment Leasing Update

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2018 Equipment Leasing Update

TOPICS OF DISCUSSION

- > Uniform Commercial Code Legal Update & Best Practices
- > Issues with Community Property States
- > Graves Amendment Update & Autonomous Vehicles
- > Sales/Use Tax Compliance
- > Lease Accounting Changes
- > Tax Reform on Equipment Leasing Industry



Uniform Commercial Code Legal Update & Best Practices

Wrongful Repossession

- > *Hyman v. Capital One Auto Finance*, 2018 U.S. Dist. LEXIS 10320 (W.D. PA. 2018)
- > Repo Agent on private property. Pennsylvania State Police on site.
- > Five-Count Complaint: (1) FDCPA against Repo; (2) “Breach of Peace Claim” against Capital One under U.C.C. 9-609; (3) Conversion against Capital One and Repo; (4) Trespass against Capital One and Repo; and (5) Federal Civil Rights Claim against State Troopers, 42 U.S.C. 1983.
- > Motion to dismiss claims 3-5 Denied.

Wrongful Repossession

- > **Practice Tip:** Negotiate a Voluntary Surrender Agreement or obtain Order for Replevin.
- > Liability for Personal Property (“I left my gold plated tool set in the truck”).
- > General Rule: If property actually left, return or be subject to conversion claim.
- > What does the Security Agreement say? (Lessee has ___ days to advise of any personal property, or deemed abandoned)
- > **Practice Tip:** inspect and document the condition of the equipment.

UCC-1 Financing Statements

RECALL FROM LAST YEAR

- > UCC Section 9-503(a) requires that a UCC Financing Statement sufficiently provide the name of the debtor as indicated on the public record of the debtor's jurisdiction of organization. Minn. Stat. § 336.9-503(a).
- > UCC Section 9-506(a) states that a financing statement substantially satisfying the requirements is effective, even if it has minor errors or omissions, ***unless the errors or omissions make the financing statement seriously misleading.*** Section 9-506(b) states that, except as provided in 9-506(c), "... a financing statement that fails sufficiently to provide the names of the debtor in accordance with Section 9-503(a) ***is seriously misleading.***"

UCC-1 Financing Statements

RECALL FROM LAST YEAR

- > UCC Section 9-506(c) provides an exception, stating “if a search of the records of the filing office under the debtor’s correct name, using the filing office’s standard search logic, if any, would disclose a financing statement that fails to sufficiently provide the name of the debtor in accordance with Section 9-503(a), the name provided does not make the financing statement seriously misleading.”

UCC-1 Financing Statements

- > *In re Pierce*, 2018 Bankr. LEXIS 287 (Bankr. S.D. Ga. Feb. 2018).
- > Financing Statement ineffective to perfect security interest under UCC 9-503(a) where individual debtor's name did not match Driver's License.
- > UCC Financing Statement: "Kenneth Pierce" / DL: "Kenneth Ray Pierce".
- > Debtor signed his DL "Kenneth Pierce".
- > "Seriously Misleading". Court wiped out secured claim entirely.

UCC-1 Financing Statements

- > *In re Voboril*, 568 B.R, 797 (Bankr. E.D. Wisc. 2017)
- > Individual Debtor's Name listed in the "organization" box.
- > "Seriously Misleading" as Wisc. maintains separate indices for individual and organization debtors.
- > UCC-1 Financing Statement ineffective to perfect security interest.
- > **Practice Tip:** Be precise.

UCC-1 Financing Statements

RECALL FROM LAST YEAR

- > Security Agreements
 - > UCC 9-108, Sufficiency of Description
 - > Detailed

- > Financing Statement
 - > UCC 9-502(a)(3), intended for notice
 - > Broad

- > UCC 9-108, Sufficiency of Description, requires a security agreement to “reasonably identify” the collateral.

- > By contrast, a financing statement need only “indicate the collateral,” pursuant to UCC 9-502(a)(3).

- > In Minnesota, “[a] financing statement sufficiently indicates the collateral that it covers if the financing statement provides (1) a description of the collateral pursuant to Section 336.9-108 ...” Under Minn. Stat. § 336.9-108, “a description of personal or real property is sufficient, whether or not it is specific, if it reasonably identifies what is described.”

UCC-1 Financing Statements

- > *In re 8760 Service Group LLC and Pelham Property, LLC*, 2018 Bankr. LEXIS 1363 (Bankr. W.D. Mo. 2018).
- > Financing Statements need not be precise in providing an “indication of collateral.” UCC 9-504.
- > UCC-1 identified collateral: “all Accounts receivable, inventory, equipment, and all business assets located at 1803 W. Main Street, Sedalia, MO 65301.”
- > Problem: 1803 just a business office. Most of the equipment located at different address.
- > 2 years later, another secured party filed a financing statement covering the debtor’s “equipment”.
- > Bankruptcy Court: First UCC-1 was “ambiguous” and might cover the collateral in question. Thus, second secured party could not rely and had a duty to inquire further.
- > **Practice Tip:** Inquire Further. Obtain the Security Agreement, collateral description.

UCC-1 Financing Statements


- > *In re Reckart Equipment, Co.*, 2017 Bankr. LEXIS 624 (Bankr. N.D. W.V. 2017).
- > UCC Financing Statement sent with improper fee was indexed, but not effective.
- > UCC Financing Statement sent with proper fee and not indexed, was effective to perfect security interest.

Perfection of Security Interest in Trust Assets

UCC 336.9-503

- > (a) Sufficiency of debtor's name. A financing statement sufficiently provides the name of the debtor:
 - > (3) if the debtor is a trust or trustee acting with respect to property held in trust, only if the financing statement:
 - > (A) provides the name specified for the trust in its organic documents or, if no name is specified, provides the name of the settlor and additional information sufficient to distinguish the debtor from other trusts having one or more of the same settlors; and
 - > (B) indicates, in the debtor's name or otherwise, that the debtor is a trust or is a trustee acting with respect to property held in trust.

UCC Financing Statement



UCC FINANCING STATEMENT
FOLLOW INSTRUCTIONS

A. NAME & PHONE OF CONTACT AT FILER (optional) Mr. Bank Representative or Filer Name			
B. E-MAIL CONTACT AT FILER (optional) BRepresentative@bank.com			
C. SEND ACKNOWLEDGMENT TO: (Name and Address)			
Mr. Bank Representative USA Bank 789 Bank Circle Bank City, MN 55XXX			

THE ABOVE SPACE IS FOR FILING OFFICE USE ONLY

1. **DEBTOR'S NAME:** Provide only one Debtor name (1a or 1b) (use exact, full name; do not omit, modify, or abbreviate any part of the Debtor's name). If any part of the Individual Debtor's name will not fit in line 1b, leave all of item 1 blank; check here and provide the Individual Debtor information in item 10 of the Financing Statement Addendum (Form UCC1Ad).

1a. ORGANIZATION'S NAME John Adams Revocable Living Trust				
OR	1b. INDIVIDUAL'S SURNAME	FIRST PERSONAL NAME	ADDITIONAL NAME(S) (INITIALS)	SUFFIX
1c. MAILING ADDRESS: 123 Trust Avenue		CITY: Trust City	STATE: MN POSTAL CODE: 55XXX	COUNTRY:

2. **DEBTOR'S NAME:** Provide only one Debtor name (2a or 2b) (use exact, full name; do not omit, modify, or abbreviate any part of the Debtor's name). If any part of the Individual Debtor's name will not fit in line 2b, leave all of item 2 blank; check here and provide the Individual Debtor information in item 10 of the Financing Statement Addendum (Form UCC1Ad).

2a. ORGANIZATION'S NAME				
OR	2b. INDIVIDUAL'S SURNAME Adams	FIRST PERSONAL NAME John	ADDITIONAL NAME(S) (INITIALS)	SUFFIX
2c. MAILING ADDRESS: 456 Settlor's Way		CITY: Settlor City	STATE: MN POSTAL CODE: 55XXX	COUNTRY:

3. **SECURED PARTY'S NAME** (or NAME OF ASSIGNEE OF ASSIGNOR SECURED PARTY): Provide only one Secured Party name (3a or 3b)

3a. ORGANIZATION'S NAME USA Bank				
OR	3b. INDIVIDUAL'S SURNAME	FIRST PERSONAL NAME	ADDITIONAL NAME(S) (INITIALS)	SUFFIX
3c. MAILING ADDRESS: 789 Bank Circle		CITY: Bank City	STATE: MN POSTAL CODE: 55XXX	COUNTRY:

4. **COLLATERAL:** This financing statement covers the following collateral:
Trust assets description.

5. Check only if applicable and check only one box: Collateral is held in a Trust (see UCC1Ad, item 17 and instructions) being administered by a Decedent's Personal Representative

6a. Check only if applicable and check only one box: Public Finance Transaction Manufactured Home Transaction A Debtor is a Transferring Utility Agricultural Loan Non-UCC Filing

6b. Check only if applicable and check only one box: Lessor/Lessee Consignor/Consignee Seller/Buyer Bailor/Bailee Licensee/Concave

7. ALTERNATIVE DESIGNATION (if applicable):

8. OPTIONAL FILER REFERENCE DATA:

International Association of Commercial Administrators (IACA)

FILING OFFICE COPY — UCC FINANCING STATEMENT (Form UCC1) (Rev. 04/2011)

Trust Scenarios

FILING PROCEDURES

	Scenario One	Scenario Two	Scenario Three	Scenario Four	Scenario Five	Scenario Six	Scenario Seven	Scenario Eight	Scenario Nine	Scenario Ten	Scenario Eleven	Scenario Twelve	Scenario Thirteen
Who is the Debtor?	Trust	Trust	Trust	Trust	Trustee	Trustee	Trustee	Trustee	Trustee	Trustee	Trustee	Trustee	Trustee
What is the Debtor Type?	Registered Organization	Organization (not registered)	Organization (not registered)	Organization (not registered)	Individual	Registered Organization	Organization (not registered)	Individual	Individual	Registered Organization	Registered Organization	Organization (not registered)	Organization (not registered)
Is the Trust Named?	YES	YES	NO	NO	YES	YES	YES	NO	NO	NO	NO	NO	NO
Is there a Settlor?	N/A	N/A	YES	YES	N/A	N/A	N/A	YES	YES	YES	YES	YES	YES
What is the Settlor Type?	N/A	N/A	Individual	Organization (all types)	N/A	N/A	N/A	Individual	Organization	Individual	Organization	Individual	Organization
1a (UCC-1)	Name of Trust	Name of Trust	N/A	Name of Settlor	Name of Trust	Name of Trust	Name of Trust	N/A	Name of Settlor	N/A	Name of Settlor	N/A	Name of Settlor
1b (UCC-1)	N/A	N/A	Name of Settlor	N/A	N/A	N/A	N/A	Name of Settlor	N/A	Name of Settlor	N/A	Name of Settlor	N/A
1c (UCC-1)	Trust's Mailing Address	Trust's Mailing Address	Trust's Mailing Address	Trust's Mailing Address	Trustee's Mailing Address	Trustee's Mailing Address	Trustee's Mailing Address	Trustee's Mailing Address	Trustee's Mailing Address	Trustee's Mailing Address	Trustee's Mailing Address	Trustee's Mailing Address	Trustee's Mailing Address
1e (UCC-1)												N/A	N/A
10 (UCC-1ad)	N/A	N/A	Distinguish debtor from other trusts w/settlor	Distinguish debtor from other trusts w/settlor	N/A	N/A	N/A	Distinguish debtor from other trusts w/settlor	Distinguish debtor from other trusts w/settlor	Distinguish debtor from other trusts w/settlor	Distinguish debtor from other trusts w/settlor	Distinguish debtor from other trusts w/settlor	Distinguish debtor from other trusts w/settlor
17 (UCC-1ad)	N/A	Trust	Trust	Trust	Trustee	Trustee	Trustee	Trustee	Trustee	Trustee	Trustee	Trustee	Trustee
Place of Filing	Where the Trustee is registered	Trust's principal place of business; CEO	Trust's principal place of business; CEO	Trust's principal place of business; CEO	Trustee's principal residence	Where the Trustee is registered	Trustee's principal place of business; CEO	Trustee's principal residence	Trustee's principal residence	Trustee's principal residence	Where the Trustee is registered	Where the Trustee is registered	Trustee's principal place of business; CEO

Certificate of Trust

CERTIFICATE OF TRUST

STATE OF MINNESOTA)
) ss.
COUNTY OF _____)

The undersigned, _____, _____, as Co-Trustees of the Residuary Trust under Will of _____ dated _____, hereby certify the following:

1. This Certificate of Trust relates to that certain revocable trust entitled the Residuary Trust dated _____ (the "Trust Instrument"), executed by _____, as Settlor, and by _____, as Trustee.
2. The name of the Settlor is _____.
3. The name of the original Trustees are: _____.
4. The names of each successor Trustee if _____, _____, _____ unable to act as Trustee are: _____.
4. The name and address of each trustee empowered to act as co-trustees under the Trust Instrument at the time of the execution of this Certificate of Trust are:

(name)
(address)
(city, state zip)
5. The Trustees are authorized by the Trust Instrument to sell, convey, pledge, mortgage, lease, or transfer title to any interest in real or personal property except as limited by the following: None
6. The Trust Instrument has not terminated and has not been revoked.
7. The undersigneds hereby represent that the statements contained in this Certificate of Trust are true and correct, and that there are no other provisions in the Trust Instrument or amendments to it that limit the powers of the Trustees to sell, convey, pledge, mortgage, lease, or transfer title to interests in real or personal property.

STATE OF MINNESOTA)
) ss.
COUNTY OF _____)

The foregoing was subscribed and sworn to before me this _____ day of May, 20____, by _____, as Trustee of the Residuary Trust Under Will of _____ dated _____.

Notary Public

(Notary Seal)

Perfection Issues

LIMITED LIABILITY COMPANIES AND LIMITED PARTNERSHIPS

- > Are the equity interests in limited liability companies and partnerships “General Intangible” (UCC § 9-102(42)) or “Investment Property” (UCC § 9-102(49))
 - > UCC § 336.9-102 (42) “General intangible” means any personal property, including things in action, other than accounts, chattel paper, commercial tort claims, deposit accounts, documents, goods, instruments, investment property, letter of credit rights, letters of credit, money, and oil, gas, or other minerals before extraction. The term includes payment intangibles and software.
 - > UCC § 336.9-102 (49) “Investment property” means a security, whether certificated or uncertificated, security entitlement, securities account, commodity contract, or commodity account.

Perfection Issues

LIMITED LIABILITY COMPANIES AND LIMITED PARTNERSHIPS

- > Has the company taken steps to be treated as a security pursuant to UCC Art. § 8-103(c)
 - > UCC § 336.8-103(c) An interest in a partnership or limited liability company is a general intangible and is not a security or a financial asset, except as follows:
 - (1) An interest in a partnership or limited liability company is a security and is not a general intangible if it is dealt in or traded on a securities exchange or in a securities market, its terms expressly provide that it is a security governed by this article, or it is an investment company security.
 - (2) An interest in a partnership or limited liability company is a financial asset and is not a general intangible if it is held in a securities account.

Perfection Issues

LIMITED LIABILITY COMPANIES AND LIMITED PARTNERSHIPS

- > If the equity interests are a general intangible, the sale method of perfection is by filing (UCC § 9-310 (a))
 - > First to file will govern priority (UCC § 9-322 (a))
- > If the equity interests are investment property, then need to determine if the securities are certificated or uncertificated. You can perfect by **filing**, **control**, or **possession**. (UCC § § 9-312(a), 9-313(a), 9-314(a))
 - > If security interests are uncertificated securities, a second party can perfect by **filing** or **control**.
 - > For purposes of priority, a secured party with control or possession has priority over a secured party by filed.

Perfection Issues

COMMON MISTAKES

- > Description of the collateral:
 - > The secured party getting the “insurance benefits” distributions and “governance rights.”
 - > To get both, the security interest must specifically state both.
 - > Must check statutes and organizational documents to determine requirements to obtain both and restrictions.
 - > May need to prohibit changes to the organizational documents and election opting in or out of Article 8.

Paid in Full

- > Borrower makes reduced payment indicated (on check or accompanying letter) as *Paid in Full* or otherwise indicated final payment (specific language not required).
- > UCC 3-311 balance discharged if check is cashed.
- > If not acceptable, do not cash and return.
- > If cashed in error, 90 days to refund.

Forum Selection Clause

- > Good News: Forum Selection Clauses are favored in most jurisdictions.
- > Challenges:
 - > Overbroad
 - > Public Policy
 - > No Relation
 - > Floating Forum Selection

Forum Selection Clause

- > Typically upheld because it promotes certainty.
- > Lease/ Loan language: All disputes under Lease/ Loan must be brought exclusively in designated state of Lessor. Lessee/ Borrower consent to jurisdiction and venue in Lessor's state and waive all challenges to inconvenient forum.
- > [Reminder: also consent to choice of law in designated state].
- > **Practice Tip:** Be sure to carve out the right for Lessor to bring suit for recovery of collateral where the collateral is located.

Forum Selection Clause

CHALLENGES

- > Overbroad: *Brooke Group Ltd. v. JCH Syndicate*, 87 N.Y. 2d 530 (1996). “In any Court located in the United States”.
- > Public Policy: intended to protect the citizens of the state.
- > No Relation to State: no compelling reason to be in a particular state. Give a reason. Home state of Lessor; incorporated state of Lessor; location of equipment.

Forum Selection Clause

CHALLENGES

- > Floating Forum Selection: one which subjects a contracting party to jurisdiction and venue wherever an assignee of the other contracting party may be located, even if the assignee is unknown or unidentified at the time of the contract.
- > Not universally recognized.
- > For example, *Preferred Capital, Inc. v. Power Engineering Group, Inc.*, 112 Ohio St. 3d 429 (2007). At the time of contract, at least one contracting party doesn't know where they are subjecting themselves to jurisdiction and venue.

Forum Selection Clause

- > *Signature Financial, LLC v. Neighbors Global Holdings LLC et al*, LEXIS 208857. *Judge Rakoff*
- > Defendants moved to dismiss for lack of personal jurisdiction in New York or transfer venue to South District of Texas.
- > Court denied the motion in its entirety. Floating forum selection enforced under NY state law:
 - > Facilitate the loan assignment market.
 - > Lower costs of servicing portfolios.
 - > Lenders with large portfolios can efficiently bring suits for non-payment in one place.
 - > By enforcing clauses, NY courts lower borrowing costs for lessees by expanding pool of capital available to finance leases.
 - > If NY invalidated clauses, NY financial institutions might reduce buying leases extended in other states, reducing access to capital in these areas.

Commercial Reasonableness

- > UCC 9-627 requires disposition in commercially reasonable manner.
- > *Patriarch Partners v. U.S. Bank*, 2017 U.S. Dist. LEXIS 145365 (SDNY 2017).
- > Collateral: Loans to portfolio companies and equity interest in those companies.
- > Default: Trustee for secured creditors sought public sale and to “bid in” at sale.
- > TRO: Borrowers brought TRO (violation of UCC 9-610). TRO granted. Amended sale procedure.
- > **Practice Tip:** How to comply with 9-627? Obtain advance judicial confirmation of sale; set terms/experts/conditions.
- > Consider setting process for unique collateral in Loan/Lease documents. *Bank Leumi v. GM Diamonds*, 2017 NY App. Div. (2017)

Default Judgement

> Compare

- > Stringent review: *Xerox Corp. v. AC Square, Inc.*, 2016 WL 5898652 (U.S. Dist. Ct. N. D. Cal.)
- > Less stringent review: *PNC Equipment Finance, LLC v. MDM Golf LLC*, 2016 WL 3453057 (U.S. Dist. Ct. S.D. Ohio).

Recourse for Breach of Rep. and Warranty

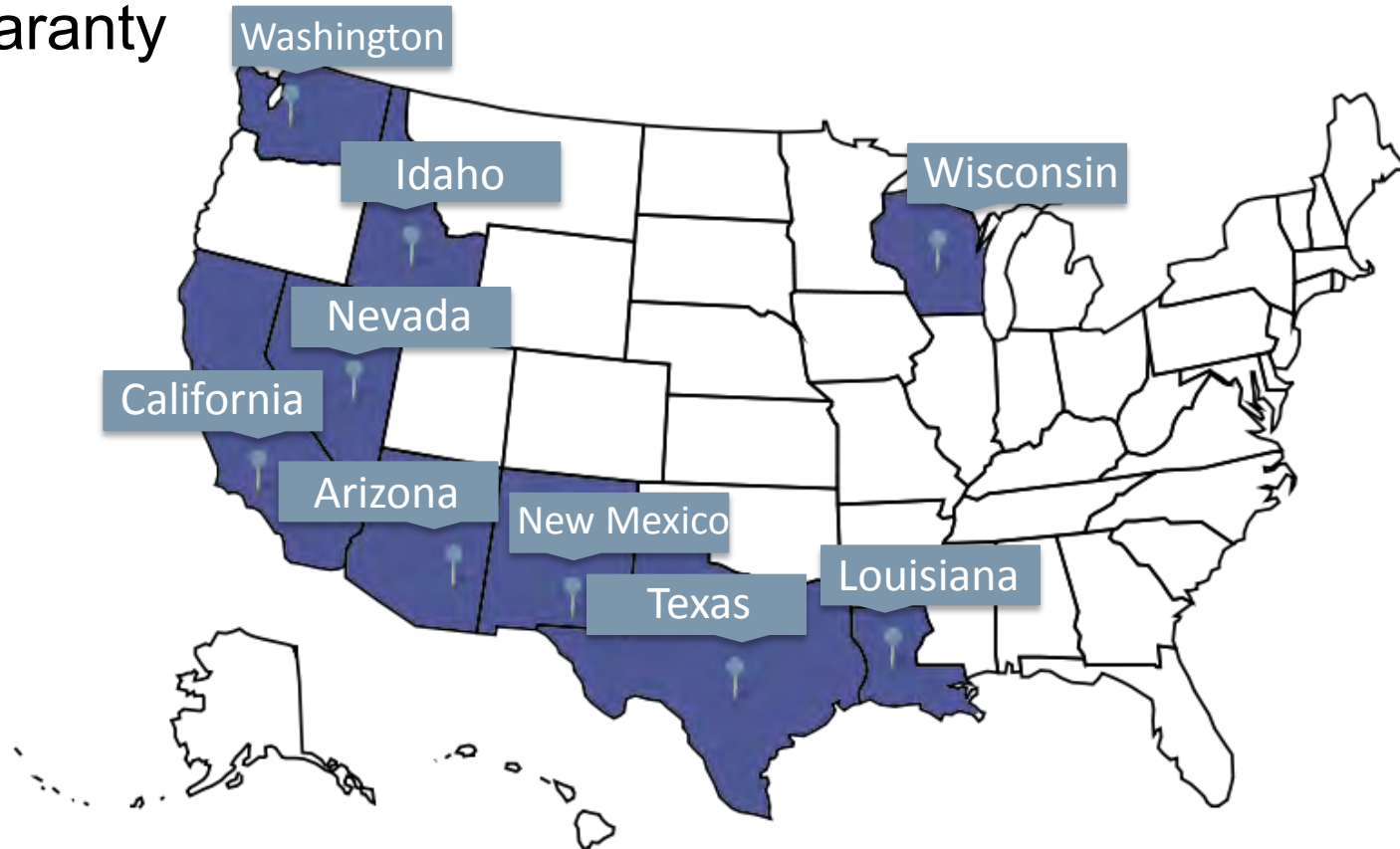
- > United Leasing, Inc. v. Balboa Capital Corp., 2017 WL 3674926
- > Balboa sold a portfolio of leases to United. United wanted recourse when it discovered a lessee had falsified information.
- > List of reps and warranties in purchase agreement preceded by “to Seller’s knowledge”.
- > Court held NO RECOURSE. (1) United agreed to conduct its own credit review; (2) non-recourse assignment; (3) agreement that Seller was not responsible for lessee’s creditworthiness.
- > Court held any ambiguity against drafter.
- > Good, practical result.



Issues with Community Property States

Community Property States

- > In these states, if you get a guaranty from only one spouse, then only their separate property is subject to guaranty



Equal Credit Opportunity Act (ECOA)

- > On multiple occasions, judges have ruled that forcing a spouse to sign a personal guaranty without first evaluating the credit worthiness of the initial guarantor is discrimination based on marital status.

The Community Property Regime

NO PRE- OR POST-NUPTIAL AGREEMENT

HIS Separate Property	OUR Community Property	HER Separate Property
<p>Consists of:</p> <ol style="list-style-type: none">1. The property he brings into the marriage2. The property that he inherits3. The property the couple agree is his sole and separate property only <p>His Separate Property is only subject to the claims of his creditors <u>only</u></p>	<p>Consists of:</p> <ol style="list-style-type: none">1. All the property acquired or earned by the spouses of either of them during the marriage2. The property that the spouses agree will be community property <p>Our Community Property is subject to the claims of the creditors of <u>both</u> spouses</p>	<p>Consists of:</p> <ol style="list-style-type: none">1. The property she brings into the marriage2. The property that she inherits3. The property the couple agree is her sole and separate property only <p>Her Separate Property is only subject to the claims of her creditors <u>only</u></p>

Source: Forbes.com

The Community Property Regime

TYPICAL RESULT AFTER DIVISION

HIS Separate Property	OUR Community Property	HER Separate Property
<p>Consists of:</p> <ol style="list-style-type: none">1. The property he brings into the marriage2. The property that he inherits3. The property the couple agree is his sole and separate property only <p>His Separate Property is only subject to the claims of his creditors <u>only</u></p>	<p>NONE. The parties agree that all property has been divided, that no community property will be created in the future, and each spouse is liable for their own debts only.</p>	<p>Consists of:</p> <ol style="list-style-type: none">1. The property she brings into the marriage2. The property that she inherits3. The property the couple agree is her sole and separate property only <p>Her Separate Property is only subject to the claims of her creditors <u>only</u></p>

Source: Forbes.com

Community Property States

ARIZONA

- > The provisions of A.R.S. § 25-215 enacted in 1973 altered the law as to community liability:
 - > Community property is liable for a spouse's premarital debts and liabilities to the extent of that spouse's contribution to the community.
 - > Community property is liable for quasi-community debts.
 - > **Both spouses must be joined in any legal action for a debt or obligation in order to recover from community property.**

Community Property States

WISCONSIN

- > W.S.A. 766.55. Obligation of Spouses. Effective December 15, 2013
 - > (1) An obligation incurred by a spouse during marriage, including one attributable to an act or omission during marriage, is presumed to be incurred in the interest of the marriage or the family. A statement separately signed by the obligated or incurring spouse at or before the time the obligation is incurred stating the obligation is or will be incurred in the interest of the marriage or the family is conclusive evidence that the obligation to which the statement refers is an obligation in the interest of the marriage or family, except that the existence of that statement does not affect any interspousal right or remedy.

Community Property States

CALIFORNIA

- > West's Ann.Cal.Fam.Code § 910. Community estate; liability for debts. Effective January 1, 2017
 - > (a) Except as otherwise expressly provided by statute, the community estate is liable for a debt incurred by either spouse before or during marriage, regardless of which spouse has the management and control of the property and regardless of whether one or both spouses are parties to the debt or to a judgement for the debt.
 - > (b) "During marriage" for purposes of this section does not include the period after the date of separation, as defined in Section 70, and before a judgement of dissolution of marriage or legal separation of the parties.



Graves Amendment Update & Autonomous Vehicles

The Graves Amendment

49 U.S.C. § 30106

- (a) In general. An owner of a motor vehicle that rents or leases the vehicle to a person (or an affiliate of the owner) shall not be liable under the law of any State or political subdivision thereof, by reason of being the owner of the vehicle (or an affiliate of the owner), for harm to persons or property that results or arises out of the use, operation, or possession of the vehicle during the period of the rental or lease, if—
 - (a) the owner (or an affiliate of the owner) is engaged in the trade or business of renting or leasing motor vehicles; and
 - (b) there is no negligence or criminal wrongdoing on the part of the owner (or an affiliate of the owner).
- (b) Financial responsibility laws. Nothing in this section supersedes the law of any State or political subdivision thereof—
 - (a) imposing financial responsibility or insurance standards on the owner of a motor vehicle for the privilege of registering and operating a motor vehicle; or
 - (b) imposing liability on business entities engaged in the trade or business of renting or leasing motor vehicles for failure to meet the financial responsibility or liability insurance requirements under State law.

Recent Cases Interpreting Graves Amendment

- > Holdover (or Terminated/Expired) Lease As Graves Exception

- > *Chase v. Cote*, 2017 Conn. Super. LEXIS 3533 (Super. Ct. June 12, 2017).

Recent Cases Interpreting Graves Amendment

- > Lessor Reserving a Right to Inspect Driving Records and/or Vehicles Does Not Equate to a Duty to do so
 - > Negligent Entrustment
 - > *Knecht v. Balanescu*, 2017 U.S. Dist. LEXIS 169829 (M.D. PA. Oct 13, 2017).
 - > *Edwards v. Zipcar, Inc.*,
 - > *Scott v. A Betterway Rent-A-Car & Kirk G. Anglin*
 - > Negligent Maintenance
 - > *Cardona v. Mason & Dixon Lines, Inc.*, 2017 U.S. Dist. LEXIS 83233 (S.D. Fla. May 31, 2017).
 - > *Zaraei v. Saini*
 - > *Anglero v. Hanif*
 - > *Rivera v. Prerac, Inc.*

Recent Cases Interpreting Graves Amendment

- > Graves Amendment Defense Is Not Grounds for Removal of Action to Federal Court
 - > *Burns v. U-Haul of Providence*, 2018 U.S. Dist LEXIS (D.R.I. Jan 2, 2018)

TRAC Leases

- > *In re: Lightning Bolt Leasing*, U.S. Bkrpt., Middle Dist. Fla, Jacksonville Division (May 25, 2016)
 - > TRAC leases treated as disguised security agreement

Autonomous Vehicles

DEVELOPMENT

- > According to a March 2017 study published by U.S. Chamber for Legal Reform, an affiliate of the U.S. Department of Commerce, fully autonomous vehicles will be widely available by 2025.
- > Companies developing self-driving cars, including auto manufacturers, technology companies, and ride-sharing services, include familiar companies: Tesla, Google, Uber, Ford (invest in start-up Argo AI), General Motors (invest in start-up Cruise Automation; Lyft).

Autonomous Vehicles

EXPECTED BENEFITS

- > **Safety:** If 10% of the cars on the road were fully Autonomous, 1,000 lives could be saved each year. If the percentage increased to 90% fully autonomous vehicles, 22,000 lives could be saved.
- > **Cost Savings:** If 10% of the cars on the road were fully autonomous, \$18 billion could be saved each year. If the percentage increased to 90% fully autonomous vehicles, \$350 billion could be saved.
- > **Societal Benefits:** Ease traffic congestion and promote ride-sharing, Reduce fuel consumption, lower harmful emissions, Reduce distracted (text) and impaired (DWI) driving, Mobility to seniors and physically impaired.

Autonomous Vehicles

TECHNOLOGY

- > Technology is evolving in stages. Society of Automobile Engineers (SAE) has identified automation levels, from level 0 (no automation) to 5 (full automation).
 - > **Level 2:** partial automation: driver remains responsible for environment and key driving tasks
 - > self-correcting lane changes, cruise control, parallel parking
 - > **Level 3:** (SAE calls “conditional automation”) vehicle performs driving functions, human driver as back up
 - > computer mapping, radar, cameras, sensors, technology to read the road, driving conditions
 - > **Level 4:** Highly automated
 - > **Level 5:** Vehicle-to-Vehicle Communication
 - > Autonomous vehicle can “see”; exchange of data between vehicles and infrastructure. Transmit speed, braking, direction, mapping, road conditions, weather, and traffic signals

Autonomous Vehicles

IMPACTS ON FINANCE

> Data

- > Auto Finance News, June 2017, reports that by 2030 the total value of data from self-driving vehicles could reach \$1.5 trillion.
 - > Who owns the data? Privacy concerns? Digital Payment?
 - > Digital and instant finance origination and approval process.

Autonomous Vehicles

IMPACTS ON FINANCE

> Loan Volume Decline

- > A 2016 Deloitte University Press study found that \$500 billion in new loans and leases are originated annually, with 86% of new car purchases and 55% of used car purchased relying on borrowed money from banks, captives, or fleet financiers. *DUPress.com*.
 - > The study anticipated that overall loan volumes will decline as customers “transform” from individual buyers to consumers of rental, fleet, ride-share, and other products. Who owns the data?
 - > Expense of collateral will increase.

Autonomous Vehicles

IMPACTS ON FINANCE

> Industries and Brand

- > Commercial fleet financing v. consumer preference.
 - > Industries expected to take advantage: Rental Car, Delivery Services, and Municipalities.
 - > Will consumers pay more for experience?

> Liability and Exposure

- > Laws vary state to state.
 - > Negligence and Product Liability theories.
 - > California and Nevada place liability for an accident on the “operator” of an autonomous vehicle. “Operator” is defined as the person behind the controls or who “causes the technology to engage”. Cal. Vehicle Code 38750; Nev. Rev. Stat. § 482A.030.

Autonomous Vehicles

IMPACTS ON FINANCE

> Insurance

- > Efforts under way to establish a National Insurance Fund.

> Location and recovery of collateral

- > GPS tracking

Autonomous Vehicles

LEGAL & PRACTICAL CONSIDERATIONS

- > Vicarious liability claims against equipment lessors are preempted by the Graves Amendment, unless the lessor is negligent. Typically, negligence claims involve negligent entrustment to the lessee or negligent maintenance by the lessor. A driverless car might arguably automatically fit either theory of negligence (notwithstanding safety studies). Is Graves appropriate and sufficient as written?
- > Autonomous vehicles already exist, so liability is the primary limiting factor in actual usage.

Autonomous Vehicles

LEGAL & PRACTICAL CONSIDERATIONS

- > States and even municipalities are considering laws relative to autonomous vehicles.
- > Will these be ineffective or even necessary given interstate travel, especially in commercial settings? Many believe the first usage of autonomous vehicles in commercial settings will be trucks driven autonomously exit-to-exit, with drivers handling local routes.

Autonomous Vehicles

LEGAL & PRACTICAL CONSIDERATIONS

- > Some degree of autonomy is already present in the market (lane-keep assist, proximity warnings, electronic stability control, adaptive cruise control).
- > Case law teaches us that warnings, disclosures and clear liability shifting in lease agreements is instrumental in avoiding liability.
- > Lessors/rental companies would be well served to consider these existing technologies and revise agreements accordingly now. Considerations include risk disclosures, ensure manufacturer instructions are received and acknowledged, clearly state lessee has chosen the specific vehicle with the specific autonomous driving features, reiterate need for appropriate license(s), continue to monitor specific insurance requirements for autonomous vehicles and be prepared to amend lease documents accordingly upon changes in the law.

Autonomous Vehicles

LEGAL & PRACTICAL CONSIDERATIONS

- > Insurance. Who is insuring? Who is insured? Will/can a national fund be established?
- > Expense of new technology will change ownership and finance. Owner operators may struggle to finance new technology, even though “driverless” vehicles might allow 24 hour usage and reduce competition.
- > Expense of new technology might increase demand for car sharing and fractional ownership.

Autonomous Vehicles

LEGAL & PRACTICAL CONSIDERATIONS

- > Lease market may shift. Those who can/will finance a \$250,000 truck might not be same that finance a \$500,000 automated truck. Those lenders who are prepared now will be able to approve deals in real time when borrowers/lessees are demanding the product.
- > Cyber security risks increase. Autonomous means remotely instructed. Likewise, joint control of personal data between multiple parties increases risks of mishandling.

Autonomous Vehicles

LEGAL & PRACTICAL CONSIDERATIONS

- > Employment and union issues are looming. Unions are lobbying at full throttle against the technology. “It is vital that Congress ensure that any new technology is used to make transportation safer and more effective, not used to put workers at risk on the job or destroy livelihoods,” Teamsters President James P. Hoffa.