

# The Transactional Lawyer

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## Gotcha!: Caught in the Explicitness Trap

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Consider the following three statements, each of which might be found in a written agreement for a commercial transaction:

Borrower hereby grants a security interest in all of Borrower’s personal property to secure [the loan].

Seller [of goods] makes no warranty, express or implied, in connection with this transaction.

Licensee may not assign its rights under this Agreement.

Each of these statements is clear and unambiguous. Yet none of them is likely to be effective. That is because each would run afoul of a legal rule that requires a heightened degree of explicitness for a particular term to be effective. This article refers to such rules as “rules of explicitness.”<sup>1</sup>

There are many rules of explicitness. Some are judicial in origin; others are statutory. Some are specific to one state; some are incorporated in the common law or in uniform legislation, and thus apply widely; and some are federal, and so apply nationally.

If rules of explicitness merely required transacting parties or their lawyers to add a few words to the written agreements they draft, the rules would perhaps be of little consequence. However, some of the rules impose substantial impediments to perfectly legitimate transactions. Others are not widely known, particularly by transacting parties that draft their own documents, and therefore function as traps for the less informed. They surprise lawyers and frustrate parties’ expectations, much

like secret liens.

This article identifies and critiques several of these rules. At the end, it invites readers to submit others, so that a future article can provide a more comprehensive catalogue of the rules of explicitness.

### Benign Rules

Not all rules of explicitness are bad. Some are consumer protection rules that, in effect, require disclosure or the use of clear language so as to inform consumers of the consequence of entering into a transaction. Although many of these rules are premised on the highly dubious assumption that consumers actually read the agreements they sign,<sup>2</sup> such rules are beyond the scope of this article.

Some other rules of explicitness appear to be premised on the belief that contracting parties normally do not intend a particular statement to have its literal meaning. For example, U.C.C. § 2-312(2) states that the warranty of title in a sale of goods can be disclaimed or modified “only by specific language or by circumstances which give the buyer reason to know that the person selling does not claim title in himself or that he is purporting to sell only such right or title that he or a third person may have.” Consequently, the language “Seller makes no warranty, express or implied, in connection with this transaction” would be ineffective to disclaim the warranty of title.<sup>3</sup> This probably makes sense. It is likely that most buyers of goods think of warranties as relating to the *quality of the goods*, not to *ownership or the right to sell* them. Moreover, few buyers would be willing to pay the purchase price for goods that the seller does not or might not own. So, requiring more explicit language or circumstances simply reflects the reasonable observation that contracting parties ordinarily do not understand or intend “no warranty” to exclude the warranty of title.

Similarly, the phrase “time is of the essence” is often included in written agreements to indicate that a delay in performance is material. In other words, it is a somewhat cryptic way of saying “any delay in performing any duty under this agreement is a material breach,” and thereby authorizes the non-breaching party to suspend its own performance. But it is doubtful that the parties to an agreement containing such a phrase really intend that a brief delay in performing a minor duty is a material

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breach. Consequently, some courts will not give literal effect to the phrase,<sup>4</sup> although they would likely enforce a more specific statement (*e.g.*, “any delay in delivery is a material breach”).

A rule of explicitness, such as those described in the previous two paragraphs, designed to give effect to the parties’ likely intent is benign and perhaps even beneficial. Most rules of explicitness are, however, either silly or downright dangerous in the sense that they are traps for the unwary.

### *Silly Rules*

#### **Disclaiming the Warranty of Merchantability**

**“Seller makes no warranty” – “no” ≠ no**

Section 2-316 of the U.C.C. states that, to disclaim the warranty of merchantability in a contract for the sale of goods, the seller must mention “merchantability” or use language – such as “as is” or “with all faults” – that in common understanding makes plain that there is no warranty.<sup>5</sup> Applying this rule, a statement such as “seller makes no implied warranty with respect to the goods” or the shorter and arguably clearer “seller makes no warranty” is probably ineffective to disclaim the implied warranty of merchantability.<sup>6</sup>

To a limited extent, this rule makes sense. The warranty of merchantability is implied in contracts for the sale of goods when the seller is a merchant with respect to goods of that kind.<sup>7</sup> The warranty requires, among other things, that the goods be fit for the ordinary purposes for which such goods are used.<sup>8</sup> In short, the goods must work. However, many buyers probably think of warranties as dealing with the *future performance* of the goods – that is, how long the goods will last – not with whether the goods work *at the time of sale*. Consequently, a phrase such as “seller makes no implied warranty with respect to the goods” probably does not signify to many buyers that the goods might not work *now*. In contrast, a phrase such as “as is” does convey that possibility.

However, the policy underlying the rule seems to have been forgotten when the rule shifts from the language it renders ineffective to the language it regards as effective. The statement “seller makes no implied warranty with respect to the goods” is ineffective to disclaim the warranty of merchantability but the statement, “seller makes no implied warranty of merchantability with respect to the goods” can be effective.<sup>9</sup> In short, adding the words “of merchantability” can change an ineffective disclaimer into an effective disclaimer. If buyers truly understood

those two statements differently, the rule might be justifiable. But there is no reason to think that buyers do that.

#### **Describing Collateral in a Security Agreement**

**“all personal property” = “no personal property”**

Unless an exception applies, for a security interest to attach to personal property, the debtor must authenticate a security agreement that contains a description of the collateral.<sup>10</sup> The description need not be specific as long as it reasonably identifies what is described.<sup>11</sup> Moreover, a description by type of collateral defined in the U.C.C. is effective.<sup>12</sup> However, U.C.C. § 9-108(c) provides that a description such as “all the debtor’s assets” or “all the debtor’s personal property” is ineffective. This rule adds a bit of unnecessary length to a security agreement intended to encumber all of the debtor’s existing personal property. Thus, consider the following two ways of describing the collateral for such a transaction:

all accounts, chattel paper, deposit accounts, documents, goods, general intangibles, instruments, investment property, letter-of-credit rights, letters of credit, and money.	all personal property.
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The description on the left is, with two exceptions,<sup>13</sup> effective to cover all personal property to which Article 9 of the U.C.C. applies. The description on the right is ineffective. So, the law effectively mandates that transactional attorneys use an additional 17 words<sup>14</sup> that neither the debtor nor the secured party might understand. There is absolutely nothing unclear or ambiguous about “all personal property.” In fact, that phrase is probably far more likely to be understood by the parties than the more detailed list that is effective. Yet that simpler and shorter phrase is ineffective. It is telling that the official comments do not attempt to justify this rule; they merely state that it “follows prevailing case law,”<sup>15</sup> as if that were an explanation.

### *Gotcha! Rules*

#### **Describing Commercial Tort Claims**

**“all commercial tort claims” = “no commercial tort claims”**

While on the subject of security agreements, let us consider the language needed for a security interest to attach to a commercial tort claim. For this purpose, a commercial tort claim includes any claim arising in tort if the debtor (the claimant) is a business entity.<sup>16</sup> U.C.C. § 9-108(e)(1) provides that describing collateral by its statutorily defined type is ineffective for a commercial tort claim. Thus, describing the collateral to include “all commercial tort claims” in fact covers none.

This rule is far more problematic than the rule of § 9-108(c) which renders “all personal property” ineffective as a description of collateral in a security agreement. Consider a transaction in which a lender will be making a sizeable loan to a business entity and expects in return to get a security interest in all the entity’s assets. To cover existing commercial tort claims, the security agreement must describe each such claim with some particularity.<sup>17</sup> Yet it is possible that a tort might have already occurred of which the debtor is unaware even though such a tort claim might be one that, in time, will seriously undermine the value of the business. In such a case, it would effectively be impossible for the security agreement to properly describe the claim.<sup>18</sup> An explicitness rule is not supposed to prevent otherwise permissible transactions.<sup>19</sup>

The explicitness rule of § 9-108(e)(1) applies not merely to security agreements, but also to financing statements, where it makes even less sense. Financing statements serve a different purpose than do security agreements. They are designed merely to give interested parties notice of a possible security interest and information about whom to contact for more information. Hence a general description of collateral as “all assets” or “all personal property” is effective in a financing statement.<sup>20</sup> As a result, we end up with a truly anomalous set of rules:

- (i) a description of “all commercial tort claims” is ineffective in a financing statement, but
- (ii) either a more specific description (“all tort claims arising from the explosion of debtor’s factory”) or a more general description (“all assets”) is effective.<sup>21</sup>

It is hard to understand what policy could be served by a rule that validates a very specific description and a very general description, but invalidates one in the middle.

#### Providing for Attorney’s Fees

**“in any action” does not include “on appeal”**

In at least one state, a term in an agreement providing that “in any action relating to this Agreement, the

prevailing party will be entitled to reasonable attorney’s fees,” does not cover fees incurred in a successful appeal. To cover such fees, the clause must expressly refer to fees incurred in appellate proceedings.<sup>22</sup> The rule is apparently premised on the state supreme court’s belief, in the mid-1960s, that the members of the bar generally understood that a contractual stipulation for attorney’s fees would not include attorney’s fees incurred on appeal.<sup>23</sup> Of course, that belief was not based on any empirical data and it completely ignored the fact that contracting parties occasionally draft their own agreements without the assistance of legal counsel.

**“all fees incurred” ≠ fees arising from litigation about fees**

In several states, the judicial penchant for the so-called “American Rule,” which requires each party to pay its own attorney’s fees, has resulted in a rule that an award of attorney’s fees incurred in litigating the entitlement to or amount of attorney’s fees will not be available unless the agreement provides for it “in a clear and decided fashion.”<sup>24</sup> Nothing about this rule is premised on the likely intent or understanding of the people who draft agreements, yet the rule can significantly undermine the benefit and purpose of a contractual clause on attorney’s fees.

#### Providing for Interest

At least two explicitness rules deal with the right to interest on indebtedness. One relates to the agreement between the creditor and the debtor, the other applies to an intercreditor agreement.

**“until full payment is made” = “until judgment is rendered”**

A promissory note, loan agreement or any other contract that provides for an extension of credit will often provide for a specified rate of interest “until payment is made,” although it might also provide for a higher interest rate after default. While such terms are typically enforceable,<sup>25</sup> they will not apply to interest that accrues after a judgment is rendered in federal court. Unless the note or agreement expressly refers to interest “post-judgment,” interest will accrue after the judgment is rendered at the federal statutory rate, which is likely to be much lower.<sup>26</sup> This rule, which apparently applies even if the judgment is merely one that confirms an arbitration award, is a trap both for those who draft loan agreements and for litigators choosing a forum in which to file a claim.

**“until full payment is made” ≠  
“post-petition”**

A subordination agreement between creditors of the same debtor typically will, at least after the debtor defaults if not before, entitle the senior creditor to be paid in full before the junior creditor may receive any payment. If both creditors are undersecured, so that the debtor’s bankruptcy estate will not be paying post-petition interest to either of them, this might mean that the senior creditor is entitled to post-petition interest before the junior creditor is entitled to return of principal. Perceiving this to be unfair, New York courts have adopted and adhered to a rule called “the Rule of Explicitness,” which requires express reference to “post-petition interest” if the junior creditor’s claim to principal is to be subordinated to the senior creditor’s right to post-petition interest. A reference merely to interest until the debt is paid in full is not sufficient.<sup>27</sup>

Given that subordination agreements tend to involve sophisticated parties, each of whom is represented by a lawyer, this rule is unlikely to be major problem. Nevertheless, it is trap for anyone who is unaware of the rule.

#### Contractual Choice of Law

**“the law of [state] governs this Agreement” =  
“the CISG governs this Agreement”**

Consider the following scenario. A merchant in Detroit regularly contracts to buy and sell goods with business entities in other locations. The merchant’s transaction documents – whether they be agreements formally executed by both parties or unilaterally issued purchase orders or sales acknowledgments that form and memorialize the deal – provide that “the law of the State of Michigan governs the agreement and all matters relating to the relationship of the parties thereto.” That language is effective when the counter-party is located in the United States.<sup>28</sup> However, if the counter-party is located in Canada or Mexico, each of which has ratified the United Nations Convention on Contracts for the International Sale of Goods (“CISG”), the choice-of-law clause is likely to be ineffective. Even though contracting parties are free to make the CISG inapplicable to their transaction,<sup>29</sup> most courts dealing with the issue have concluded that more specific language is needed to do that.<sup>30</sup> They have done so not because the intent of the language is unclear, but due to the rather formalistic notion that, due to the Supremacy Clause, the CISG is part of each state’s law. So, to opt out of the CISG, the choice-of-law clause needs to be rephrased to something

like: “the law of the State of Michigan, other than the CISG, governs the agreement and all matters relating to the relationship of the parties thereto.”

**“the law of [state] governs this Agreement”  
means the statute of limitations of some other  
state applies**

Unless a contrary intent is manifest, states interpret a contractual choice-of-law clause as dealing only with substantive law, not procedural law.<sup>31</sup> That distinction can be critical because many states regard a statute of limitations as procedural, and therefore when serving as the forum for litigation, apply their own statute of limitations rather than applicable statute of limitations law.<sup>32</sup> It seems doubtful that parties who choose one state’s law to govern their contractual rights and obligations want another jurisdiction’s statute of limitations to apply. So, to the extent that contracting parties want and are permitted to select the limitations period for claims between them, their choice-of-law clause should expressly refer to the chosen law’s statutes of limitations.

#### Restrictions on Assignment of Rights

**“Licensee may not assign its rights under this  
Agreement” means the Licensee can assign its  
rights.**

Contractual restrictions on the assignment of contract rights often involve a clash between two fundamental policies of American law: (i) freedom of contract, which suggests that contracting parties should be allowed to agree to restrict either or both parties’ right to assign; and (ii) the free alienability of property, which suggests that anyone with contract rights should be able to transfer them, provided doing so has no material impact on the duties or rights of the contractual counter-party.

To some significant extent, the law now sides with the latter principle by overriding contractual restrictions on assignment.<sup>33</sup> But when it does not – that is, when the law permits contracting parties to prohibit or restrict assignment of their contract rights – it nevertheless imposes a rather peculiar rule of explicitness. Under this rule, a contractual term prohibiting the assignment of contract rights merely gives rise to a claim for breach; it does not render assignment ineffective.<sup>34</sup> As the U.S. Court of Appeals for the Third Circuit has explained, there is a difference between the *right* to assign and the *power* to assign, and contractual language that merely prohibits assignment affects only the former.<sup>35</sup> If the parties want to make an attempted assignment ineffective,

they need to expressly so state by adding language such as “and any attempted assignment is void.”

At a superficial level, this rule of explicitness makes some sense. The statement “neither party *may* assign its rights” is phrased as a denial of discretion or permission, not of power. The statement “neither party *shall* assign its rights” appears to be a covenant: that is, a promise not to assign rights. Neither statement purports to deal with the consequence of an assignment. However, given that damages for breach of either statement are likely to be very small and difficult to prove, interpreting either statement as merely a basis for breach makes the statement almost a nullity. It is far more likely that parties using either statement intend to prevent assignment. Thus, requiring additional language to make that clear is somewhat silly and probably frustrates the parties’ intent.

### Scope of Arbitration

**“all disputes arising out of or relating to this Agreement” does not cover issues of arbitrability**

In general, a presumption exists that any ambiguity concerning the scope of an arbitration clause should be resolved in favor of arbitration.<sup>36</sup> This presumption does not apply, however, to issues of arbitrability. Instead, there is a presumption that the parties intend courts, not arbitrators, to decide disputes about arbitrability,<sup>37</sup> including questions such as whether the parties are bound by a given arbitration clause, or whether an arbitration clause in a concededly binding contract applies to a particular type of controversy.<sup>38</sup> In short, courts treat the issue of arbitrability as one for judicial resolution absent clear and unmistakable evidence that the parties delegated the issue to the arbitrator.<sup>39</sup> Consequently, an arbitration clause covering “all claims or controversies arising out of or relating to this Agreement” is not sufficient to delegate the issue of arbitrability to the arbitrator.<sup>40</sup>

Applying this explicitness rule, the courts have reached some questionable distinctions.<sup>41</sup> More relevant to this article, however, most courts regard an incorporation by reference of the rules of the American Arbitration Association, which give the arbitrator authority to rule on the existence, scope, or validity of the arbitration agreement,<sup>42</sup> as sufficiently clear to delegate issues of arbitrability to the arbitrator.<sup>43</sup> As a result, the two clauses below, which differ only by the language in blue, have very different effects with respect to delegating issues of arbitrability, even though neither speaks directly to the issue:

The parties shall arbitrate all claims or controversies arising out of or relating to this Agreement.

The parties shall arbitrate all claims or controversies arising out of or relating to this Agreement pursuant to the commercial arbitration rules of the American Arbitration Association.

This is not a rule of explicitness; it is a rule of inexplicitness.<sup>44</sup>

### Conclusion and Contest

This article has identified thirteen different rules of explicitness: two it classifies as benign, one as silly, and ten as poorly considered rules that trap unsuspecting drafters of agreements. Now it is your turn. Readers are invited to identify additional rules of explicitness by sending a brief message explaining the rule and providing citation to at least one authority that applies the rule. A future article in this newsletter will disclose and discuss these additional rules. A prize will be awarded to the first person who submits a message describing what, in the sole judgment of the editors of the newsletter, is the worst of these rules of explicitness.

### To Submit a “Rule of Explicitness,”

send an email message to:

[sepinuck@gonzaga.edu](mailto:sepinuck@gonzaga.edu)

The message must: (i) briefly explain the rule; and (ii) provide a citation to at least one authority that applies the rule.

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### Notes:

1. A contractual term covered by a rule of explicitness will be enforceable if drafted properly. In contrast, a contractual term that offends public policy might not be enforceable no matter how carefully drafted.
2. See RESTATEMENT (THIRD) OF CONSUMER CONTRACTS, Reporter’s Introduction at 3 (Council Draft No. 4, Dec. 2017) (“disclosure of standard terms generally does not render the assent process any more meaningful, because consumers rarely read the disclosed terms”). These rules are also premised on the assumption

– perhaps less dubious but nevertheless unproven – that consumers understand the terms even when the mandated language is used and read.

3. *See, e.g.*, *Sunseri v. RKO-Stanley Warner Theatres, Inc.*, [374 A.2d 1342](#), 1344-45 (Pa. Super. Ct. 1977) (“Seller shall in nowise be deemed or held to be obligated, liable, or accountable upon or under guaranties (sic) or warranties, in any manner or form including, but not limited to, the implied warranties of title” was ineffective to disclaim the warranty of title). *See also* *Rochester Equip. & Maint. v. Roxbury Mountain Serv., Inc.*, [891 N.Y.S.2d 781](#), 782 (App. Div. 2009) (sale of vehicle “as is” did not disclaim the warranty of title).

Note also that the warranty of title is not designated as an “implied warranty,” and thus even if the quoted language were effective to disclaim all implied warranties – which it is not, *see infra* notes 4-5 and accompanying text – it would still not be effective to disclaim the warranty of title. *See* U.C.C. § 2-312 cmt. 6.

4. *See, e.g.*, *Kodak Graphic Communications Canada Co. v. E.I. du Pont de Nemours and Co.*, [640 F. App'x 36](#) (2d Cir. 2016) (despite a “time is of the essence” clause, a jury could conclude that timely delivery was not a material term); *Foundation Development Corp. v. Loehmann's Inc.*, [788 P.2d 1189](#) (Ariz. 1990) (a tenant’s two-day delay in paying the common area charge was not a material breach despite a provision in the lease that time is of the essence); [RESTATEMENT \(SECOND\) OF CONTRACTS § 242](#) cmt d & ill. 9 (stock phrases such as “time is of the essence” do not necessarily make every delay in performance a material breach). *See also* *Boston LLC v. Juarez*, [199 Cal. Rptr. 3d 452](#) (Cal. Ct. App. 2016) (parties to a lease cannot contract around the materiality requirement so that every breach results in a forfeiture); *Asif Saleem, Think Twice before Using “Time Is of the Essence,”* [7 THE TRANSACTIONAL LAWYER 1](#) (Aug. 2017). *But cf.* *Mining Investment Group, LLC v. Roberts*, [177 P.3d 1207](#) (Ariz. Ct. App. 2008) (refusing to extend *Loehmann's* to a real estate purchase agreement that, instead of having a general time-is-of-the-essence clause, expressly stated that the breach at issue – failure to timely pay – was material); *Milad v. Marcisak*, [762 N.Y.S.2d 282](#) (N.Y. Sup. Ct. 2003) (When “time of the essence” is expressly stated, the parties to a real property purchase agreement are obligated to strictly comply with the terms of the contract).

5. U.C.C. § 2-213(2), (3).

6. *See, e.g.*, *Pay Tel Sys., Inc. v. Seiscor Techs., Inc.*, [850 F. Supp. 276](#), 280-81 (S.D.N.Y. 1994) (language purporting to disclaim any unspecified “warranty, express or implied . . . to any dealer, customer, owner, or user” was ineffective to disclaim the implied warranty of

merchantability); *Richard O'Brien Cos. v. Challenge-Cook Bros., Inc.*, [672 F. Supp. 466](#), 469-70 (D. Colo. 1987) (conspicuous clause stating that “[t]here are no warranties, express or implied, made by Seller on the products sold by it to Dealer, or anyone else” was ineffective to disclaim the warranty of merchantability); *Tarter v. MonArk Boat Co.*, [430 F. Supp. 1290](#), 1294 (E.D. Mo. 1977) (a statement after an express warranty that “[t]he above policy is [the seller’s] entire warranty and no other warranty is intended or implied other than the above stated policy” did not disclaim the warranty of merchantability).

This conclusion is supported not only by cases, but by the last sentence of § 2-316(2), which indicates that a phrase such as “there are no warranties which extend beyond the description on the face hereof” can disclaim the implied warranty of fitness but, by its silence, suggests the phrase does not disclaim the implied warranty of merchantability.

7. U.C.C. § 2-314(1).

8. U.C.C. § 2-314(2)(c).

9. It must be made either orally or conspicuously in a writing.

10. *See* U.C.C. § 9-203(b)(3)(A). Exceptions include situations in which the collateral is in the possession of the secured party pursuant to an oral security agreement, *see* § 9-203(b)(3)(B), and transactions outside the scope of Article 9, *see* § 9-109(d).

11. U.C.C. § 9-108(a).

12. U.C.C. § 9-108(b)(3).

13. One exception is consumer goods, for which a more specific description is required. *See* U.C.C. § 9-108(e)(1). The other exception is commercial tort claims, discussed *infra* notes 15-20 and accompanying text.

14. Many transactional attorneys representing secured parties insist that the longer phrase begin with “all personal property, including,” which causes the longer phrase to be 20 words more than the shorter phrase. One possible benefit to including a reference to “all personal property” is that those words might be effective to encumber property if a security interest in it would be outside the scope of Article 9.

15. U.C.C. § 9-108 cmt. 2. To the extent that the now-codified rule is intended to prevent overreaching, it is poorly designed. Overreaching is more properly addressed through a restriction on what contracting parties may do, *see, e.g.*, U.C.C. § 9-204(b)(1) (preventing an after-acquired property clause in a security agreement from encumbering consumer goods except in

narrow circumstances), than through a rule requiring particular language.

16. U.C.C. § 9-102(a)(13)(A). The tort claim of an individual debtor is a commercial tort claim if the claim arises in the course of the individual's business or profession and does not include damages for personal injury or death. U.C.C. § 9-102(a)(13)(B).

17. *See* U.C.C. § 9-108 cmt. 5 (providing some guidance on how specific the description must be).

18. Moreover, it is unclear whether some types of statutory claims – such as antitrust claims – qualify as tort claims and thus it remains uncertain whether such claims are subject to the rule of § 9-108(e)(1).

19. During the revision of Article 9 in the 1990s, which expanded Article 9's scope to cover security interests in commercial tort claims, concern was expressed that debtors would inadvertently create security interests in tort claims and that the secured party and its lawyers would interfere with the conduct of the tort litigation. To deal with this, it was decided to limit security interests in commercial tort claims to situations in which the secured party was really relying on the claim as collateral, and the explicitness rule of § 9-108(e)(2) was devised as a proxy for that reliance.

20. *See* U.C.C. § 9-504(2).

21. Moreover, if a commercial tort claim were proceeds of other collateral, a financing statement that described only that other collateral and which neither described the commercial tort claim nor purported to cover “all assets” would nevertheless be effective to perfect a security interest in the commercial tort claim. *See* U.C.C. § 9-315(c), (d)(1). As a result, a prospective lender seeking to determine if a commercial tort claim is encumbered by a perfected security interest cannot safely ignore any financing statement filed against the debtor, regardless of how that financing statement describes the collateral.

If all this were not enough, the rule of § 9-108(e)(2) has also confused courts and led to some astoundingly bad decisions. *See, e.g.*, Carl S. Bjerre & Stephen L. Sepinuck, *Spotlight*, [COMMERCIAL LAW NEWSLETTER 9](#), 11-12 (Nov. 2016) (discussing Bayer Cropscience LP v. Stearns Bank, [837 F.3d 911](#) (8th Cir. 2016)). The Permanent Editorial Board is reportedly working on a draft commentary to explain why *Bayer Cropscience* is incorrectly decided.

22. *Synectic Ventures I, LLC v. EVI Corp.*, [261 P.3d 30](#) (Or. Ct. App. 2011) (discussing *Adair v. McAtee*, [388 P.2d 748](#) (Or. 1964)).

23. *Id.* at 32.

24. *See, e.g.*, *214 Wall Street Associates, LLC v. Medical Arts-Huntington Realty*, [953 N.Y.S.2d 124](#) (N.Y. App. Div. 2012); Allen Benson, *Fees on Fees – Drafting to Include Attorney's Fees Incurred in Seeking Fees*, [4 THE TRANSACTIONAL LAWYER 1](#) (Aug. 2014).

25. A higher rate of interest after default can be invalidated as a penalty. *See* Stephanie J. Richards, *The Enforceability of Default Interest*, [5 THE TRANSACTIONAL LAWYER 1](#) (Oct. 2015).

26. Stephen L. Sepinuck, *Very Interesting . . . or Is It: Limitations on Default Interest*, [3 THE TRANSACTIONAL LAWYER 2](#) (Feb. 2013).

27. *See In re Southeast Banking Corp.*, [710 N.E.2d 1083](#) (N.Y. 1999). *See also* *U.S. Bank v. T.D. Bank*, [569 B.R. 12](#) (Bankr. S.D.N.Y. 2017) (by providing that the lenders were “entitled to receive post-petition interest . . . to the fullest extent permitted by law,” the intercreditor agreement was sufficiently explicit that both the senior and junior lenders were entitled to post-petition interest before the principal of either the senior or junior debt is paid; it did not matter that post-petition interest would not have been available in the bankruptcy proceeding because this was not a bankruptcy case and, in any event, the agreement defined “Obligations” to include “interest and fees that accrue after the commencement . . . of any Insolvency or Liquidation Proceeding . . . regardless of whether such interest and fees are allowed claims in such proceeding”); Stephen L. Sepinuck *The Dangers of Uni-tranche Loans & the Rule of Explicitness*, [3 THE TRANSACTIONAL LAWYER 3](#) (Oct. 2013).

28. *See* U.C.C. § 1-301(a).

29. *See* CISG Art. 6 (“The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions”).

30. *BP Oil Int'l, Ltd. v. Empresa Estatal Petroleos*, [332 F.3d 333](#) (5th Cir. 2003); *Travelers Prop. Cas. Co. of Am. v. Saint-Gobain Technical Fabrics Canada Ltd.*, [474 F. Supp. 2d 1075](#) (D. Minn. 2007); *American Mint LLC v. GOSoftware, Inc.*, [2006 WL 42090](#) (M.D. Pa. 2006); *Ajax Tool Works, Inc. v. Can-Eng Mfg. Ltd.*, [2003 WL 223187](#) (N.D. Ill. 2003); *Asante Techs., Inc. v. PMC-Sierra, Inc.*, [164 F. Supp. 2d 1142](#) (N.D. Cal. 2001). *But see* *American Biophysics Corp. v. Dubois Marine Specialties*, [411 F. Supp. 2d 61](#) (D.R.I. 2006).

31. *See, e.g.*, [RESTATEMENT \(SECOND\) OF CONFLICT OF LAWS § 122](#); *Parker v. K & L Gates, LLP*, [76 A.3d 859](#) (D.C. 2013).

32. *See, e.g.*, *Pivotal Payments Direct Corp. v. Planet Payment, Inc.*, [2015 WL 9595285](#) (Del. Super. Ct. 2015) (because, under Delaware law, a choice-of-law provision

in a contract does not apply to statutes of limitations unless the provision expressly says so, the parties' general selection of New York law did not make the N.Y. limitations period applicable, and thus the plaintiff's fraudulent inducement claim was time barred under Delaware law); *Citizens Bank v. Merrill, Lynch, Pierce, Fenner and Smith, Inc.*, [2012 WL 5828623](#) (E.D. Mich. 2012) (applying Michigan procedural law, including its six-year statute of limitations, instead of the chosen law of New York, with its three-year limitations period, to tort and contract claims brought under New York law). *But cf.* *In re Sterba*, [852 F.3d 1175](#) (9th Cir. 2017) (exceptional circumstances existed warranting application of the statute of limitations from the chosen state's law); [RESTATEMENT \(SECOND\) OF CONFLICT OF LAWS § 142](#) & cmt. f (as amended in 1988) ("The view that statutes of limitations should ordinarily be characterized as procedural has been abandoned in many recent decisions"). The Restatement distinguishes between and treats differently situations in which the forum state has a longer limitations period than does the chosen law and situations in which the forum state has a shorter limitations period.

33. *See, e.g.*, U.C.C. §§ 2-210(2), (3), 9-406(d), 9-408(a).

34. *See* [RESTATEMENT \(SECOND\) OF CONTRACTS § 322\(2\)\(b\)](#).

A different interpretive rule provides that a contractual term prohibiting assignment of "the contract" merely bars delegation of duties, not assignment of rights. *See* [RESTATEMENT \(SECOND\) OF CONTRACTS § 322\(1\)](#); U.C.C. § 2-210(4). This is probably a desirable interpretive principle, premised on the assumption that contracting parties are more likely to be concerned with delegation of duties than with assignment of rights.

35. *Bel-Ray Co. v. Chemrite (Pty) Ltd*, [181 F.3d 435](#) (3d Cir. 1999). *See also* *BSC Assocs., LLC v. Leidos, Inc.*, [2015 WL 667853](#) (N.D.N.Y. 2015); *Gallagher v. Southern Source Packaging, LLC*, [564 F. Supp. 2d 503](#) (E.D.N.C. 2008); *United Health Servs. Credit Union v. Open Solutions Inc.*, [2007 WL 433090](#) (E.D. Wash. 2007); *Marion Blumenthal Trust ex rel. Blumenthal v. Arbor Com. Mtg. LLC*, [2013 WL 3814385](#) (N.Y. Sup. Ct. 2013); *Shao v. Li*, [2013 WL 3481411](#) (N.Y. Sup. Ct. 2013). *Contra* *Travertine Corp. v. Lexington-Silverwood*, [683 N.W.2d 267](#) (Minn. 2004) (right to payment under a management contract); *Texas Dev. Co. v. Exxon Mobil Corp.*, [119 S.W.3d 875](#) (Tex. Ct. App. 2003); *but cf.* *J.G. Wentworth S.S.C. Ltd. P'ship v. Callahan*, [649 N.W.2d 694](#) (Wis. Ct. App. 2002) (agreement stating that a party had no "power" to assign structured settlement rendered attempted assignment ineffective); *Rother-Gallagher v. Montana Power Co.*, [522 P.2d 1226](#) (Mont. 1974)

(agreement providing that one party "shall not assign this contract, or any portion thereof, . . . without the written consent" of the other party was effective to prevent assignment).

36. *E.g.*, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, [473 U.S. 614](#), 626 (1985); *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, [460 U.S. 1](#), 24-25 (1983).

37. *See, e.g.*, *First Options of Chi., Inc. v. Kaplan*, [514 U.S. 938](#), 944-45 (1995).

38. *BG Group, PLC v. Republic of Argentina*, [134 S.Ct. 1198](#), 1206 (2014).

In contrast, an issue about whether the entire agreement is void or voidable is presumptively for the arbitrator. *E.g.*, *Buckeye Check Cashing, Inc. v. Cardegna*, [546 U.S. 440](#) (2006).

39. *See, e.g.*, *Rent-A-Ctr., W., Inc. v. Jackson*, [561 U.S. 63](#), 69 n.1 (2010); *Simply Wireless, Inc. v. T-Mobile US, Inc.*, [877 F.3d 522](#), 526 (4th Cir. 2017) *State ex rel. Pinkerton v. Fahnstock*, [531 S.W.3d 36](#), 43 (Mo. 2017).

40. *Simply Wireless, Inc.*, [877 F.3d at 526-27](#). *See also* *Hernandez v. San Gabriel Temp. Staffing Servs., LC*, [2018 WL 1582914](#) at \*5-6 (N.D. Cal. 2018) ("Any dispute that arises out of or relates to Employee's employment" was insufficient to delegate issue or arbitrability).

41. *Compare* *Baker v. Bristol Care, Inc.*, [450 S.W.3d 770](#) (Mo. 2014) (an arbitration clause covering "any dispute relating to the applicability or enforceability of the Agreement" did not delegate issues of arbitrability to the arbitrator), *with* *Ford Motor Credit Co., LLC v. Jones*, [2018 WL 1384505](#) (Mo. Ct. App. 2018) (an arbitration clause covering "[c]laims regarding the interpretation, scope, or validity of this provision, or arbitrability of any issue" did delegate the issue of arbitrability). The reference in *Baker* to the "enforceability of the Agreement" would seem, necessarily, to cover the enforceability of the arbitration clause contained in the Agreement, and thus delegate issues of arbitrability to the arbitrator.

42. [AAA COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES, Rule 7\(a\)](#) (2013).

43. *E.g.*, *Brennan v. Opus Bank*, [796 F.3d 1125](#), 1129 (9th Cir. 2015); *Petrofac, Inc. v. DynMcDermott Petroleum Operations Co.*, [687 F.3d 671](#), 674 (5th Cir. 2012); *Fallo v. High-Tech Inst.*, [559 F.3d 874](#), 877-78 (8th Cir. 2009); *Qualcomm Inc. v. Nokia Corp.*, [466 F.3d 1366](#), 1373 (Fed. Cir. 2006); *Terminix Int'l Co. v. Palmer Ranch LP*, [432 F.3d 1327](#), 1332 (11th Cir. 2005); *Contec Corp. v. Remote Solution Co.*, [398 F.3d 205](#), 208 (2d Cir.



2005); State ex rel. Pinkerton, [531 S.W.3d at 45](#). See also *Simply Wireless, Inc. v. T-Mobile US, Inc.*, [877 F.3d at 525-28](#) (incorporation of Judicial Arbitration & Mediation Services rules was sufficient to delegate issue of arbitrability); *Belnap v. Iasis Healthcare*, [844 F.3d 1272](#), 1281-82 (10th Cir. 2017) (same); *Cooper v. WestEnd Capital Mgmt., LLC*, [832 F.3d 534](#), 546 (5th Cir. 2016) (same); *Oracle Am., Inc. v. Myriad Group A.G.*, [724 F.3d 1069](#) (9th Cir. 2013) (incorporation of UNCITRAL arbitration rules was sufficient to delegate issue of arbitrability).

The result *might* be different if either or both contracting parties is not a sophisticated business entity, e.g., *Meadows v. Dickey's Barbeque Restaurants Inc.*, [144 F. Supp. 3d 1069](#), 1078-79 (N.D. Cal. 2015), but the bulk of authority appears to be to the contrary, e.g., *Esquer v. Education Mgmt. Corp.*, [2017 WL 5194635](#) (S.D. Cal. 2017); *Cubria v. Uber Techs., Inc.*, [242 F. Supp. 3d 541](#), 549-50 (W.D. Tex. 2017).

44. Perhaps in part because of this, that is, because the rule is so opaque, courts have also had to resolve thousands of disputes about what language is a clear and unmistakable delegation of authority to an arbitrator. Thus, the rule appears to have generated litigation rather than reduce it.



## Recent Cases

### SECURED TRANSACTIONS

#### *Attachment Issues*

*In re Cocoa Services, LLC*,

[2018 WL 180124](#) (Bankr. S.D.N.Y. 2018)

A security agreement that described the collateral as “[a]ll of the Debtor’s equipment . . . whether now owned or hereafter acquired and wherever located . . . [i]ncluding but not limited to the equipment listed below,” followed by a long list of specified items was sufficient to cover all equipment, not merely the items specifically listed. Moreover, it did not matter that the list of specified items indicated an incorrect address for those items.

#### *Perfection Issues*

*In re Cocoa Services, LLC*,

[2018 WL 180124](#) (Bankr. S.D.N.Y. 2018)

Even if a secured party’s fixture filing was ineffective to perfect a security interest in fixtures because it did not correctly identify the record owner of the real property

and gave an incorrect address for the real property, the secured party’s security interest was perfected by the financing statement it filed where the debtor is located.

*Winfield Solutions, LLC v. Success Grain, Inc.*,

[2018 WL 1595871](#) (E.D. Ark. 2018)

A financing statement covering equipment, among other things, was not seriously misleading because it incorrectly included in the collateral description the statement, “this filing filed as ag lien.” A searcher would find the financing statement because the debtor’s name was listed correctly and the erroneous language would not mislead the searcher as to the collateral the financing statement covers.

*In re 8760 Service Group, LLC*,

[2018 WL 2138282](#) (Bankr. W.D. Mo. 2018)

An amended financing statement describing the collateral as “[a]ll Accounts Receivable, Inventory, equipment and all business assets, located at 1803 W. Main Street,” was effective even though the debtor’s goods were located at a different address because the description was ambiguous – the address could restrict all the described collateral or merely the phrase “all business assets” – and thus a reasonably prudent searcher should inquire further.

*In re Abell*,

[2018 WL 1787357](#) (Bankr. W.D. Ky. 2018)

A creditor’s purchase-money security interest in a vehicle was not perfected because the interest was not stated on the certificate of title, apparently due to the creditor’s failure to pay the filing fee. Under Kentucky law, perfection of a security interest in a motor vehicle is not accomplished when the fee and paperwork are submitted to the county clerk; perfection occurs when the notation is made on the certificate of title.

#### *Enforcement Issues*

*United Capital Funding Corp. v. Ericsson Inc.*,

[2018 WL 1531119](#) (9th Cir. 2018)

Although Washington state courts have held that a secured party’s instruction to an account debtor to pay the secured party pay must identify the accounts it covers, and a statement that “all” accounts have been assigned does not reasonably identify the covered accounts, because the account debtor in this case followed the instruction and paid \$3.4 million to the secured party over the course of a year, the account debtor might have conceded that the notice was effective and waived any challenges thereto.

**Liability Issues**

*Foster v. Parker Community Bank*,  
[2018 WL 1989966](#) (Wis. Ct. App. 2018)

A bank with a security interest in a boat did not act unconscionably or violate the state consumer protection act by obtaining and billing the debtors for retroactive gap insurance for the period when the boat was uninsured due to the debtors' failure to maintain continuous coverage. Even though the debtors were unaware of any damage to the boat during the gap in coverage, the possibility remained that damage might be discovered and attributed to some event that occurred during the gap period.

*The Florida Bar v. Parrish*,  
[2018 WL 2049999](#) (Fla. 2018)

A lawyer who acquired a security interest in a client's Lamborghini to secure payment of past and future legal fees thereby entered into a business transaction with the client that was not an ordinary fee agreement because the transaction enabled the lawyer to obtain funds from the sale of the Lamborghini that would constitute an excessive fee. Because the lawyer did not comply with the rules of professional responsibility relating to such transactions, he was subject to discipline.

*Bilbija v. Lane*,  
[2018 WL 2183967](#) (S.D. Ind. 2018)

A married couple that loaned money to a retired baseball player with the understanding that the promissory note would be secured by the borrower's MLB pension stated a cause of action against the lawyer who drafted the note while representing both them and the borrower because, after the borrower defaulted, they learned that the pension did not secure the note.

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**BANKRUPTCY**

*In re Power*,  
[2018 WL 1887318](#) (Bankr. D. Idaho 2018)

Because a lender that refinanced the debtors' existing car loan did not perfect its security interest until at least 40 days after the loan was made, due in part to the debtors' error in completing the original title application and in part to the lender's own dilatory actions, the grant of the security interest was not substantially contemporaneous with the loan and was avoidable as a preference.

**LENDING & CONTRACTING**

*AltEnergy Cyber, LLC v. Blackridge Tech. Holdings, Inc.*, [2018 WL 1954963](#) (Conn. Super. Ct. 2018)

A senior lender that signed an intercreditor agreement contemporaneously with making the loan and receiving a promissory note and security agreement was bound by the terms of the intercreditor agreement that allowed the agent for the lenders to extend the time for payment with approval of lenders holding at least 75% of the senior debt. It did not matter that the promissory note did not expressly reference the intercreditor agreement.

*Cain v. Price*,  
[2018 WL 1755396](#) (Nev. 2017)

A term in a settlement agreement between two parties in which one of them "hereby fully and forever releases" a third party from liability, was rendered unenforceable when the other party to the agreement materially breached by not paying the agreed-upon amount.

*Helena Chemical Co. v. Torian*,  
[2018 WL 1972703](#) (E.D. Ark. 2018)

A clause in a settlement agreement providing for a security interest and for the secured party's expenses and reasonable attorney's fees in "retaking, holding, preparing for sale, selling and the like" did not cover attorney's fees incurred in seeking payment of the debt.

*Sierra Equipment, Inc. v. Lexington Insurance Co.*,  
[2018 WL 2222695](#) (5th Cir. 2018)

A lessor of equipment was not entitled under Texas law to an equitable lien on the proceeds of insurance payable to the lessee and arising from damage to and destruction of the equipment because, even though the lease required the lessee to insure the equipment, it did not require that the policy list the lessor as an additional insured or as a loss payee.

*U.S. Bank Trust v. Spurgeon,*

[2018 WL 1660122](#) (Ind. Ct. App. 2018)

A mortgage executed by a trust and covering real property owned by the trust that was intended to secure a debt of an individual but which erroneously defined the “Borrower” as the trust was nevertheless enforceable because it described the secured note with the correct dollar amount and date.

*MHS Captial LLC v. Goggin,*

[2018 WL 2149718](#) (Del. Ch. Ct. 2018)

An exculpatory provision in the membership agreement for an LLC, which provides that the manager “shall not be liable . . . for breach of such person’s duty as Manager” but which also requires the manager to “discharge his . . . duties in good faith, with the care an ordinarily prudent person in a like position would exercise under similar circumstances, and in a manner [he] reasonably believes to be in the best interests of the Company,” did not prevent a contract claim against the manager for diverting LLC assets to himself and his friends.

*In re Energy Future Holdings Corp.,*

[2018 WL 1560081](#) (D. Del. 2018)

The holders of the highest tranche of first-lien debt – the whole of which was undersecured – were not entitled to post-petition interest out of the adequate protection payments and plan distributions allocated to the lower tranches because the waterfall in the intercreditor agreement dealt only with payments out of the proceeds of collateral. The plan distributions of stock in a spin-off did not constitute proceeds of collateral because no sale or disposition occurred. The adequate protection payments were not distributions of cash collateral because the cash was generated post-petition and no effort was made to trace the cash to a sale of pre-petition collateral. Moreover, neither amounts resulted from the exercise of remedies under the loan documents.



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