

# The Transactional Lawyer

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## The Challenge of Disclaiming Punitive Damages

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Punitive damages are not generally available for breach of contract unless the conduct constituting the breach is also a tort for which punitive damages are available.<sup>1</sup> This hostility to punitive damages is so strong that parties cannot by their agreement expressly contract for them. A contract clause creating a penalty for breach is invalid and a clause providing for unreasonably large liquidated damages will be deemed to create a penalty, and is similarly invalid on grounds of public policy.<sup>2</sup>

But what about the reverse? If a statute or other rule of law expressly authorizes punitive, exemplary, special, statutory, or multiple damages (hereinafter collectively referred to as “punitive damages”<sup>3</sup>) for conduct relating to the creation or performance of a contract, can the parties in their agreement – prior to any dispute – disclaim or waive the right to such damages? If not, can they achieve the same effect through an arbitration clause? The prevailing answer to both of these questions is “no,” but that answer is not universal. This article explores the limits on the ability of contracting parties to disclaim punitive damages and offers advice to transactional lawyers drafting such clauses.

### *Disclaiming Punitive Damages Generally*

Some statutes that provide for punitive damages in connection with a contract or contractual relationship expressly prohibit the parties from waiving the right to such damages.<sup>4</sup> In the absence of such an express statutory prohibition, courts analyze a disclaimer of punitive damages under traditional principles and rules of

contract law. In so doing, most courts addressing the issue have concluded that a pre-dispute, contractual disclaimer of punitive damages is unenforceable. They have reached this conclusion regardless of whether the punitive damages were made available by statute<sup>5</sup> or under the common law of tort.<sup>6</sup>

A few courts have based their ruling on the grounds that such a disclaimer violates public policy.<sup>7</sup> That is, if a statute or rule of common law authorizes punitive damages, it does so to punish or regulate undesirable conduct, and a contract clause disclaiming liability for such punitive damages would undermine that goal.<sup>8</sup> More commonly, however, courts have analyzed the issue and reached the same result by applying the doctrine of unconscionability.<sup>9</sup>

This choice to use the doctrine of unconscionability is somewhat surprising and potentially significant. Invalidating a contract clause on the basis of public policy is relatively simple, at least in the sense that the analysis focuses solely on the substance or effect of the clause. In contrast, courts in most states will declare a contractual term unconscionable only if there is some quantum of both procedural unconscionability and substantive unconscionability.<sup>10</sup> That is, in addition to the substantive unfairness of the term, there must be something in the contract formation process to indicate that the party challenging the clause did not freely consent to it.<sup>11</sup> This suggests that the courts might regard as effective a disclaimer of punitive damages when there is no defect in the contract formation process, each side has significant bargaining power, or in merchant-to-merchant transactions. That said, several of the courts that have held that a waiver of punitive damages is unconscionable have paid little or no attention to procedural unconscionability and based their decision on the substance of the term,<sup>12</sup> although such cases almost invariably involve a form agreement between a merchant and a non-merchant.<sup>13</sup>

There are a few cases suggesting that a disclaimer of punitive damages is, or at least might be, permissible in some states. For example, the Connecticut Supreme Court concluded that an arbitrator exceeded his authority by awarding attorney’s fees in an employment dispute because the employment agreement disclaimed punitive damages and, according to the court, an award of attorney’s fees is “in the nature of” punitive damages.<sup>14</sup> The Fifth Circuit suggested in a footnote that, under

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Georgia law, contracting parties are free to limit their available remedies, including punitive damages, but it cited to cases dealing with a disclaimer of liability for lost profits, not punitive damages.<sup>15</sup>

Perhaps the most significant case treating a disclaimer of punitive damages as enforceable is the Supreme Court of South Carolina's decision in *Maybank v. BB&T Corp.*<sup>16</sup> The case involved a contract between a wealth management firm and one of its customers, who also happened to be an investment advisor. The customer claimed the firm had mismanaged his portfolio, deceived him, and provided investment advice designed more to generate fees than to serve his needs, in violation of securities laws and the state Unfair Trade Practices Act.<sup>17</sup> The jury returned a verdict for \$3.1 million in compensatory damages and \$5 million in punitive damages, even though the wealth management agreement expressly provided that the firm would not be liable "for any incidental, indirect, special, consequential or punitive damages."<sup>18</sup>

On appeal, the Supreme Court ruled that the disclaimer was not against public policy or unconscionable, and was therefore sufficient to bar liability for punitive damages.<sup>19</sup> With respect to public policy, the customer's principal argument was that a contracting party should not be permitted to insulate itself from liability when the parties have disparate bargaining power. The court rejected this argument not on principle, but because the customer had extensive experience as an investment advisor.<sup>20</sup> With respect to unconscionability, the court concluded that because the disclaimer did not deprive the customer of compensatory damages, it was not unconscionable.<sup>21</sup>

Nevertheless, transactional lawyers drafting an agreement that will not be governed by the law of one of these few states should assume that a term disclaiming punitive damages will be unenforceable. Even if the agreement will be governed by the law of one of these states, the transactional lawyer should consider the possibility that an agreement formed in a different context – particularly one for a merchant-to-consumer transaction – might lead to a different result.

### *Disclaiming Punitive Damages through Arbitration*

Contracting parties have largely been unsuccessful in reaching a different result through a combination of an agreement to arbitrate and a term either: (i) disclaiming punitive damages; or (ii) expressly denying the arbitrator permission to award punitive damages. Putting aside the sometimes thorny issue of whether the arbitrator or a court is to decide this issue,<sup>22</sup> the overwhelming weight of authority is that the disclaimer of punitive damages

renders the entire arbitration clause unconscionable unless the disclaimer can be severed from the arbitration clause and separately invalidated.<sup>23</sup> As the Supreme Court of Alabama stated, the state legislature intended that punitive damages be available as a remedy in fraud actions to protect its citizens from wrongful behavior and to punish the wrongdoer. If parties to an arbitration agreement waive an arbitrator's ability to award punitive damages, the door will open wide to rampant fraudulent conduct with few, if any, legal repercussions.<sup>24</sup>

There is some contrary authority. The Supreme Court of Ohio has ruled that an arbitration agreement between a nursing home and a resident was not substantively unconscionable because it waived punitive damages.<sup>25</sup> And the Eighth Circuit has suggested that even though under Missouri law a contractual waiver of punitive damages is unenforceable, because parties may incorporate terms into arbitration agreements that are contrary to state law, a waiver of punitive damages might prevent an award of such damages by an arbitrator.<sup>26</sup> However, these authorities are few and constitute a clear minority.

### *Drafting Advice*

Given the weight of authority, transactional lawyers should be reluctant to include in an agreement containing an arbitration clause a term prohibiting the arbitrator from awarding punitive damages or otherwise disclaiming liability for punitive damages. Doing so creates a substantial risk that the entire arbitration clause will be deemed unconscionable, particularly if the agreement relates to a consumer transaction. If such a term is included in an agreement containing an arbitration clause, the agreement should also contain a very clear statement that if the prohibition on punitive damages is unenforceable, that prohibition is to be severed and the remainder of the agreement, including the arbitration clause, is to remain enforceable.

In addition, transactional lawyers might consider including in the agreement one or more other terms that are triggered upon severance of the disclaimer of punitive damages. For example, if in connection with a contract for the sale of property or provision of services, the contract price is premised on the efficacy of a term disclaiming the seller's or service provider's liability for punitive damages, the agreement could provide that, if a court invalidates and severs the disclaimer, the contract price automatically increases by a specified amount. Such a term might serve two distinct purposes. First, it might dissuade the other party from challenging the disclaimer. Second, it might help demonstrate that the disclaimer was bargained for, and thus neither

procedurally nor substantively unconscionable. Of course, a court might find some basis for invalidating the springing price increase, but including the term in the agreement might help and probably cannot hurt.

On a more general note, in drafting any contract clause purporting to limit remedies, transactional lawyers should be aware that while “punitive damages” and “exemplary damages” might be synonymous terms,<sup>27</sup> courts apparently do not regard either as encompassing “multiple damages” or “statutory” damages.<sup>28</sup> Accordingly, if the parties’ transaction or relationship is governed by a statute that authorizes or requires an award of double damages, treble damages, or damages measured by a statutory formula, any disclaimer intended to cover such damages should not refer to them as “punitive damages.”

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#### Notes:

1. RESTATEMENT (SECOND) OF CONTRACTS § 355. In some states, punitive damages might be available if the conduct constituting a breach is malicious or undertaken with wanton disregard for the counter-party’s rights, regardless of whether it is also a tort. *See, e.g.*, *Romero v. Mervyn’s*, [784 P.2d 992](#) (N.M. 1989). Similarly, in some states an insurer’s bad faith denial of coverage is treated as a tort or otherwise treated as tort-like, so as to justify an award of punitive damages. *See, e.g.*, *Deters v. USF Ins. Co.*, [2011 WL 222533](#) (Iowa Ct. App. 2011); *Fresno Unified Sch. Dist. v. Coregis Ins. Co.*, [2006 WL 1633683](#) (Cal. Ct. App. 2006); *Trinity Evangelical Lutheran Church and School-Freistadt v. Tower Ins. Co.*, [661 N.W.2d 789](#) (Wis. 2003); *Hoskins v. Aetna Life Ins. Co.*, [452 N.E.2d 1315](#) (Ohio 1983). *But see* *New York University v. Continental Ins. Co.*, [662 N.E.2d 763](#) (N.Y. 1995). *See also* *Acquista v. New York Life Ins. Co.*, [730 N.Y.S.2d 272](#) (App. Div. 2001) (collecting cases). With respect to tort liability for bad faith in other contractual settings, see *Freeman & Mills, Inc. v. Belcher Oil. Co.*, [900 P.2d 669](#) (Cal. 1995) (overruling and earlier case and basically limiting tort liability for bad faith to insurance contracts).

2. RESTATEMENT (SECOND) OF CONTRACTS § 356.

3. As discussed below, however, these terms are not synonymous. *See infra* notes 27-28 and accompanying text.

4. *See, e.g.*, U.C.C. §§ 9-602(13), 9-625(c)(2) (dealing with a secured party’s improper enforcement of a secured interest in consumer goods). *See also* [Cal. Civ. Code § 1668](#) (“All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law”); *SI 59 LLC v. Variel Warner Ventures, LLC*, [2018 WL 5993816](#) (Cal. Ct. App. 2018) (§ 1668 invalidates a disclaimer of punitive damages only when all or some of the essential facts occur concurrently with or after execution of the contract; it does not apply when all the elements are past events).

5. *See, e.g.*, *Roman v. Bergen Logistics, LLC*, [192 A.3d 1029](#) (N.J. Super. Ct. 2018); *In re Poly-Am., L.P.*, [262 S.W.3d 337](#) (Tex. 2008); *Ridge Natural Res., L.L.C. v. Double Eagle Royalty, L.P.*, [2018 WL 4057283](#), at \*19-21 (Tex. Ct. App. 2018).

6. *See, e.g.*, *Zuver v. Airtouch Communc’s, Inc.*, [103 P.3d 753](#), 765-67 (Wash. 2004).

7. *See, e.g.*, *Ridge Natural Res., L.L.C.*, [2018 WL 4057283](#), at \*19-21; *Shotts v. OP Winter Haven, Inc.*, [86 So. 3d 456](#) (Fla. 2011) (because the waiver of punitive damages in a nursing home contract undermined remedial statutes designed to protect nursing home residents, the waiver violated public policy and was unenforceable); *Alterra Healthcare Corp. v. Estate of Linton ex rel. Graham*, [953 So. 2d 574](#), 578 (Fla. Ct. App. 2007), *abrogated on other grounds by* *Mendez v. Hampton Court Nursing Ctr., LLC*, [203 So. 3d 146](#) (Fla. 2016). *See also* RESTATEMENT (SECOND) OF CONTRACTS §§ 178, 179 (indicating that a promise or agreement that violates public policy is unenforceable).

8. *See also* *Stark v. Sandberg, Phoenix & von Gontard, P.C.*, [381 F.3d 793](#), 800 (8th Cir. 2004) (under Missouri law, one may never exonerate oneself from future liability for intentional torts or for gross negligence, or for activities involving the public interest, and hence a contractual waiver of punitive damages is unenforceable).

9. *See, e.g.*, *Covenant Health Rehab of Picayune, L.P. v. Brown*, [949 So. 2d 732](#) (Miss. 2007), *overruled on other grounds*, *Covenant Health & Rehab. of Picayune, LP v. Estate of Moulds*, [14 So. 3d 695](#) (Miss. 2009) (a waiver of punitive damages in a contract for nursing home services is substantively unconscionable); *Zuver*, [103 P.3d at 765-67](#) (a provision in an employment agreement providing that the employee waived all rights

to recover punitive or exemplary damages in connection with any common-law tort and contract claims, but not waiving the employer's right to recover such damages for nondisclosure of confidential information was substantively unconscionable); *Pardee Constr. Co. v. Superior Court*, [123 Cal. Rptr. 2d 288](#) (Cal. Ct. App. 2002) (a waiver of punitive damages in contract for the purchase of a single-family residence was substantively unconscionable and unenforceable under Cal. Civ. Code § 1668). *See also* RESTATEMENT (SECOND) OF CONTRACTS § 208 (indicating that a court may refuse to enforce a contract or contract term that is unconscionable).

Indeed, the Alabama Supreme Court followed this approach after indicating that because public policy is something for the legislature to pronounce, if the legislature is silent on an issue, the judiciary may declare a contract unconscionable but cannot treat it as unenforceable on the grounds of public policy. *Ex parte Thicklin*, [824 So. 2d 723](#), 732-33 (Ala. 2002), *overruled on other grounds*, *Patriot Mfg., Inc. v. Jackson*, 929 So. 2d 997 (Ala. 2005) (refusing to enforce an arbitration clause in a contract to purchase a mobile home because the clause disclaimed liability for punitive damages and was, therefore, unconscionable).

10. *See, e.g.*, *Basulto v. Hialeah Auto.*, [141 So. 3d 1145](#) (Fla. 2014); *Strand v. U.S. Bank*, [693 N.W.2d 918](#) (N.D. 2005); *Pietroske, Inc. v. Globalcom, Inc.*, [685 N.W.2d 884](#) (Wis. 2004).

11. *Bagley v. Mt. Bachelor, Inc.*, [340 P.3d 27](#), 35 (Or. 2014)

12. *E.g.*, *Covenant Health Rehab of Picayune*, [949 So. 2d 732](#) (finding no procedural unconscionability but nevertheless invalidating the disclaimer); *Zuver*, [103 P.3d 753](#) (although there was no procedural unconscionability, some provisions of an employment agreement were substantively unconscionable and must be severed from the contract).

13. *See supra* n.12.

14. *See Harty v. Cantor Fitzgerald & Co.*, [881 A.2d 139](#), 156-57 (Conn. 2005).

15. *Overstreet v. Contigroup Cos.*, [462 F.3d 409](#), 412 n.2 (5th Cir. 2006).

Somewhat similarly, one justice of the Washington Supreme Court wrote, in dissent, that “[a] contract provision forgoing punitive damages is not against public policy in this state.” *Zuver*, [103 P.3d at 772-73](#) (Madsen, J. dissenting). However, the authority cited to support this statement provided merely that punitive damages are unavailable in some cases, not that a waiver of available punitive damages is enforceable.

16. [787 S.E.2d 498](#) (S.C. 2016).

17. *Id.* at 505-06.

18. *Id.* at 514.

19. *Id.* at 515-17.

20. *Id.* at 515.

21. *Id.* at 516.

22. *Compare Torres v. Simpatico, Inc.*, [781 F.3d 963](#) (8th Cir. 2015) (whether a waiver of punitive damages violates the public policy underlying RICO's treble damages provision is a matter for the arbitrators in the first instance); *Terminix Int'l Co., LP v. Palmer Ranch L.P.*, [432 F.3d 1327](#) (11th Cir. 2005) (because the arbitration clause at issue incorporated AAA Commercial Arbitration Rules, which authorize the arbitrator to decide issues of arbitrability, the arbitration clause was valid even though it contained a potentially invalid term prohibiting the arbitrator from awarding punitive and treble damages; consequently, the arbitrator should decide the validity of the remedial restriction provisions); *Anders v. Hometown Mortg. Services, Inc.*, [346 F.3d 1024](#) (11th Cir. 2003) (because the arbitration agreement executed in connection with a loan transaction contained a severability clause, the arbitration clause was valid even though it contained a potentially invalid term prohibiting the arbitrator from awarding punitive and treble damages; consequently, the arbitrator should decide the validity of the remedial restriction provisions), *with Gessa v. Manor Care of Florida, Inc.*, [86 So. 3d 484](#) (Fla. 2011) (even though an arbitration agreement between a nursing home and a resident contained a severability clause, the waiver of punitive damages was not severable and therefore the court, not the arbitrator, must decide the enforceability of the agreement).

23. *See, e.g.*, *Zaborowski v. MHN Government Services, Inc.*, [601 F. App'x 461](#) (9th Cir. 2014) (a waiver of punitive damages made an arbitration clause in an employment agreement substantively unconscionable because it “improperly proscribes available statutory remedies”; the district court did not abuse its discretion in failing to sever the unconscionable portions of the arbitration clause); *Shotts v. OP Winter Haven, Inc.*, [86 So. 3d 456](#) (Fla. 2011) (because the waiver of punitive damages in a nursing home contract violated public policy and was unenforceable, and that term was not severable from the arbitration clause, the arbitration clause was not enforceable); *In re Poly-America, L.P.*, [262 S.W.3d 337](#) (Tex. 2008) (the provision of an arbitration agreement executed by an employee as a condition of employment, which prohibited an award of punitive damages otherwise available by statute, was substantively unconscionable and therefore void under

Texas law, but could be severed so that the arbitration agreement was otherwise enforceable); *State ex rel. Dunlap v. Berger*, [567 S.E.2d 265](#) (W. Va. 2002) (an arbitration clause in a credit purchase agreement between a jewelry store and a customer, which prohibited an award of punitive damages, was unconscionable and hence arbitration would not be compelled); *Cavalier Mfg., Inc. v. Jackson*, [823 So. 2d 1237](#) (Ala. 2001) (a pre-dispute arbitration clause that forbids an arbitrator from awarding punitive damages is void as contrary to public policy); *Armendariz v. Found. Health Psychcare Servs., Inc.*, [6 P.3d 669](#), 682-83 (Cal. 2000) (an arbitration clause in an employment agreement violated public policy by excluding liability for punitive damages, and thus the exclusion was unenforceable).

24. *Cavalier Mfg.*, [823 So. 2d at 1248](#).

25. *Hayes v. Oakridge Home*, [908 N.E.2d 408](#) (Ohio 2009).

26. *Stark*, [381 F.3d at 800](#). The court did not have to reach that issue, however, because it concluded that because the parties' arbitration clause waived the right to punitive damages "to the fullest extent permitted by law," the clause had not waived the right to punitive damages. *Id.*

27. *See Harty*, [881 A.2d at 153](#).

28. *Id.*; *Maybank*, [787 S.E.2d at 517-18](#) (because a disclaimer of punitive damages did not mention "statutory" or "multiple" damages, it did not prevent the trebling of the jury's damages award for willful violation of the state Unfair Trade Practices Act); *Investment Partners, L.P. v. Glamour Shots Licensing, Inc.*, [298 F.3d 314](#) (5th Cir. 2002) (a franchise agreement's arbitration clause, which prohibited an award of "punitive damages," did not proscribe treble damages under antitrust law because punitive damage punish the wrongdoer while treble damages compensate the injured party).

Note, even if the law classifies "punitive damages" differently from "multiple damages" and "statutory damages," that should not be determinative of what any of those terms means in the contracting parties' private agreement. As long as contracting parties ascribe the same meaning to a term, that meaning should prevail. *See* RESTATEMENT (SECOND) OF CONTRACTS § 201(1). On the other hand, many courts interpret remedies limitations narrowly, so that any dispute about the meaning of a term limiting remedies is likely to operate against the party that wants a broad interpretation of the term.



## Recent Cases

### SECURED TRANSACTIONS

#### *Attachment Issues*

*In re Meena, Inc.*,

[2018 WL 5880916](#) (Bankr. E.D.N.Y. 2018)

A franchisor that entered into three franchise agreements with two individual debtors, and which also entered into two purchase-money security agreements with the individuals, but which then proceeded to sell inventory to the corporations owned by the individuals, did not in fact have a franchise relationship with the corporations or a security interest in the corporations' property.

*Gill v. Board of the National Credit Union Admin.*,

[2018 WL 5045755](#) (E.D.N.Y. 2018)

Although the written security agreement that was to collateralize a limousine lacked a description of the collateral when the debtor signed the agreement, it was nevertheless effective because a description that was consistent with both parties' intent and with the loan application – and which identified the limousine by year, make, color, and VIN – was later added by the secured party.

*In re Somerset Regional Water Resources, LLC*,

[2018 WL 4587868](#) (Bankr. W.D. Pa. 2018)

A debtor-in-possession financing order that provided for the sole member of the debtor to "assign to Lender any rights or interest in the 2015 Federal tax refund due to him individually, but attributable to the operating losses of the Debtor" was ambiguous as to whether it covered a refund of 2014 taxes attributable to a carryback of 2015 losses. After considering parol evidence, it was apparent that the parties understood that the entirety of any refund generated on account of the 2015 operating losses was to be the collateral.

*First American Bank v. SJP Group, Inc.*,

[2018 WL 5722252](#) (D.N.J. 2018)

Even if the bank that had loaned money to an employer, which had in turn used most of the funds to make a secured loan to an ESOP, had not released its security interest in the employer's contract rights, and even if the bank had not deemed the secured obligation fully satisfied, and even if the ESOP's grant of a security interest in its shares of stock in the employer was not a prohibited transaction under ERISA, the bank would still not have a security interest in the ESOP's rights under agreements with the employer and the plan trustee that settled the ESOP's claims made for overpayment for the stock. Those claims were not proceeds of the stock

because they were not for diminution in value of the stock, but for overvaluing and overpaying for the stock in the first instance.

### **Priority Issues**

*In re Essex Construction, LLC*,  
[2018 WL 4656206](#) (Bankr. D. Md. 2018)

Because priorities in bankruptcy are fixed as of the filing of the petition, a creditor with a first-priority security interest at that time retained priority over another perfected security interest even though the senior creditor's financing statement lapsed and the security interest became unperfected post-petition.

### **Enforcement Issues**

*Valley Commercial Capital, LLC v. N795FM, LLC*,  
[2018 WL 5634944](#) (S.D. Tex. 2018)

A debtor that had failed to make timely payments on its aircraft loan had no defense based on the lender's alleged promises to accept half payments and not to foreclose due to the declining health of the debtor's principal because the promise was not in writing and New Jersey law requires that an agreement by a creditor to forbear from enforcing an existing loan agreement must be in a signed writing. The debtor also had no defense based on promissory estoppel in part because the promissory note expressly stated that its terms could not be changed "orally or by estoppel or waiver or by an alleged oral modification regardless of any claimed partial performance thereto," and that no modification or waiver would be effective unless it was made in writing and signed by the creditor.

*Temsu Ulasim Araclari Sanayi Ve Ticaret A.S. v. CH Bus Sales, LLC*, [2018 WL 4905593](#) (D. Del. 2018)

Even though the security agreement between a manufacturer and its exclusive distributor contained no arbitration clause – instead, it expressly provided for judicial resolution of disputes between the parties – because the distribution agreement contained an arbitration clause calling for arbitration pursuant to AAA rules, it was for the arbitrator to determine in the first instance whether the pending dispute was subject to arbitration.

### **Liability Issues**

*Gill v. Board of the National Credit Union Admin.*,  
[2018 WL 5045755](#) (E.D.N.Y. 2018)

A credit union had no liability for not returning the personal property of the debtor that was in his vehicle at the time the vehicle was repossessed because the security agreement expressly provided that "the Credit Union will not be responsible for any of [debtor's] property not

covered by this Agreement that you leave inside the collateral" and, in any event, the debtor failed to provide any evidence of the value of the papers, band aids, scissors, tools, books, tokens, radio, and vouchers that were allegedly in the vehicle.

*U.S. Bank Equipment Finance v. J.W. Jones Co.*,  
[2018 WL 5312905](#) (S.D. Ind. 2018)

Because the security agreement between an equipment dealer and a bank expressly provided that the dealer held proceeds of equipment sales in trust for the bank and made the proceeds the "property of" the bank until paid to the bank, the agreement created an express trust with fiduciary duties, even though the agreement did not require that the proceeds be segregated. Accordingly, the dealer was liable for breach of fiduciary duty for failing to remit the proceeds to the bank and that liability would be nondischargeable under § 523(a)(4) and (6) if the debtor files for bankruptcy.

## **GUARANTIES & RELATED MATTERS**

*Bowers v. Today's Bank*,  
[2018 WL 4998236](#) (Ga. Ct. App. 2018)

A guarantor's springing liability on a nonrecourse debt, which was to ripen if the collateral became subject to a "voluntary bankruptcy or insolvency proceeding," did not ripen when the debtor consented to the lender's receivership proceeding. The term "voluntary" modified both "bankruptcy" and "insolvency proceeding" and the debtor's consent to the lender's actions did not make the proceeding a voluntary one.

*BMO Harris Bank v. Smith*,  
[2018 WL 4691212](#) (D. Kan. 2018)

A bank that received an assignment of eight secured loans guaranteed by a single guaranty could enforce the guaranty with respect to those loans even though the guaranty also covered an additional loan that the original creditor had previously assigned to a different party. The notification of the first assignment was expressly "to the extent any such Guaranty relates to the Assigned Account and the transaction contemplated thereby," and thus the original creditor retained an interest in the guaranty that it could and did later assign to the bank.

*ACP GP, LLC v. United Home Care, Inc.*,  
[2018 WL 4693969](#) (D.N.J. 2018)

Two lenders sufficiently alleged breach of a validity guaranty by claiming that the guarantor personally compromised the validity of the security interest in the collateral by misappropriating the borrowers' funds and continuing to seek advances on behalf of borrowers despite knowledge of their inability to repay, and by failing to indemnify the creditor for losses caused by the

guarantor's own fraud and deceit as an officer, employee, or agent of the borrowers. The fact that the guaranty was in the form of a letter did not make it unenforceable. The lenders alleged that they manifested acceptance of the guaranty by executing the loan and security agreement and making advances to the borrowers. The guaranty was supported by consideration because the guaranty itself acknowledged the that promises and representations it contained were made to "induce [the lenders] to make financial accommodations available to" the borrowers.

*Harlley v. Hynes,*

[2018 WL 5093975](#) (Pa. Super. Ct. 2018)

Guarantors who had waived any requirement that the creditor proceed first against the collateral and "any and all rights or defenses based on suretyship or impairment of collateral" could not assert a defense based on impairment of the collateral in the creditor's possession. The duties imposed by § 9-207(a) on a secured party in possession of collateral are not included in the list of nonwaivable obligations in § 9-602, and thus the guarantors did waive their rights under § 9-207. This conclusion is supported by § 3-605(f), which expressly allows secondary obligors to waive an impairment of collateral defense.

## LENDING & CONTRACTING

*Rescap Liquidating Trust v. First California Mort. Co.,*

[2018 WL 5310795](#) (N.D. Cal. 2018)

A mortgage loan buyer that had, in connection with the settlement of an action against the seller for misrepresentation and breach of warranties, released the seller and related parties of "all manner of claims . . . relating to the Subject Loans" did not thereby release the seller and related parties of liability for intentional fraudulent transfers, of which the buyer was not then aware, that raided the seller of more \$15 million and rendered it insolvent.

*Foundation Cap. Res., Inc. v. Prayer Tabernacle Church of Love, Inc.,* [2018 WL 4697281](#) (D. Conn. 2018)

Under Delaware law, while a standard merger clause will not bar parol evidence of a fraudulent inducement claim, a clear anti-reliance clause – one that expressly states that no oral representations have been relied upon – will. However, under Connecticut law evidence of fraud is not made inadmissible by the parol evidence rule even if the parties' agreement contains an express disclaimer of oral representations.

*Sweely Holdings, LLC v. Suntrust Bank,*

[2018 WL 6071127](#) (Va. 2018)

A borrower had no cause of action against a lender for fraud in connection with the parties' workout agreement merely because the lender allegedly claimed to have appraisals of the collateral showing that the lender was undersecured, and would thereby be able to obtain relief from the automatic stay if the borrower sought bankruptcy protection. The borrower could not have justifiably relied on this alleged misrepresentation given that it had asked for the appraisals but the lender refused to provide them and a principal purpose of the workout was to avoid bankruptcy.

*Ferrari v. Aetna Life Ins. Co.,*

[2018 WL 5870038](#) (5th Cir. 2018)

A contractual clause between a physician and an insurer limiting each party's liability to "actual damages" and waiving the right to "indirect, incidental, punitive, exemplary, special or consequential damages of any kind whatsoever" did not prevent an award of attorney's fees pursuant to a statute authorizing such an award because attorney's fees are not "incidental" damages.

*International Fid. Ins. Co. v. Americaribe-Moriarty JV,*

[2018 WL 5306683](#) (11th Cir. 2018)

A surety that successfully sought a judicial declaration that it was not liable to a general contractor on a performance bond was not entitled to an award of attorney's fees based on a combination of the indemnification clause in the subcontract covered by the performance bond, which made the subcontractor liable for the contractor's losses caused by the subcontractor's breach, and Fla. Stat. § 57.105(7), which makes attorney's fees clauses reciprocal. Because the indemnity clause of the subcontract would not allow the contractor to recover attorney's fees in an action against the subcontractor (even though it might cover attorney's fees incurred in connection with actions by or against third parties), it was not a unilateral attorney's fees clause and did not come within the scope of the statute.

*FTC v. MOBE Ltd,*

[2018 WL 4960232](#) (M.D. Fla. 2018)

A merchant for which a credit card processor maintained a reserve account for potential charge backs was the owner of the funds credited to the account, not the processor or the bank where the account was maintained. This was evidenced in part by the fact that the contracts among the parties purported to have the merchant grant the bank a security interest in the account and to authorize setoff against the account. Accordingly, a receiver for the merchant was entitled to the funds.

*GECMC 2006-C1 Complex 400, LLC, v. RP 400 Urban Renewal, LLC*, [2018 WL 6055672](#) (N.J. Super. Ct. 2018)

A default rate of interest on promissory notes between commercial parties that was 5% higher than the stated interest rate and retroactive to the date of default was an enforceable liquidated damages clause, and not unconscionable.

*KnighTek, LLC v. Jive Communications, LLC*, [2018 WL 5802519](#) (Del. Super. Ct. 2018)

The seller of a business, whose right to receive deferred payment was to accelerate upon a change in control, had no claim against the buyer for failing to disclose, before the seller agreed to discharge the future right to payment in return for a current payment at a substantially discounted rate, an imminent transaction that resulted in a change in control. The agreements establish an arms-length, commercial relationship between sophisticated parties; they did not establish a fiduciary relationship or impose on the buyer any duty to make affirmative disclosures on issues about which the seller did not ask.

*Lucy v. Platinum Services, Inc.*, [2018 WL 5840801](#) (Iowa Ct. App. 2018)

An employee who owned 10% of the shares in his corporate employer and whose stock redemption agreement included a covenant not to compete was entitled to full payment for his shares despite breach of the covenant because he sold the shares to the corporation's principal shareholder pursuant to a stock purchase agreement, not to the corporation pursuant to the redemption agreement. The stock purchase agreement did not incorporate the covenant not to compete or other terms of the redemption agreement.

*Moore v. Fischer*, [2018 WL 4868289](#) (N.J. Super. Ct. 2018)

The trial court erred in dismissing a class action for usury and other violations of New Jersey law filed by a resident of New Jersey who entered into a car title loan transaction with a Delaware lender. Although the plaintiff signed the agreement in Delaware and the agreement purports to choose Delaware law as the law to govern the transaction, the plaintiff saw an on-line advertisement for the loan, applied for the loan, and made an appointment with lender, all from her New Jersey home. In addition, the lender called her in New Jersey to advise her that the loan had been approved. Because the 180% interest rate violates fundamental policy of New Jersey, the trial court should have considered whether these facts are sufficient to show that New Jersey has a materially greater interest than Delaware in the litigation and that New Jersey law would apply but for the choice-of-law clause.



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