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THE TRANSACTIONAL LAWYER

Volume 14 – April 2024

DOWN WITH LEGALESE – BUT UP WITH "HEREBY"

Scott J. Burnham

In an article in this newsletter last month on superfluous words, Stephen Sepinuck noted that in a security agreement, the granting clause "hereby pledges, collaterally assigns, mortgages, transfers and grants" could be shortened to "hereby transfers" or "hereby grants" without any reduction in meaning.[1] Curiously, Sepinuck did not treat the "hereby" as superfluous, apparently implying that it serves a useful purpose. This article makes explicit what Sepinuck left to implication.

With little success, experts on legal drafting have been imploring us to eschew the archaic "here-" and "there-" words such as *herein, heretofore, hereinafter, hereunder, thereof, thereto, therewith, thereunder, therefor, thereon,* and *therefrom*. Bryan Garner's entry on "Here- and There- Words" in Garner's Dictionary of Legal Usage concludes by stating that "[t]hese words are generally to be used only as a last resort to avoid awkward phrasing."[2] The use of these terms often sounds like padding, a leftover from the days when drafters were paid by the word, or like the drafter trying to sound lawyerly. They are sometimes used as adverbs and sometimes used as conjunctions, but a more modern and clearer substitute can always be found.[3] For example, traditional contract language of transition such as "Now, Wherefore in consideration of the mutual covenants and promises set forth in this agreement, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows," can be reduced to the pithy "It is agreed."

Sometimes the usage borders on the comical. In a Montana case involving the sale of a business, the agreement began by stating:

> On this date 3-8-77, I, Terry L. Baldwin, here-to-fore known as sellor, and Alan D. Stuber, here-to-fore known as sellee, enter into a selling agreement, which is here-to-fore known as The Natural Look Barber Salon.[4]

The agreement went downhill from there.

Even lawyers get confused by these words. In a release I recently signed, I consented to the use of my likeness "in perpetuity by any means and through any medium now known or hereinafter used." I think the drafter meant "hereafter used" since "hereinafter" generally means "later on in this document" rather than "at a later time."

Garner, however, gives a pass to hereby when it is used not as surplusage, but as a performative adverb.[5] Contracts generally contain obligations that are to be performed at some future time. "Hereby" is correctly used when it indicates that the language itself is effective to accomplish an act. President Nixon had no precedent to guide him when he drafted his letter of resignation. But ever the lawyer, Nixon wrote: "I hereby resign the Office of President of the United States."[6] Nixon was informing us that by writing the letter, he had accomplished the act.

When I officiated at my son's wedding, I got a kick by concluding with "[b]y the power invested in me by the State of California, I hereby declare you husband and wife." It is kind of amazing that the words themselves have the power to accomplish the feat, and "hereby" brings that home.

Many cases support the distinction made by the use of *hereby*. Perhaps the most significant is *Board of Trustees of Leland Stanford Junior University v. Roche Molecular Systems, Inc.*[7] To put the case in context, an employer owns copyrights created by its employees during the course of employment, but the opposite is true of patents, so the prudent employer will secure an assignment of its employees' future patent rights. That is what Stanford attempted to do with its employee, Dr. Holodniy.

Stanford had Holodniy sign an agreement stating that he did "agree to assign" his patent rights to Stanford. Stanford then sent Holodniy to Cetus to learn a technique. There he signed an agreement that he did "hereby assign" his patent rights to Cetus. Holodniy returned to Stanford and Stanford claimed patents on the process he had developed. Roche, which had acquired Cetus, claimed it owned the invention because of the Cetus agreement with Holodniy.

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Citing two prior Federal Circuit cases, the Federal Circuit Court of Appeals held that under federal patent law, the language "agree to assign" in the Stanford agreement was merely a promise by Holodniy to assign his rights to Stanford at some undetermined future time. On the other hand, the language "do hereby assign" in the Cetus agreement was "a present assignment of Holodniy's future inventions to Cetus," thereby giving Cetus immediate rights in Holodniy's future inventions.[8] By the time Holodniy executed an assignment to Stanford with respect to the patent applications that Stanford filed, his rights already belonged to Cetus and the subsequent assignment to Stanford was void. Courts have reached similar results interpreting contract language under state law. [9]

Returning to our original example, "Debtor *shall* grant" and "Debtor *will* grant" are ambiguous because, even when the drafter intended an obligation to be performed immediately, there is an element of futurity in the italicized words.[10] There is no such ambiguity with "Debtor hereby grants." The prudent transactional lawyer will follow Sepinuck's lead and state that the debtor "hereby grants" a security interest in order to make clear that the security interest is granted at the time the security agreement is signed.

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Notes:

1. Stephen L. Sepinuck, *Less Might Not Be More But It Is Often Better*, 14 The Transactional Lawyer 1 (Feb. 2024).

2. BRYAN A. GARNER, GARNER'S DICTIONARY OF LEGAL USAGE, 407.

3. BRYAN A. GARNER, THE REDBOOK, has a section on Avoiding Legalese which provides a list of legalisms and their Plain English translations (4th ed. pp. 246-248).

4. Baldwin v. Stuber, 597 P.2d 1135 (Mont. 1979).

5. BRYAN GARNER, GARNER'S DICTIONARY OF LEGAL USAGE, 407. *But see* David T. Daly, *Top 10 Phrases Not to Use in a Contract*, Mich. Bar J., Feb. 1999, 186-187 ("'Hereby' Always eliminate this unnecessary word. I have been looking for the last few years to find an example of a necessary hereby, and I am still looking.")

6. Nixon Resignation Letter.

7. 583 F.3d 832, 841 (Fed. Cir. 2009) (citing IpVenture, Inc. v. Prostar Computer, Inc., 503 F.3d 1324, 1327 (Fed. Cir. 2007) (interpreting "agree to assign" as "an agreement to assign," requiring a subsequent written instrument); *see also* Arachnid, Inc. v. Merit Indus., Inc., 939 F.2d 1574, 1580-81 (Fed. Cir. 1991) (holding that "will be assigned" does not create "a present assignment of an expectant interest"), *aff'd*, 563 U.S. 776 (2011). *See also* Omni MedSci, Inc. v. Apple Inc., 7 F.4th 1148 (Fed. Cir. 2021) (a term incorporated into the employment agreement between a university and its faculty and providing that patents issued as a result of research directly or indirectly supported by the university "shall be property of the University" did not presently assign a faculty member's rights to a future patent; at most it indicated an agreement to assign in the future).

8. 583 F.3d at 841.

9. *See* National Oilwell Varco, L.P. v. Omron Oilfield & Marine, Inc., 676 F. App'x 967 (Fed. Cir. 2017) (applying Delaware law) (affirming on other grounds the trial court's conclusion that the clause "Contributor shall convey, assign, and transfer the Property to Partnership" was merely a promise to transfer in the future, not a present transfer); LHPT Columbus, LLC v. Capitol City Cardiology, Inc., 24 N.E.3d 712 (Ohio Ct. App. 2014) (clause in wind-up agreement providing that "[t]he real estate leases . . . shall be assigned . . . by an Assignment of Lease . . . substantially in the form attached hereto" did not in fact assign the leases).

10. *See* In re Monson, 2013 WL 12461138 (Bankr. M.D. Fla. 2013) (suggesting that an agreement providing that a lender "will be entitled to file with appropriate governmental agencies any documents necessary to preserve a lien upon all equipment, fixtures, and assets of the [borrower], and you shall agree to execute all documents presented to you in order to establish a lien upon such equipment, fixtures, and assets of the [borrower]," was insufficient to create a security interest). In re Genesis Global Holdco LLC, 2024 WL 478062 (Bankr. S.D.N.Y. 2024) (a security agreement that described the collateral to include "all property from time to time transferred by or on behalf of [the debtor] to or for the benefit of [the secured party]," and which was later amended to provide that the debtor's remote parent would transfer 31,180,804 additional shares of stock to the debtor, which the debtor promptly thereafter "shall transfer or cause to be transferred" to the secured party did not grant a security interest in the additional shares; the agreement unambiguously required a transfer of the additional shares and no such transfer took place).

DISPOSING OF COLLATERAL IN THE ABSENCE OF DEFAULT

Stephen L. Sepinuck & John F. Hilson

Last summer, a New York appellate court ruled in *Walsh v. Ocwen Loan Servicing* that debtors who had granted a security interest in their shares in a cooperative apartment and the associated proprietary lease[1] – which New York law treats as personal property – could not prevent the person who had acquired the shares and lease at an Article 9 disposition from evicting the debtors, even though the debtors claimed that the disposition occurred when there was no default.[2] The ruling is dubious. This article provides a more thorough analysis of the issue than the court did, and then provides advice to transactional lawyers who document Article 9 dispositions.

THE CASE

The debtors in *Walsh*, who had owned and resided in their New York coop for fifteen years, allegedly defaulted on a loan secured by their shares in the coop and the associated proprietary lease. The shares and lease were sold at an Article 9 disposition. Six months later, the buyer commenced a proceeding to evict the debtors from the apartment. The debtors brought a separate proceeding against the secured party, claiming that they had not defaulted under the terms of the loan and that the secured party had failed to provide the required notification of the sale, and seeking a declaration that the sale was invalid.[3] The trial court issued a preliminary injunction enjoining the eviction during the pendency of the action. The buyer appealed the issuance of the injunction.

The appellate court reversed. In a very brief opinion, the court ruled that the relief the debtors sought – essentially, an order vacating the sale – was unavailable under Article 9 of the UCC. Instead, the debtors' only remedy was an award of damages. In support, the court cited to § 9-617 and to three cases. But whether those authorities support the court's ruling depends on precisely what the debtors were arguing, and that was not clear from the court's opinion. If the debtors' argument was based solely on the secured party's failure to send prior notification of the disposition, the court's ruling was correct. If the debtors alternatively or additionally argued that they were not in default when the disposition occurred, and it appears they did make this argument,[4] the authorities cited provide no support for the court's ruling.

SECTION 9-617

Section 9-617 details the principal effects of a disposition of collateral. Subsection (a) provides that:

> A secured party's disposition of collateral after default:
>
> (1) transfers to a transferee for value all of the debtor's rights in the collateral;
>
> (2) discharges the security interest under which the disposition is made; and
>
> (3) discharges any subordinate security interest or other subordinate lien

Subsection (b) then provides that:

> A transferee that acts in good faith takes free of the rights and interests described in subsection (a), even if the secured party fails to comply with this article or the requirements of any judicial proceeding.

Under these rules, a good faith transferee at a disposition after default acquires the debtor's rights in the collateral irrespective of whether the secured party complies with Article 9. Thus, for example, if a secured party fails to send to the debtor advance notification of the disposition, when such notification is required by § 9-611, the debtor might have a claim against the secured party under § 9-625, but the disposition is effective to transfer the debtor's rights in the collateral.[5]

But the result appears to be different if the disposition occurs when the debtor is not in default. In such a situation, subsection (a) clearly does not apply because the opening phrase of that subsection refers to a disposition of collateral "after default."[6] Although subsection (b) does not expressly repeat the phrase "after default," there can be little doubt that the phrase is implied. This is so for two reasons.

First, subsection (b)'s placement after subsection (a) and its reference to "[a] transferee" undoubtedly make that a reference to a transferee mentioned under subsection (a) – that is, to a transferee in a secured party's disposition of collateral. In other words, subsection (b) must be read in context.[7] If instead subsection (b) were read in isolation, it would refer to a transferee but not of what or from whom. In such isolation, it would apply to *the debtor*'s transferee, which would lead to absurd results.[8]

Second, subsection (b) refers to "the rights and interests described in subsection (a)." That is not quite the same thing as referring to "a transaction described in subsection (a)," but it comes very close. Indeed, one of the "interests described in subsection (a)" is "the security interest *under which the disposition is made*." Thus, subsection (b) provides that a transferee takes free of a security interest under which the

disposition is made, and thus necessarily refers to disposition by a secured party. Given that, there is no reason to think it refers to a class of dispositions (those occurring pre-default) to which subsection (a) does not apply.

The import of this is clear. If, after default, a secured party conducts a commercially unreasonable disposition or fails to send the requisite advance notification, the secured party might incur liability to the debtor, but § 9-617(b) protects the transferee and the finality of the disposition. If, however, the secured party conducts a disposition when the debtor is not in default, the act is tortious – conversion of the debtor's property rights – and neither subsection (a) nor subsection (b) applies. As a result, the transferee might not acquire the debtor's rights in the collateral.

THE CITED CASES

The three cases cited by the court in *Walsh* for the proposition that the debtors' only remedy was to seek monetary damages against the secured party all dealt with a disposition of collateral after default. In the first case, the debtor sought to unwind an Article 9 disposition of the debtor's equity interest in a privately held holding company, claiming that the disposition was commercially unreasonable.[9] Although the court was unable to resolve, on a motion to dismiss, the commercial reasonableness of the sale, the court did dismiss the claim for a declaration invalidating the sale.[10]

In the second case, the debtor sought a declaration invalidating the secured party's Article 9 disposition of the debtor's interest in a cooperative apartment.[11] The claim rested on allegations that the security interest was unperfected, that the secured party failed to send the required notification of the sale, and that the sale was commercially unreasonable.[12] The court entered summary judgment for the secured party after concluding that none of these allegations was a basis for invalidating the sale.[13]

The third case involved a dispute about who owned a claim against a bankruptcy debtor. The issued boiled down to a dispute between an entity that had purchased the claim at a disposition conducted by the original claimant's secured party and a subsequent assignee of the original claimant.[14] The subsequent assignee alleged that, because the secured party had not sent the required notification of the disposition, the disposition was invalid. The court rejected the assignee's claim, concluding that even if the notification was insufficient, the appropriate remedy would not be to invalidate the sale but to award damages under § 9-625.[15]

None of these cases supports the *Walsh* court's somewhat cavalier conflation of the debtors' arguments. Selling the shares and proprietary lease without proper notification would, as the court ruled, not be a basis for invalidating the sale. Selling the property when the debtors were not in default is completely different, and none of the authorities cited by the court support its decision.

In fact, although the rules of § 9-617(a) and (b) have been around for over a half-century,[16] there do not appear to be any cases addressing whether they apply in to a disposition conducted in the absence of default.

A MORE COMPLETE ANALYSIS

None of this means that the court was wrong. The mere fact that § 9-617 does not apply does not mean that the buyer at the disposition received no rights; it means instead that we must look to other law to determine what rights, if any, the buyer received. Although the secured party lacked the *right* to sell the collateral, perhaps the secured party nevertheless had the *power* to do so.

For some types of collateral, a secured party does have the power to transfer the debtor's rights to a disposition buyer even if the debtor were not in default. For example, if the collateral were a negotiable instrument in bearer form or indorsed to the secured party, the secured party could transfer the instrument to a holder in due course who would take free of claims to the instrument, including the debtor's claims.[17] A buyer at a disposition could potentially qualify as a holder in due course.[18] If the collateral were a certificated or uncertificated security, a disposition buyer might qualify as a protected purchaser that similarly takes free of adverse claims.[19] A disposition buyer could also acquire good title to a negotiable document of title – and to the goods covered by the document – through due negotiation of the document.[20] Finally, under new Article 12, a buyer at a disposition could potentially be a qualifying purchaser of a controllable electronic record,[21] and thereby take free of a claim of a property right in the controllable electronic record.[22]

Each of the foregoing examples involves a take-free rule of the UCC that protects a limited class of transferees of a specified type of property. For each, a disposition buyer could be within the protected class. For a buyer of goods at an Article 9 disposition, the result is less clear

The first sentence of § 2-403(1) states that a purchaser of goods acquires "all title" which the transferor had or had power to transfer. The second sentence adds that a person with voidable title can transfer good title to a good faith purchaser for value. But these provisions seem to do little to protect a person who buys goods from a secured party. To be sure, a buyer at a disposition is a purchaser.[23] Therefore, under the first sentence, a disposition buyer would acquire all title to the goods that the secured party has or has power to convey. But a secured party does not have title to goods, merely a security interest,[24] which means that the analysis falls back to the

question about whether the secured party has the power to transfer title when the secured party lacks the right to do so. The second sentence would not answer that question because it refers to a person with voidable title, and a secured party lacks title, voidable or otherwise.

For other types of property – accounts and general intangibles, for example – the UCC contains no rule allowing a purchaser to acquire greater rights than the transferor has. For all such property, the issue would again devolve to whether, under the common law, the secured party has the power to transfer the debtor's property rights when the secured party lacks the contractual or legal right to do so. This lack of a clear answer would appear to apply to an interest in a New York cooperative apartment. While there is some limited authority for the proposition that shares in a cooperative apartment do or can constitute a "security" under the UCC,[25] – which would potentially enable a secured party to transfer the shares to a protected purchaser – subsequent developments call that authority into question and strongly suggest that the shares are a general intangible.[26]

The one thing that is clear from all this is that the issue of whether the buyer in *Walsh* acquired the debtor's rights in the collateral deserved far more attention than the two sentences that the court devoted to it.

CONSEQUENCES

One consequence of this uncertainty this is that a buyer at an Article 9 disposition has potential exposure. If the collateral is goods, accounts, or general intangibles, the buyer might not acquire rights to the collateral if the debtor is not in default. The same result would follow in a disposition of other property if the facts are such that the buyer does not qualify as the type of transferee that the law otherwise protects (*e.g.*, a holder in due course of an instrument, a protected purchaser of a security, or a qualifying purchaser of a controllable electronic record).

To put this in context, consider a secured party that repossesses and sells an automobile under the mistaken belief that the debtor has defaulted. The secured party's actions – both the repossession and the sale – would be conversion. If the buyer received possession of the collateral and then refused to surrender the collateral to the debtor, the buyer too might have liability for conversion.[27] In some states, the buyer might be liable for punitive damages.

Such a buyer might have no recourse against the secured party. Although a disposition presumptively includes whatever warranties relating to title accompany a voluntary transfer of such property under applicable law,[28] those warranties can be disclaimed.[29] And experience indicates that secured parties do frequently disclaim the warranty of title at Article 9 dispositions. Indeed, secured parties have good reason to do so. They might have no way to reliably ascertain whether the debtor ever acquired good title. They almost certainly cannot be sure that there are no senior liens that will survive the disposition.[30]

A buyer who gets no warranty of title from the secured party conducting a disposition, but who incurs tort liability to the debtor, might have paid the purchase price, acquired nothing, and yet be liable for additional damages. Even if the buyer does not incur tort liability to the debtor – perhaps because the collateral is intangible or the buyer never obtained possession of it – the buyer will still be out the purchase price but will have received nothing in return.

ADVICE

The risk to buyers at dispositions might be small. After all, there does not appear to be a slew of cases dealing with the finality of an Article 9 foreclosure conducted in the absence of default. Indeed, in the only known case – *Walsh* – the buyer was allowed to retain the property.[31]

Nevertheless, there is a middle ground between warranting good title and providing no warranty at all. A secured party at a disposition should be prepared to warrant that the disposition is being conduced pursuant to § 9-617(a) after default. The following provision should be acceptable to both the secured party and the buyer:

> This sale is being conducted pursuant to Article 9 of the [state] Commercial Code. Seller warrants that the debtor is in default. Seller makes no warranty of title with respect to the [property]. The buyer will acquire only those rights in the [property] that a transferee acquires under § 9-617 of the [state] Commercial Code.

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Notes:

1. A proprietary lease is a lease between the cooperative apartment association and a tenant that carries with it the right to occupy a specific apartment.

2. Walsh v. Ocwen Loan Servicing, LLC, 217 A.D.3d 802 (N.Y. Sup. Ct. App. Div. 2023).

3. *Id.* at 803.

4. *See* Paul Golden, *Second Department Rules That Cooperative Apartment Owners' Rights Are Precarious*, 40

N.Y. Real Estate Reporter 1 (Sept. 2023). Mr. Golden was the lawyer who represented the debtors.

5. *See* U.C.C. § 9-617. cmt. 2.

6. Subsection (a) also does not apply if the transaction is other than a disposition of collateral by the secured party.

7. Such an interpretation would be consistent with the Uniform Law Commission's drafting manual, which counsels those writing uniform laws not to unnecessarily repeat words and states "[i]n a section with subsections, a term in a later subsection may depend on an earlier subsection for its meaning without specific reference back to the earlier subsection if the antecedent is clear." ULC, Drafting Rules and Style Manual, Rule 104(g) (2021).

8. If *the debtor* transferred the collateral, it would be completely inappropriate for the transfer to discharge the security interest. That would create a conflict with § 9-315(a)(1) – which provides that a security interest generally continues in collateral notwithstanding sale – and would undermine the utility of security interests. Moreover, § 9-617 is included in Part 6 of Article 9, which deals with default and enforcement of security interests. If § 9-617(b) applies to transfers of collateral other than dispositions by the secured party, the provision would be far broader than its placement within Article 9 would suggest.

9. Atlas MF Mezzanine Borrower, LLC v. Macquarie Tex. Loan Holder LLC, 105 N.Y.S.3d 59 (Sup. Ct. App. Div. 2019).

10. *Id.* at 65-67.

11. Rapillo v. CitiMortgage, Inc., 2018 WL 1175127 (E.D.N.Y. 2018).

12. *Id.* at *3.

13. *Id.* at *7-10.

14. In re Enron Corp., 2005 WL 3873890 (Bankr. S.D.N.Y. 2005).

15. *Id.* at *9-10.

16. Section 9-617(a) and (b) are derived from § 9-504(4) of old Article 9, which had substantially identical language. Comment 4 to that provision echoed the condition that the debtor be in default by referring to "a purchaser for value from a secured party after default."

17. *See* UCC § 3-306.

18. *See* UCC § 3-302(a).

19. *See* UCC § 8-303(a), (b).

20. *See* UCC § 7-501

21. *See* UCC § 12-102(a)(2).

22. *See* UCC § 12-104(e). This rule would also apply to a controllable account or controllable payment intangible. *See id.* § 12-104(a).

23. *See* UCC § 1-201(b)(29), (30).

24. Even if the secured party was a credit seller that had purported to retain title pending full payment, retention of title would be "limited in effect to a reservation of a security interest." UCC §§ 1-201(b)(35), 2-401(1).

25. *See* Superior Fin. Corp. v. Haskell, 556 F. Supp. 199 (S.D.N.Y. 1983) (decided under old Article 9). *See also* ALH Properties Ten, Inc. v. 306-100th Street Owners Corp., 658 N.E.2d 1034, 1036 n.* (N.Y. 1995) (noting that the issue has vexed courts).

26. *See* First Sav. Bank of Va. v. Barclays Bank, 618 A.2d 134 (D.C. 1992). *See also* N.Y. U.C.C. (McKinney's) § 9-310(d) (providing that, except for a security interest held by the cooperative association, a security interest in an interest in a cooperative may be perfected only by filing a financing statement – a rule inconsistent with treatment of the interest as a security).

27. The buyer's liability might depend on whether the buyer acquired the secured party's rights and, if so, whether those rights permit the buyer to retain possession.

28. *See* UCC § 9-610(d).

29. *See* UCC § 9-610(e).

30. For example, another creditor might have perfected a security interest in the collateral by filing a financing statement that the filing office misplaced of misindexed. If this occurred before the foreclosing secured party filed or perfected, the other creditor's interest would have priority even though there was no way for the foreclosing secured party to have discovered the earlier interest. *See* UCC §§ 9-322(a)(1), 9-517.

31. There have been cases in which the debtor has successfully sued the secured party for conducting a disposition prior to default. *See, e.g.*, Segovia v. Equities First Holding, LLC, 2008 WL 2251218 (Del. Super. Ct. 2008) (a secured party committed conversion by selling pledged stock prior to default, failing to credit the secured obligation with the proceeds received from the sale, and continuing to accept interest payments on the debt that was thereby paid in full). But that is different from an action against the disposition buyer seeking to reclaim the property purchased.

Recent Cases

SECURED TRANSACTIONS

Enforcement Issues

Bren Road LLC v. Talon OP, LP, 2024 WL 545150 (Minn. Ct. App. 2024)
A secured party's purchase of the collateral – an interest in a limited partnership – at a disposition was not effective because notification of the disposition was never sent. The limited partnership interests were not customarily sold on a recognized market. It did not matter that the interests could be exchanged for stock in a parent company that was publicly traded because no such exchange was ever made. There was no indication whether the sale was public or private and no discussion of § 9-617(b).

CCO Condo Portfolio (AZ) Junior Mezzanine, LLC v. Feldman, 2024 WL 622098 (S.D.N.Y. 2024)
The guarantors of four loans secured by the equity in LLCs that owned New York condominiums were liable for the full amount of the deficiency owing after the collateral was sold for $65 million at a public sale. The sale was conducted in a commercially reasonable manner even though it was advertised during the winter holiday season and held shortly after the new year during the COVID-19 pandemic. Advertisements ran in The New York Times and New York Daily News for a week and in the New York Post for a day. 170 potential bidders executed the nondisclosure agreement required to access the data room, 97 entered the data room, and 88 downloaded the due diligence materials. The $500,000 deposit to bid was reasonable as was the requirement that the winning bidder pay a deposit of 5% of the winning bid. The term authorizing the secured party to designate a back-up high bidder if the high bidder failed to close also did not make the sale commercially unreasonable.

Liability Issues

Kamath v. Itria Ventures, LLC, 2024 WL 590603 (N.D. Cal. 2024)
A prospective buyer of receivables that, after conducting its due diligence review, offered less money than indicated in the parties' Receivables Sale Agreement had no liability for failing to provide the full amount or for filing – and then terminating – a financing statement against the prospective seller. The agreement conditioned funding on a due-diligence review at the prospective buyer's "sole discretion" and it expressly authorized the prospective buyer to file a financing statement.

Kabushiki Kaisha Too Marker Products, Inc. v. Global Creative, Inc., 2024 WL 1116116 (D. Or. 2024)
Neither a secured party's loan nor its later acquisition of collateral through a surrender agreement were fraudulent transfers. Although the secured party was also an owner of the debtor, there was no evidence that the loan was concealed, and therefore insufficient evidence that it was made with intent to hinder, delay, or defraud a judgment creditor of the debtor. The value of the collateral did not exceed the amount of the loan, and therefore was transferred for reasonably equivalent value.

Minnesota Bank & Trust v. Principal Securities, Inc., 2024 WL 713957 (D. Minn. 2024)
A secured party had no claim against a stock brokerage company that had breached its promise in a control agreement not to allow the debtor to transfer assets credited to a securities account without the secured party's prior consent. After the debtor transferred all the assets credited to the account, the secured party released its security interest as part of a renegotiation of the loan. By releasing the security interest, the secured party broke the causation chain between the breach of the control agreement and the damages it suffered, with the result that it had no standing to pursue the claim.

Good Meat Project v. GOOD Meat, Inc., 2024 WL 1083462 (N.D. Cal. 2024)
The grant of a security interest in all of the debtor's rights in trademarks did not raise the policy concerns that underlie the Lanham Act's anti-trafficking provision and therefore did not affect the debtor's standing to bring an infringement action.

BANKRUPTCY

Property of the Estate

In re Odonata Ltd., 2024 WL 728882 (Bankr. S.D.N.Y. 2024)
A deposit account that a tenant created and funded with the amount of rent due during its appeal of a case against the landlord, in lieu of a bond, and which the tenant's lawyer and the appellate court referred to as an "escrow," was not a true escrow under New York law. A valid escrow requires an agreement that specifies the terms upon which the escrowed property will be released. There was no such agreement in this case, the deposit account was in the name of the tenant, and the tenant at all times had full control of and access to the funds. Consequently, the deposit account became property of the estate when the tenant filed for bankruptcy.

LENDING, CONTRACTING & COMMERCIAL LITIGATION

Contract Interpretation

PennyMac Loan Servs., LLC v. Pheasant Trail Seventh Owners Ass'n, Inc., 2024 WL 260096 (Iowa Ct. App. 2024)
A term in a Declaration of Condominium that entitled the condominium association to attorney's fees if it "successfully brings an action" to enforce a provision of the Declaration, the Bylaws, or an association rule did not apply when a mortgagee that had acquired a condominium unit through foreclosure brought an action seeking a declaration that it did not owe a foreclosure fee. The association was not a party to the foreclosure action and it did not bring the action seeking a declaratory judgment.

Forum Selection

Celsius Network LLC v. Mawson Infrastructure Group Inc., 2024 WL 807321 (Bankr. S.D.N.Y. 2024)
The arbitration clause in an Equipment Co-location Agreement governed disputes "in connection with" that agreement, but not disputes relating to the contemporaneously executed security agreement and promissory note. Neither the Equipment Co-location Agreement nor the security agreement and promissory note incorporated terms from the other and the former selected Delaware law to govern while the latter selected New York law. Accordingly, the claims for breach of the Equipment Co-location Agreement – along with claims for turnover of property under § 542(b) of the Bankruptcy Code, which were predicated on an alleged breach of the Equipment Co-location Agreement – had to be arbitrated. The claims arising under the promissory note and security agreement were not subject to arbitration and would not be stayed pending arbitration.

Penalties, Fees & Liquidated Damages

Cantor Fitzgerald, L.P. v. Ainslie, 2024 WL 315193 (Del. 2024)
A term in a limited partnership agreement that excused the partnership's obligation to refund a former partner's capital account over a four-year period if the former partner engaged in competitive activities before payment became due was not a liquidated damages clause, and therefore did not need to be a reasonable estimate of damages. The term was merely a condition to the partnership's obligation. Because the state has a fundamental public policy in favor of freedom of contract, particularly in the context of partnership agreements, and the condition did not restrict competition, impair a former partner's ability to work, or support injunctive relief, the condition was not void. The interests to be protected when evaluating a prohibition on competition are significantly weakened when competition is in fact permitted and, as in this case, highly remunerative. The common law's disfavor of forfeitures does not apply to limited partnership agreements.

Remedies

Jet Midwest International Co., Ltd. v. Jet Midwest Group, LLC, 93 F.4th 408 (8th Cir. 2024)
The recipients of an intentionally fraudulent and avoidable transfer were not liable for the attorney's fees that the lender incurred in bringing the avoidance action. Although the transferor/borrower was contractually liable for attorney's fees that the lender incurred in enforcing the loan, and that liability would include attorney's fees incurred in bringing the fraudulent transfer action, the transferees were not parties to that contract and therefore had no liability under that contractual provision. Nevertheless, the transferees were liable for attorney's fees because they had engaged in intentional misconduct, which can serve as a basis for a special exception to the general rule that each party is responsible for its own attorney's fees. The transferees has acted with actual intent to hinder, delay and defraud.

Defenses & Excuses to Contract Liability

Bellinger v. Laboratories Topco LLC, 2024 WL 359273 (D. Del. 2024)
Individuals that sold their business to – and invested in – an existing limited liability company had no cause of action for breach of contract or fraud arising from misrepresentations allegedly made by the company's representatives. The transaction documents stated that no person had been authorized to make a representation or warranty regarding the company or its business, assets, or operations, and that any representation or warranty made could not be relied upon. The transaction documents also contained a merger clause disclaiming the existence of any unwritten term, another clause disclaiming all unwritten representations and warranties, and a third clause prohibiting the individuals from asserting a claim based on any inaccuracy, misstatement, or omissions about the company's finances other than the statements made in writing in the transaction documents. Although Delaware courts sometimes refuse to enforce provisions of a contract that are instruments of fraud if enforcement would circumvent a claim grounded in the same contractual fraud, that doctrine had no applicability to the claim for breach of contract. As to the claim for fraud, even if the individuals had properly pled fraud by deliberate concealment, the anti-reliance terms in the transaction documents bar the claim. Although a general anti-reliance clause – such as one stating that a party has been provided with and evaluated such documents and information as the party has deemed necessary to make an informed decision – will not bar a claim for deliberate concealment, a clause explicitly disclaiming the accuracy and completeness of information provided outside the representations and warranties in the agreement will.

Fertilizantes Tocantins S.A. v. TGO Agriculture (USA) Inc., 2024 WL 916529 (M.D. Fla. 2024)
A domestic fertilizer supplier formed and breached a contract to sell goods to a Brazilian importer even though the agreement was not in a signed writing. The United Nations Convention on Contracts for the International Sale of Goods has no statute of frauds and both usage of trade and the parties' course of dealing indicated that the parties were bound without a signed writing. The supplier's liability was properly measured using the buyer's cover transactions.

Other

Petróleos de Venezuela S.A. v. MUFG Union Bank, 2024 WL 674251 (N.Y. 2024)
Pursuant to UCC § 8-110(a)(1), Venezuela law governs the validity of securities issued by instrumentalities of the Venezuelan government even though the indenture for the securities selected New York law to govern. For this purpose, a provision of the Venezuela Constitution requiring the approval of the National Assembly for "national public interest contracts" related to validity even though it did not specifically address the issuance of securities. It was sufficient that the provision related to the authority of the issuer. In contrast, matters of law relating to enforceability – for example, limits on interest rate or mandatory terms – do not bear on validity. If the securities are invalid, the effect of invalidity is governed by New York law, and that includes whether the issuer can or cannot assert invalidity as a defense.

In re IIG Global Trade Fund, Ltd., 2024 WL 1134734 (S.D.N.Y. 2024)
The fifth amendment to a loan agreement was binding on the parties even though the versions of the document signed by the parties 13 days apart had slight textual differences. The documents were the same in all material respects but: (i) the version executed by the lender bore the words "Execution Copy"; (ii) the dates of execution differed; and (iii) the definition of "Fifth Amendment" referred to those different dates.

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