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Drafting a Bullet-Proof Merger Clause

Jennifer Niesen

A merger clause, also known as an integration clause, is a provision in a written agreement that states that all the terms to which the parties have agreed are incorporated into the writing. A merger clause provides strong, but not conclusive, evidence that the writing is a fully integrated agreement and thus helps to invoke the full force of the parol evidence rule, keeping out evidence of all prior or contemporaneous terms not included in the writing, whether those terms are contradictory or merely supplemental. Nevertheless, even if a writing is fully integrated, parties are normally free to introduce evidence to demonstrate that an alleged contract is either void or voidable. *See* **Restatement (Second) of Contracts § 214(d)**. *See also Citizens State Bank v. Symington*, **780 N.W.2d 676** (N.D. 2010) (parol evidence rule does not bar evidence of fraud, mistake, or accident).

A recent decision by the Supreme Court of Georgia, *Novare Group, Inc. v. Sarif,* **718 S.E.2d 304** (Ga. 2011), suggests that a properly drafted merger clause can not only help prevent admission of supplemental parol terms, but also help bar evidence of fraud or misrepresentation.

In *Sarif,* purchasers of a condominium brought suit against the brokers and the developers alleging fraudulent inducement, negligent representation, and negligent supervision. The purchasers had each bought condominiums from the developers based on advertisements of "spectacular views" and the statements by the brokers that any future development across the street would be low-to mid-rise office buildings that would not block the views. In fact, the developers had already begun plans to build a 46-story building, which eventually blocked the purchasers' views.

Unfortunately for the purchasers, each of them had signed an agreement stating:

(i) "The views from the natural light available to the unit may change over time";
(ii) "Oral representations cannot be relied upon as correctly stating the representations of seller";
(iii) "Neither party has relied upon any representation or warranty not set forth in this Agreement";
(iv) "[T]his agreement contains the entire agreement between the parties hereto."

The Supreme Court of Georgia reasoned that, collectively, these terms barred the purchaser's parol evidence of fraud and misrepresentation because the parol evidence directly contradicted the statements in the writing. Therefore, the trial court properly dismissed the purchaser's claims.

It may be that not all courts will follow this approach. In another recent case, *Webster Bus. Credit Corp. v. Bradley Lumber Co.,* **2011 WL 5974582** (W.D. Ark. 2011) (applying NY law), the court rejected a borrower's claim for fraudulent inducement but in doing so did not rely on the provision in the loan agreement providing that "Borrower acknowledges that it has been advised by counsel in connection with the execution of this Agreement … and is not relying on any oral representations or statement inconsistent with the terms and provisions of this Agreement." Instead, the court focused on the fact that the borrower continued to accept the benefits of the agreement even after it became aware of the allegedly fraudulent misrepresentation.

Nevertheless, a merger clause such as the one in *Sarif* may help prevent admission of evidence relating to fraud, misrepresentation, or similar grounds for avoidance. Such a "bullet-proof" merger clause should: (i) state that the writing contains the entire agreement of the parties relating to the subject matter thereto; (ii) state that neither party has made any

Contents

Drafting a Bullet-Proof Merger Clause 1
Taking a Security Interest in Escrowed Assets 2
Express Warranties by Affirmation under § 2-313: Does a Representation Remain? 3
Section Captions in Contracts 4
Three New Draft PEB Commentaries 7
Recent Cases 7

representation or warranty not included in the writing; and (iii) to the extent possible, expressly negate any misrepresentation that is likely to be alleged.

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Taking a Security Interest in Escrowed Assets

Stephen L. Sepinuck

The debtor has put funds or other property in escrow in connection with a planned transaction. Pursuant to the escrow agreement, the debtor has a contingent right to the funds or property back or, if the planned transaction goes through, to something else in return. Your client wants a security interest in the debtor's rights. What are those rights and how should the security interest be perfected?

In a broad sense, an escrow contemplates two deliveries. The first is from the depositor to the escrow agent and the second is from the escrow agent to the beneficiary. There is little doubt that ownership of the escrowed property does not pass to the beneficiary until the second delivery, or at least until the conditions to the escrow agent's duty to deliver have been satisfied. What is less clear is whether the first delivery – from the depositor to the escrow agent – constitutes a transfer of ownership from the depositor to the escrow agent. Put simply, is an escrow merely a bailment, which involves no transfer of ownership, or is it a trust that involves a transfer of title or other ownership rights from the depositor to the escrow agent, as trustee?

There is some authority for the proposition that it is merely a bailment, and although the depositor loses control of the property placed in escrow, the depositor retains title and ownership thereto until performance of the condition or the happening of the event upon which delivery is to be made by the escrow agent. The bulk of authority, however, is to the contrary:

> Although legal title does not transfer [to the grantee] upon placing property in escrow, the grantor does not necessarily hold the same rights to the property as he did prior to the deposit. Rather, "[w]hen property is delivered in escrow, a trust is created." *FDIC v. Knostman*, 966 F.2d 1133, 1140 (7th Cir. 1992); Restatement (Second) of Trusts § 32 cmt. d (1959) ("At the time of the delivery in escrow there is a presently created trust").

In re NTA, LLC, **380 F.3d 523**, 529-30 (1st Cir. 2004). That said, the mere fact that a trust is created by delivering property into escrow does not mean that title passes to the trustee. *See* **Restatement (Second) of Trusts § 32** cmts. a, d, **§ 56** cmt. b. It may simply mean that the escrow agent acquires trustee-like duties. Nevertheless, most courts have ruled that placing property in escrow removes the property from the depositor's subsequently created bankruptcy estate. *See, e.g., Davis v. Cox*, **356 F.3d 76** (1st Cir. 2004) (dealing with court-ordered escrow pending a division of marital assets); *In re Scanlon*, **239 F.3d 1195** (11th Cir. 2001) (dealing with funds deposited by debtor's mother-in-law, whom the debtor had since reimbursed); *In re Weatherite*, **46 F.3d 1149** (9th Cir. 1995). Instead, the estate contains merely the debtor's retained contingent right to the escrowed assets.

So, what is the depositor's interest and how would it be classified for the purposes of Article 9? The Second Circuit spoke to this issue two decades ago in *Vienna Park Properties*, **976 F.2d 106** (2d Cir. 1992), a case in which creditors claimed a security interest in the depositor's "rights to receive funds now or hereafter deposited in the Escrow Account in accordance with the Escrow Agreement." The court ruled that the security interest was not in the deposited funds themselves, but merely in the depositor's contingent right to return of those funds, a right the court classified as a general intangible. Critical to the court's reasoning was the fact that the secured creditors were not parties to the escrow agreement and claimed a security interest only in the depositor's rights under the escrow agreement. *Id.* at 117. Most other courts are in accord. *See In re E-Z Serve Convenience Stores, Inc.*, **299 B.R. 126** (Bankr. M.D.N.C. 2003) (debtor-client's continuing interest in security retainer provided to law firm was a "general intangible"), although the result may be different if the escrow is itself merely a security device. *See, e.g. In re LDM Dev. Corp.*, **211 B.R. 348** (Bankr. D. Minn. 1997). *See also In re Yeary*, **55 F.3d 504** (10th Cir. 1995) (ruling that escrowed corporate stock did go into the depositor's subsequent bankruptcy estate because the escrow was created for the benefit of a secured party – *i.e.,* to facilitate the exercise of the secured party's rights upon default – and thus the escrow was either by itself or part of a secured transaction). *Contra In re NTA, LLC*, **380 F.3d at 531**.

Still, perhaps resolution of this issue depends on what the security agreement purports to create a security interest in: the escrowed asset or the escrow agreement. In *Vienna Park Properties*, the security agreement purported to collateralize the depositor's "rights to receive" the escrowed funds, not the funds themselves. Thus, the issue in that case was easy to resolve. However, a different result may be possible if the security agreement is phrased differently. Consider a debtor who owns a painting, enters into a sales contract for it, and delivers the painting to an escrow agent to close the sale. The debtor then purports to grant a security interest in either: (i) the painting; or (ii) the debtor's rights under the escrow agreement.

In scenario (i), the security interest should attach to *the painting* because the debtor still has rights in it. This is true regardless of whether title is deemed to have passed to the escrow agent. *See* § 9-202. Accordingly, the collateral would be goods and the security interest could be perfected by filing or through possession by the escrow agent. *See* § 9-313(c). One potential drawback to this approach would be that the secured party's interest, if perfected, might have priority over the buyer's, *see* § 9-317(b), at least unless the secured party expressly or implicitly authorized the sale to the buyer free and clear, *see* § 9-315(a)(1). Thus, the secured party's priority might interfere with the escrow transaction. On the other hand, if the sale does go through, the amounts the buyer pays into the escrow would undoubtedly be proceeds of the painting.

In scenario (ii), the security interest would attach to *the debtor's rights under the escrow agreement*, a general intangible. One potential drawback to this approach is that it is less clear that these rights generate proceeds. For example, if the sale falls through and the painting comes back, is the painting proceeds of the escrow contract? It may be, but the scenario does not fit easily into the definition of "proceeds" in § 9-102(a)(64). Similarly, if the sale does go through, the funds that the buyer pays are undoubtedly proceeds of the *painting*, but it remains questionable whether they are also proceeds of the *escrow agreement*.

Given the uncertainty in all this, secured parties are well advised to insist on a security interest in both (i) the escrowed assets; and (ii) the depositor's rights under the escrow agreement. Perfection in the latter requires filing a financing statement covering either general intangibles or the rights under the escrow agreement. Perfection in the former depends on what the escrowed assets are and may require some form of control agreement.

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Express Warranties by Affirmation under § 2-313: Does a Representation Remain?

Douglas R. Dick

Careful transactional lawyers are cognizant of the distinction between representations and warranties. A representation is a *statement of fact* made by one of the parties to a transaction. If untrue, and if the party making the representation knew or should have known it was untrue, the misrepresentation can be a basis for avoiding the contract and may even give rise to tort liability. A warranty, on the other hand, is a *promise of fact* made by one party. If untrue, it gives rise to contract liability. Transactional lawyers use great care in deciding whether a particular fact should be the subject of a representation, warranty, or both. Unfortunately, Article 2 of the Uniform Commercial may upset this careful planning by converting many representations to warranties. A recent decision from the Eastern District of Pennsylvania provides an ideal backdrop to examine this bit of alchemy.

In *CB Aviation, LLC v. Hawker Beechcraft Corp.*, **2011 WL 5386365** (E.D. Pa. Nov. 8, 2011), Beechcraft contracted to sell a used airplane to CB Aviation. Section II, paragraph 1 of the sales agreement included a statement by Beechcraft that "the Aircraft will be in an airworthy condition." The agreement also provided that the buyer "agrees that, *except for the seller's representations* in Section II, Paragraph 1…, the Aircraft is purchased 'as is, where is, and with all faults.' [Buyer] acknowledges that, in purchasing and accepting the Aircraft, [Buyer] has relied solely upon its own investigation of the aircraft." (emphasis added). After the buyer discovered defects in the plane, the buyer filed suit for breach of express warranty and rescission based on mutual mistake.

The language of the agreement strongly indicates that Beechcraft intended its statement regarding the aircraft's airworthiness to be a representation. However, the court ruled that the statement was an "affirmation of fact or promise," and therefore

constituted an express warranty under § 2-313. It then awarded summary judgment for CB Aviation on the claim for breach of the express warranty.

This portion of the court's ruling was undoubtedly correct. Section 2-313 states that "any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise." Therefore, any representation that is or could be construed as an essential part of the basis of the bargain could potentially be converted into a warranty. U.C.C. § 2-313, cmt. 3. No specific intention to make a warranty is necessary in order for affirmations of fact regarding the goods to become entwined into the fabric of the agreement, nor does a particular reliance need to be shown by the buyer. *Id.*

It is worth noting that § 2-313 does not convert all representations into warranties, merely those that relate to the goods being sold. Thus, a representation regarding the identity or intentions of the seller would still qualify as a representation.

There is no easy way for a seller to avoid having its representations about the goods qualify as an express warranty. Comment 4 to § 2-313 explicitly states that a clause generally disclaiming "all warranties, express or implied" cannot reduce the seller's obligation with respect to a description of the goods and therefore cannot be given literal effect under § 2-316. However, words of limitation such as "to the best of seller's knowledge" or "seller states that it is its belief" could be used in order to avoid an express warranty. Also, the seller could by agreement impose limitations on the time for bringing a warranty claim or the extent of warranty liability, but a seller who makes an express representation about the goods cannot readily avoid warranty liability entirely.

The more interesting question is whether the seller's representation about the goods still qualifies as a representation after § 2-313 has treated it as a warranty. At least one commentator has suggested that it would be "bizarre" if the buyer could not bring a claim for misrepresentation based on an express representation about the goods, but he cited no authority for the proposition that this is in fact how courts have ruled. *See* Kenneth A. Adams, A Manual of Style for Contract Drafting § 12.299 (2d ed. 2008) (also suggesting that it should not matter whether the agreement uses the words "represents," "warrants" or "represents and warrants"). The court in *CB Aviation* rejected the buyer's claim for rescission based on mutual mistake, but did so on the basis that two years had passed and it was not possible to restore the seller to its pre-contract position, not on the basis that there was no misrepresentation or that rescission was otherwise unavailable. This suggests but hardly proves that misrepresentation claims survive. U.C.C. § 2-721 makes clear that rescission for fraud and recovery of contract damages are not mutually exclusive, but that section similarly fails to indicate whether an express representation that qualifies as a warranty loses its force as a representation.

With no definitive guidance available, this is an issue on which transactional attorneys should be very careful. If the attorney truly wants a statement about the goods to function as both a representation and a warranty, perhaps the best advice is to include a clause outlining the remedies for both misrepresentation and breach of warranty.

Representations and Warranties

(a) Seller represents and warrants that:

* * *

(b) All statements under subsection (a) are material to this Agreement and to the transactions thereunder. Buyer has relied on each of these statements and such reliance is reasonable. All statements made under subsection (a) are part of the basis of the bargain. Buyer will be entitled to all remedies under the law for any misrepresentation under subsection (a) and such remedies will be, to the maximum extent permitted, cumulative with any remedies available for breach of warranty.

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Section Captions in Contracts

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In an article in the December, 2011 issue of *The Transactional Lawyer*, I discussed the significance of U.C.C. § 1-109, which provides that section captions or headings are part of the Code provisions. The fact that they are enacted by the legislature along with the text of the sections distinguishes section captions in the U.C.C. from section captions in other statutes, which

are usually added by an administrative agency. Courts, therefore, have given the U.C.C. section captions weight when interpreting the statutes.

When construing statutes outside the U.C.C., courts generally find that the caption may not be used to create an ambiguity that is not contained in the body of the statute. *See, e.g., Bersio v. United States*, **124 F.2d 310** (4th Cir. 1941). When addressing captions in contracts, many courts find that the caption can create an ambiguity, which makes sense since the caption is arguably part of a contract even though it is not part of a statute. Courts then frequently construe that ambiguity against the drafter. Sometimes the drafter will attempt to contract around that possibility by including a boilerplate provision to the effect that the captions are only for convenience and are not to be given any substantive weight. This essay explores cases that have discussed the weight to be given to captions in contracts.

Adhesion Contracts

The issue often arises in an adhesion contract in which a party surrenders a significant right. Insurance contracts, for example, are often drafted by the insurance company without any opportunity for bargaining by the insured. On the other hand, the contract is often subject to state regulation, so it could be argued that the state acts as an agent for the insured in negotiating terms. In Washington, for example, the state may refuse to approve a group health insurance contract "if it has any title, heading, or other indication of its provisions which is misleading." *See* Wash. Rev. Code § 48.44.020(2)(b).

Of course, an ambiguity is usually discovered after the fact, and a court may find that if the substance of the caption differs from the substance of the provision, the court will construe the ambiguity against the drafter. For example, in *Skelton v. Lowen*, **850 F.2d 200** (4th Cir. 1988), the plaintiff insured sought coverage when he became permanently disabled. The defendant trustees argued that they could deny coverage because the relevant portion of the plan was captioned "Temporary Long-Term Disability Program," and therefore applied only to those who had a temporary disability. The court rejected the defendants' argument because the provision itself made no reference to temporary disability.

On the other hand, the caption was given greater weight to achieve a result favorable to the insured in *Public Service Mut. Ins. Co. v. Levy*, **395 N.Y.S.2d 1** (N.Y. App. Div. 1977). In *Levy*, a dentist waited until suit was brought before informing his medical malpractice insurer that his patient had died. The insurance company claimed that the dentist should have given notice at the time of death because the policy required that the insured give notice "in the event of receiving notice of claim or suit, or *any unusual occurrence*." The court, however, noted that this section of the policy was captioned, "Procedure of insured in claim or suit." The Appellate Division affirmed the decision of the trial court, which found that "[a] busy professional man, reading the policy in the midst of the day's many activities, may well be led to believe he need notify the Company only if there is a 'claim' or 'suit' against him, rather than simply 'any unusual occurrence.' "

Similarly, in *St. John's Episcopal Hosp. v. McAdoo*, **405 N.Y.S.2d 935** (N.Y. Civ. Ct. 1978), a hospital asked a husband to sign a form when the hospital treated his estranged wife. The form contained this provision:

> ASSIGNMENT OF INSURANCE BENEFITS: I hereby authorize payment directly to the above named hospital of the hospital expense benefits otherwise payable to me but not to exceed the hospital's regular charges for this period of hospitalization. I understand that I am financially responsible to the hospital for the charges not covered by my group insurance plan.

Based on the last sentence of this provision, the hospital demanded that the husband pay the wife's bill. The court ruled, however, that "defendant would have been entirely justified in concluding from the heading that he was agreeing only to have his union insurance pay for his wife's hospital bills."

Courts often closely scrutinize exculpatory clauses. In *Ferrell v. Southern Nevada Off-Road Enthusiasts, Ltd.* **195 Cal. Rptr. 90** (Cal. Ct. App. 1983), an injured dune buggy driver was able to avoid an exculpatory clause because the language did not clearly state that he released the named parties from liability for their negligence. The court mentioned in passing that "[t]he only time the word 'release' appears in the entire document is in its title," which stated, "RELEASE OF LIABILITY." A later case wisely commented that "drafters of releases always face the problem of steering between the Scylla of simplicity and the Charybdis of completeness." *National & Int'l Bhd. of Street Racers, Inc. v. Superior Court*, 264 Cal. Rptr. 44 (Cal. Ct. App. 1989). In the course of upholding an exculpatory clause, the court cited *Ferrell* as holding that "[a release] will be attacked as totally

ineffective if a key word is placed in the caption for emphasis but not repeated in the text." *Id*. at 46.

Many instances of inadequate captions arise in warranty law. Section 2-316 requires that a disclaimer of implied warranties be conspicuous. In *Massey-Ferguson v. Utley*, **439 S.W.2d 57** (Ky. 1969), the language of disclaimer was not in contrasting type but the caption was. The caption, however, said "WARRANTY and AGREEMENT," language that did not call the buyer's attention to the fact that a warranty was being disclaimed. Accordingly, the court ruled the disclaimer was ineffective. Similarly, in *Blankenship v. Northtown Ford, Inc.*, **420 N.E.2d 167** (Ill. App. Ct. 1981), the court held that a disclaimer was ineffective because the section providing that the factory did not give a warranty was captioned "Factory Warranty."

The courts in these cases seem to be applying the doctrine of reasonable expectations. Knowing that parties do not read form contracts, the drafting party may have a duty to at least call to the attention of the other party a provision that might take that party by surprise. For example, when limiting coverage or warranties, the drafter might better caption the section "What Claims We Cover" or "What the Warranty Covers" instead of "Coverage" or "Warranties." In any event, the prudent drafter should not caption the provision with the opposite of its substance.

If the warrantor gives a Magnuson-Moss warranty, then the content of the caption is regulated. The regulations require that the warranty "must be designated either 'Full (statement of duration) Warranty' or 'Limited Warranty'. Warrantors may include a statement of duration in a limited warranty designation. *The designation or designations should appear clearly and conspicuously as a caption, or prominent title, clearly separated from the text of the warranty.* The full (statement of duration) warranty and limited warranty are the exclusive designations permitted under the Act, unless a specific exception is created by rule." [Emphasis supplied.] *See* **16 C.F.R. § 700.6(a)**.

Negotiated Contracts

The adhesion contract cases often reveal courts straining to find a reason to rule against the more sophisticated party, but courts have found captions troubling in contracts between two sophisticated parties as well. In *In re Carter*, **134 A.2d 908** (Pa. 1957), the dispute concerned the available remedy if an event did not occur. A provision in an agreement for the purchase of a business contained this language:

> (a) *Financial condition at closing*. As of the time of closing the financial condition of the Company and its subsidiaries in the aggregate shall be no less favorable than the financial condition shown on the statements of said corporations dated June 30, 1954 and warranted to be true and complete in paragraph 5(e) hereof.

After the closing, the buyer sought damages because the financial condition was in fact less favorable that that shown on the referenced statements. The court, however, noted that this provision was preceded by this caption and language:

> 9. *Conditions precedent*. All obligations of Buyer under this agreement are subject to the fulfillment, prior to or at the closing of each of the following *conditions:* [Emphasis supplied.]

The language in the caption made it appear that the parties intended that the financial condition being no less favorable was a *condition* to closing, rather than a *promise* that would survive closing. Therefore, if the event did not occur, the remedy of the buyer was to refuse to close rather than to recover damages. This interpretation was strengthened by the fact that an earlier provision contained this caption and language:

> 5. *Representations and Warranties*. Sellers *represent* and *warrant* as follows: [Emphasis supplied.]

Thus, because the drafter clearly knew how to distinguish between a warranty and a condition, the buyer was held to the remedies those captions implied.

Contract Boilerplate Addressing Captions

The case of *M & M Group, Inc. v. Holmes*, **666 S.E.2d 262** (S.C. Ct. App. 2008), also involved an attempt to enforce a condition, but in this case the condition was buried in a recital, violating the rule that recitals should not contain operative language. The recital stated: "[w]hereas, the parties agree that Buyer's obligation to purchase the assets of the business and Seller's obligation to sell the assets is contingent upon Buyer's ability to secure commercial financing at prevailing interest rates." Like the drafter in *Carter*, the drafter in *M & M* demonstrated understanding of how to properly state conditions to performance in another section of the agreement labeled "Contingencies."

Nevertheless, the case came out differently, with the court holding that the parties had intended to create

a condition. One of the factors noted by the court was a boilerplate provision that stated:

> **HEADINGS AND CONSTRUCTION.** The caption headings are used in this Agreement only as a matter of convenience and for reference and do not define, limit, or describe either the scope of this Agreement or the intent of any provision.

By including such a provision, the prudent drafter incorporates into a private agreement the rule for legislation (other than the U.C.C.). Such a provision also assisted the trial court in interpreting a contract provision in *Nissho-Iwai Co. Ltd. v. Occidental Crude Sales, Inc.*, **848 F.2d 613** (5th Cir. 1988).

It is not clear how much weight courts will give to such a provision. While the provision was given weight in the cited cases, it is probably notable that they involved negotiated contracts between sophisticated parties. It is unlikely that such a provision would have turned the tables in the cases involving adhesion contracts cited earlier in this article. Nevertheless, the drafter is unlikely to do any harm by including such a provision in the contract.

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Three New Draft PEB Commentaries

In February, the Permanent Editorial Board for the Uniform Commercial Code issued three new draft commentaries.

One explains how § 9-406 and § 9-408 apply to the transfer of an interest in an unincorporated business organization. The draft commentary is consistent with the analysis in Professor Sepinuck's article ***Analyzing Restrictions on Assigning Ownership Rights in a Business Entity***, published in the February edition of this newsletter. The draft commentary can be accessed at the ALI's **web site**.

A second draft commentary deals with the infamous decision of the New York Court of Appeals in *Highland Capital Management v. Schneider*, 866 N.E.2d 1020 (N.Y. 2007). The commentary explains why the decision is wrong. The commentary also notes that the paragraph added to § 8-102 comment 13 in connection with the 2010 amendments to Article 9 is not limited to matters governed by those amendments or restricted to states that have enacted those amendments, but instead reflects the law as it should have been interpreted at the time of the Court of Appeals decision. The draft commentary can be accessed **here**.

The final draft commentary explains that a limited liability partnership is not a "registered organization" under § 9-102(a)(70) because it is formed by the partnership agreement, not by the filing of a public organic record. The commentary is available **here**.

Recent Cases

Secured Transactions

Branch Banking & Trust Co. v. M/Y BEOWULF,
2012 WL 464002 (S.D. Fla. 2012)
Summary judgment denied on whether bank acquired a security interest in a yacht because the putative debtor signed only in his individual capacity and, while he did own the vessel at some point, it remained unproven whether he owned it at the time he signed the security agreement given that document filed with the Coast Guard five months later described a wholly-owned corporation as the owner.

In re Bucala,
2012 WL 265835 (Bankr. S.D.N.Y. 2012)
Promissory note signed in connection with sale of manufactured home which provided that: (i) the lender could file a motor vehicle lien against the home; (ii) interest would be added to the debt "and secured by the DMV lien"; (iii) the lender was to discharge the lien when the note was fully paid; and, most important, (iv) if the borrower defaulted the home could be repossessed, was sufficient to create a security interest. It did not matter that the note misidentified the model year of the manufactured home, given that the sales contract properly identified the model year and the documents could be read together.

In re Buttke,
2012 WL 529241 (Bankr. D.S.D. 2012)
Application for certificate of title and certificate itself, each of which identified a security interest, did not *create or provide for* a security interest, and thus did not constitute a security agreement.

In re TMST, Inc.,
[2012 WL 589572] (Bankr. D. Md. 2012)
Security Agreement executed by debtor-loan servicer covered only the debtor's rights as "owner" under various servicing agreements, not the debtor's rights as "servicer." Because the owner had the right to terminate and replace the servicer without cause, the rights as owner were substantially more valuable than the rights as servicer. A combined sale by the debtor's bankruptcy trustee of all rights would be allocated 95% to the rights as owner and 5% to rights as servicer, with the former therefore qualifying as proceeds of the collateral.

In re Moye,
[2012 WL 96478] (5th Cir. 2012)
Putative buyers of chattel paper consisting of retail installment contracts for vehicles did not in fact acquire any interest in the chattel paper because the buyers were not licensed as required by Texas law.

Commercial Capital Bank v. House,
[2012 WL 220214] (W.D. La. 2012)
Secured party who perfected security interest in equipment in 1997 and twice filed timely continuation statements – as well as new financing statements for additional secured loans – had priority over subsequent creditor with security interest perfected in 2003 because, even though the original secured party's first loan was paid off, that security agreement covered future advances.

Dayka & Hackett, LLC v. Del Monte Fresh Produce, Inc.,
[2012 WL 234142] (Ariz. Ct. App. 2012)
Prior to amendments in 2009, Mexican law did not generally require a filing as a condition to a security interest obtaining priority over the rights of a lien creditor – something to be assessed in general, not on a collateral-specific basis – and thus secured party that filed in the District of Columbia against Mexican debtors' grape crop had priority over secured party that recorded in Mexico. Junior secured party, which had sold the crop, was liable for conversion because a senior secured party is entitled to possession even if it does not demand possession, although such a demand was in fact made. The fact that the junior secured party also acted as the debtor's distributor, and therefore had recoupment rights with the respect to the sale proceeds was irrelevant.

Valley Community Bank v. Progressive Cas. Ins. Co.,
[2012 WL 581301] (N.D. Cal. 2012)
Insurer that provided Bond and Safe Depository Coverage to bank that issued loan purportedly secured by securities account maintained at brokerage firm was not liable for losses the bank incurred because, even if the control agreement was forged, the proximate cause of the loss was the fact that there were no securities.

GMG Cap. Invs., LLC v. Athenian Venture Parts. I, L.P.,
[2012 WL 10916] (Del. Super. Ct. 2012)
Although the security agreement provided that the secured party's "sole remedy for payment of the Secured Obligations is the Pledged Securities pledged under this Agreement," ambiguity sufficient to prevent summary judgment existed because the promissory note appeared to create a carve-out for certain "Mandatory Payments."

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