

# THE TRANSACTIONAL LAWYER

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## DRAFTING AN EXCULPATORY CLAUSE

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A recent decision by the United States Court of Appeals for the Seventh Circuit places significant limits on the ability of contracting parties to limit the scope of their contract and tort liability.<sup>1</sup> Transactional lawyers who draft such clauses should be aware of the decision, and consider ways to avoid its impact.

### *The Facts*

To clear the main sewer line to his home, Calvin Horne decided to rent an electric drain rodder from the local Home Depot store. He signed a 3-page rental agreement for an Electric Eel Model R, which had been shipped to the store two months earlier. After a prior rental, a Home Depot employee determined that the foot pedal, which acted as an on/off switch, was defective, and the employee replaced it.<sup>2</sup>

While Horne was using the rodder, a kink appeared in the rodder's cable. Horne stopped the machine, put the toggle switch in reverse, and then pressed the foot pedal in an effort to extract the cable. The machine did not turn on. Horne then tried to remove the cable by hand. The cable wrapped around his hand and he and the machine were flipped over. His hand was badly injured and, after the wound became gangrenous, most of his right index finger was amputated.<sup>3</sup> Horne sued Home Depot for breach of warranty, negligence, and strict liability. The trial court granted summary judgment for Home Depot, relying on the following exculpatory clause in the rental contract:

**RELEASE, INDEMNIFICATION AND WAIVER OF DAMAGES.**

**To the fullest extent permitted by law, customer indemnifies, releases, waives and holds the Home Depot harmless from and against all claims, losses, expenses (including attorney's fees and expenses), liabilities and damages (including personal injury, death, property damage, lost profits, and special, incidental and consequential damages) in any way connected with the equipment, its operation or use, or any defect or failure thereof or a breach of the Home Depot's obligations herein.**

### *The Appellate Ruling*

On appeal, Horne claimed that the exculpatory provision was unenforceable for two reasons: (i) Home Depot had materially breached the contract by providing him with a rodder that was not in good working condition, contrary to an express promise in the agreement; (ii) the provision violated public policy. He also raised, but then failed to preserve, a claim that the provision was unconscionable.<sup>4</sup>

The Circuit Court began its analysis by looking at Home Depot's "General Responsibilities" under the rental agreement. Those responsibilities included providing Horne with a tool "as is" and in good working condition.<sup>5</sup> Horne claimed that Home Depot had materially breached this duty by providing a rodder with a hidden, pre-existing kink in the cable, a reverse toggle switch that was faulty, and a malfunctioning foot pedal.<sup>6</sup> Because those facts were in dispute, the Circuit Court accepted them as true for the purpose of reviewing the trial court's grant of summary judgment.<sup>7</sup>

The court then turned to Illinois law regarding the exculpatory clause. The court noted that "a party in material breach may not enforce a provision of a contract that is favorable to him, such as an exculpatory clause."<sup>8</sup> Thus, Home Depot could not rely on the exculpatory clause if it could not prove substantial compliance with its contractual obligations to Horne. The court acknowledged "exculpatory clauses generally come into play once there has been a breach," but reiterated that an exculpatory clause cannot relieve a party of a "material breach of an express promise at the core of the contract because that would render the contract illusory."<sup>9</sup>

The court then looked to Home Depot's obligations under the rental contract. The court described the obligation to provide the rodder "as is" and in good working condition" as "ambiguous" and "confusing[]." <sup>10</sup> Citing Black's Law Dictionary, the court stated that the phrase "as is" usually signifies that "the buyer takes the entire risk as to the quality of the goods involved," because the phrase disclaims both implied and express warranties.<sup>11</sup> Resolving the ambiguity against the drafter, Home Depot, the court concluded that the promise to provide a rodder in "good working condition" took precedence.<sup>12</sup> It then added, without further supporting citation, that Home Depot could not disclaim liability for injuries that occur as a result of a breach of that promise. In other words, the court read the exculpatory clause as not applying following a material breach by Home Depot.<sup>13</sup>

The court then turned to Horne’s public policy argument. Having interpreted the exculpatory provision narrowly, the court determined the provision did not violate public policy. In so doing, the court noted that U.C.C. § 2-314 provides for a warranty of merchantability “unless excluded or modified,” and § 2-316 provides a mechanism for disclaiming that warranty. As long as the parties comply with § 2-316, a term excluding or modifying the warranty would not violate public policy.<sup>14</sup>

Finally, the court discussed another provision of the rental agreement, which limited Home Depot’s liability:

**Should The Home Depot fail to meet any of its obligations under this Agreement, Customer’s only remedy is repair or replacement of deficient Equipment or to receive, at The Home Depot’s option, a rental charge adjustment.**

The court concluded that, at most, this provision – which referred to Home Depot’s “obligations under this Agreement” – limited Horne’s damages for breach of warranty; it had no relevance to his negligence claim.<sup>15</sup> The court therefore remanded the case for trial, at which Horne will have to prove that Home Depot breached by not providing a rodder in good working condition and that such breach caused his injury.

### *Problems with the Court’s Analysis*

There is a lot to criticize in the court’s opinion but let’s start with the low hanging fruit: the court’s discussion of Article 2. Pretty much everything the court wrote was wrong or irrelevant.

First, the contract between Horne and Home Depot was a lease of goods, not a sale of goods. So, Article 2A – not Article 2 – applied. The court should not have addressed Article 2 at all. Second, despite what Black’s Law Dictionary might say, the phrase “as is” does not disclaim express warranties. Under both Article 2 and Article 2A, a conspicuous “as is” clause disclaims *implied* warranties, such as the implied warranty of merchantability,<sup>16</sup> but it does not disclaim *express* warranties.<sup>17</sup> Therefore, there was arguably no ambiguity in the rental agreement. Home Depot was expressly warranting that the rodder was in good working condition but – assuming the “as is” term was conspicuous – Home Depot was making no implied warranty relating to the goods.<sup>18</sup>

Third, much of the court’s analysis confuses a disclaimer of warranties with a limitation on remedies. But those two types of clauses are quite different. The former can negate a breach; the latter eliminates or reduces remedies for a breach that does occur. Not surprisingly, the U.C.C. treats these two types of clauses differently. Specifically, the comments to Article 2 make it clear that while the essence of a sales contract requires that there be “a fair quantum of remedy for breach,” the “seller is in all cases free to disclaim warranties.”<sup>19</sup> As a result, a seller or lessor is generally free to disclaim all warranties or quality,

and any seller or lessor that does so properly will have no contract liability for damages caused by defective goods. However, a seller or lessor that does not disclaim all warranties of quality must provide a fair remedy for breach of any warranty made, and therefore must have some liability for damages attributable to defective goods. Thus, when the Seventh Circuit concluded that the contractual limitation on liability did not violate public policy because Article 2 expressly authorizes sellers to disclaim warranties, the court lost track of what type of clause was at issue.

Perhaps most significant, the court’s central conclusion seems highly questionable. Recall that the court ruled that an exculpatory clause cannot relieve a party of a material breach of an express promise at the core of the contract because that would render the contract illusory. But it is one thing to include an exculpation clause absolving a party of *all liability* for failing to perform its *only contractual duty* – that indeed would render the duty illusory – and another to limit liability for breach. Home Depot’s lease agreement with Horne did not relieve Home Depot of all liability, and therefore Home Depot’s obligations were not illusory. This was the main point of a vigorous dissent.<sup>20</sup>

Nevertheless, the court probably reached the correct result because the contractual limitation on liability was likely unenforceable with respect to Horne’s personal injury claim. Both Article 2 and Article 2A provide that a limitation on consequential damages for personal injury is *prima facie* unconscionable with respect to consumer goods.<sup>21</sup> So, assuming Home Depot had made and breached an express warranty that the rodder was in good working condition, Home Depot was likely liable for Horne’s personal injuries. Unfortunately, the court failed to cite to the provisions making the damages limitation presumptively unconscionable, perhaps because Horne had not preserved his unconscionability claim and the litigators did not bring them to the court’s attention.<sup>22</sup>

### *Redrafting the Exculpatory Clauses*

Whatever criticism the court’s decision might merit, at least as much can be directed at the language in Home Depot’s lease agreement. The clauses at issue in the case are an amalgam of terms and concepts welded together into an almost incomprehensible mass. Let’s review carefully the language of the clauses quoted above, along with three other related clauses in Home Depot’s agreement with Horne, which the court also mentioned. The clauses are sequenced below so as to facilitate discussion, and might not be in the order in which they appear in the agreement. For ease of reading, the two clauses that the agreement printed in all capital letters have been converted to lowercase lettering and their titles put on a separate line.

*Clause 1: The First Disclaimer*

**1. The Home Depot will provide Customer the tool(s) identified on page 1 of this Agreement . . . “as is” and in good working condition for the time . . . of this Agreement.**

As the court noted, this clause contains both language creating an express warranty (“in good working condition”) and language attempting to disclaim warranties. The U.C.C. provides that, wherever reasonable, terms attempting both such things are to be construed as consistent with each other, but if reading them consistently is not reasonable, the language of disclaimer is inoperative.<sup>23</sup> The U.C.C. also requires that any written disclaimer of implied warranties be conspicuous,<sup>24</sup> and it is not clear from the court’s opinion whether the clause was conspicuous.<sup>25</sup>

Given the court’s confusion about this clause, a rewrite that more clearly distinguishes the express warranty from the disclaimer seems in order. The following is one of many ways to accomplish that, provided that the language of disclaimer is conspicuous. Note that the rewritten express warranty does not extend “for the time of this Agreement” because the condition of the goods might change after the customer receives them – such as through the customer’s misuse, accident, or vandalism by a third party – and Home Depot probably does not want to be responsible for a problem with the goods attributable to such an event.

**1. Home Depot shall provide Customer the tool(s) identified on page 1 of this Agreement in good working condition at the time Customer receives the tool(s). HOME DEPOT DISCLAIMS ALL OTHER WARRANTIES, INCLUDING THE WARRANTY OF MERCHANTABILITY AND THE WARRANTY OF FITNESS FOR PARTICULAR PURPOSE.**

*Clause 2: Another Disclaimer*

**2. Customer acknowledge(s) acceptance of the Equipment “as is” and on a “where is” basis, with “all faults” and without any recourse whatsoever against The Home Depot.**

This clause is, to put it bluntly, a complete mess. First, the clause uses two phrases – “as is” and “with all faults” – which are redundant, so there is no need to use both. Second, the added phrase “where is,” which is designed to disclaim Home Depot’s responsibility to deliver the goods, is quite possibly inappropriate. If the customer signs the agreement before receiving the tool(s), which might be large, heavy, and stored in a back room, it is inconceivable that Home Depot expects the

customer to venture into that space, which is typically reserved for employees, to retrieve the goods.

Third, the phrase “without any recourse whatsoever against The Home Depot” is far too broad. Not only is it inconsistent with the existence of an express warranty that the rented tools are “in good working condition,” but it feeds into the court’s concern that the agreement is illusory. If Home Depot truly has no responsibility for anything, then there is no contract at all, and Home Depot cannot rely on any exculpatory language in the agreement. Pigs get fat; hogs get slaughtered. This language should be removed.

Fourth, it is not clear why the clause is phrased as an acknowledgment. Such phrasing is often used either to make a representation or to negate the existence of or reliance on a representation by the other party. But the purpose of the clause is, apparently, to negate warranties, not to create or negate a representation. It is highly doubtful that Home Depot seeks to have the customer make a representation because Home Depot has little need to impose liability on the customer or to establish a basis for rescission, and in any event a claim for of defense based on misrepresentation requires justifiable reliance,<sup>26</sup> and this is not the kind of statement that Home Depot could rely on. As for negating a representation by Home Depot, this clause probably does not work. In general, a term in an agreement cannot insulate a party from the consequences of a misrepresentation.<sup>27</sup> Moreover, Articles 2 and 2A treat any affirmation of fact about the goods made by a seller or lessor as an express warranty, provided the statement is part of the basis of the bargain.<sup>28</sup> And an express warranty, once made, cannot be disclaimed.<sup>29</sup> Thus, for example, if a Home Depot sales agent made a statement or promise about the goods to the customer, this clause would not prevent that statement or promise from constituting an express warranty. The only way Home Depot can reliably escape liability for such an express warranty is through the parol evidence rule.

Given all of these problems, Clause 2 should be deleted entirely.

*Clause 3: The Release, Indemnification & Waiver*

**3. RELEASE, INDEMNIFICATION AND WAIVER OF DAMAGES.**

**To the fullest extent permitted by law, customer indemnifies, releases, waives and holds the Home Depot harmless from and against all claims, losses, expenses (including attorney’s fees and expenses), liabilities and damages (including personal injury, death, property damage, lost profits, and special, incidental and consequential damages) in any way connected with the equipment, its operation or use, or any defect or failure thereof or a breach of the Home Depot’s obligations herein.**

This clause is, if anything, more convoluted than Clause 2. It lumps together several different concepts – release, indemnity, and waiver – and as a result addresses none of them well.

Let's start with the heading. The phrase “release, indemnification and waiver of damages” is ambiguous. The words “of damages” might modify only the term “waiver” or it might modify all three nouns. Judging by the remainder of the clause however, the words “of damages” are not really intended to modify any of the terms, and therefore do not belong at all. It appears that the clause is intended to release and waive “claims,” and indemnify for “liabilities,” and thus is not restricted to damages.

The opening phrase “[t]o the fullest extent permitted by law” probably serves no purpose and is unnecessary. If the intent of those words is to make sure that any invalid portion is severed from the remainder of the text, that would be better accomplished by a properly drafted severability clause.<sup>30</sup>

The main body of the clause uses the verbs “indemnifies, releases, waives and holds . . . harmless,” each in the present tense. But while a release and waiver are something that a contracting party might do at the time the agreement is signed, because each deals with a present right, indemnification and holding harmless are something that the promisor does later, when a claim is asserted. Each of those is really a covenant, and should be phrased as such.

The words “release” and “waive” in this clause are likely intended to accomplish the same thing: exempt Home Depot from tort liability arising from the lease of the goods. But they are different concepts. Waiver is traditionally defined as either the voluntary or intentional relinquishment of a known *right*.<sup>31</sup> For example, many contracting parties waive the right to a jury trial. Alternatively, a buyer of real property might waive a financing condition to the buyer's duty to consummate the purchase (if, for example, the buyer is able to obtain financing elsewhere). A release, in contrast, is the relinquishment of a *claim*; its effect is to extinguish any cause of action on account of such claim. Releases are most frequently used in connection with the settlement of a dispute. When contracting parties wish to deal with claims, they should probably refrain from using the term “waiver,” because the term does not properly apply in that context.

But the term “release” is probably misused here too. Releases do not relate to future claims. Instead, they are retrospective, applying only to claims that already exist. To prevent liability for events in the future, the proper clause is an assumption of risk,<sup>32</sup> although the “hold harmless” language probably has the same effect. Because Clause 4, discussed below, also deals with assumption of the risk, most of Clause 3 can be jettisoned.

The one portion of Clause 3 that might be worth retaining is the portion dealing with indemnification. Unlike the waiver, release, and the language holding Home Depot harmless, each of which deals with the customer's rights against Home Depot, indemnification deals with a third party's claim for damages, and who, as between the contracting parties, is responsible for that.<sup>33</sup> If Home Depot truly wishes to make the customer responsible for such third-party claims, the agreement should contain language to that effect. Suggested language is included below at the end of the discussion of Clause 4.

#### *Clause 4: Assumption of the Risk*

#### **4. CUSTOMER LIABILITY.**

**During the rental period, customer assumes all risks associated with and full responsibility for the possession, custody and operation of the equipment, including, but not limited to, rental charges, customer transport, loading and unloading, property damages and destruction, losses, personal injury, and death.**

This clause is also somewhat unclear. It is phrased principally as an assumption-of-risk clause, suggesting that it deals with tort – specifically a tort in which the customer or some third party suffers personal injury or property damage. However, the title – “Customer Liability” – suggests that the clause is about the customer's responsibility for damages to the goods themselves. Such liability is not properly regarded as an assumption of the risk. Perhaps, therefore, this clause should be divided into two separate clauses: one dealing with assumption of the risk and another dealing with liability for damage to the rented goods. With respect to assumption of the risk, it is worth remembering that while contracting parties often can disclaim liability for negligence, they cannot normally disclaim liability for recklessness or intentional torts, and probably not for strict tort liability.<sup>34</sup>

The clause also includes a reference to the customer's liability for the rental charge, but that is no doubt dealt with elsewhere in the agreement. There is no need for this clause to address it at all.<sup>35</sup>

Finally, the clause by its terms applies “[d]uring the rental period,” but this phrase might be too limited. In another part of the agreement, the phrase “Rental Period” – with initial capital letters – is defined. The absence of capital letters in this clause makes the phrase ambiguous as to whether the definition applies. If it does, the clause is too narrow because the customer might retain the goods beyond the rental period. If the customer does so, the customer should be assuming the risk throughout the period the goods are in the customer's charge.

Here is a revised version of Clauses 3 and 4.

**4a. ASSUMPTION OF THE RISK.**

**Customer assumes all risks associated with operation, loading, unloading, and transportation of the equipment, including risks resulting in personal injury or death or damage to any property.**

**4b. INDEMNIFICATION.**

**Customer shall indemnify Home Depot from and against all claims, losses, expenses (including attorney’s fees), liabilities, and damages in any way arising from or connected with customer’s rental of the equipment.**

**4c. CUSTOMER LIABILITY.**

**Customer shall return the equipment in the condition it was in when customer first received it, normal wear and tear excepted, and is liable for all damages thereto not attributable to normal wear and tear.**

*Clause 5: Remedy Limitation*

**5. Should The Home Depot fail to meet any of its obligations under this Agreement, Customer’s only remedy is repair or replacement of deficient Equipment or to receive, at The Home Depot’s option, a rental charge adjustment.**

This clause is a limitation on remedy. It suffers from at least three problems. First, as phrased, it applies to Home Depot’s failure to satisfy its contractual obligations, and thus does not cover any liability in tort. If the intent is to cover tort liability as well, then the language needs to be revised, but whether such an effort would be effective is beyond the scope of this article.

Second, the clause probably should give the customer, not Home Depot, the option of either a refund or repair or replacement of the goods, and the language regarding repair or replacement needs to be tweaked. This is because a customer is entitled to the normal panoply of statutory remedies if a limited remedy fails of its essential purpose.<sup>36</sup> The limited remedy in this clause could fail of its essential purpose because it gives Home Depot the option to provide a partial refund, and the amount provided might render the remedy meaningless. As for repair or replacement of the goods, that is an exclusive remedy commonly provided for in agreements for sale. But in a lease transaction, particularly a short-term lease such as Home Depot typically enters into, repairing or providing replacement goods would be meaningless if the lease term has already expired. No doubt Home Depot does not intend to promise repaired or replacement goods only to then turn around and assert that the lease term is over so that the customer gets nothing, but the language could be read to permit that. Given that courts will often seize on any plausible argument that will allow the court to disregard a limitation on remedies so as to

protect a consumer, the language should be revised to make it clear that the customer is entitled to working goods for a term equal to the entire rental period.

Third, as noted above, both Article 2 and Article 2A provide that a limitation on consequential damages for personal injury is prima facie unconscionable with respect to consumer goods.<sup>37</sup> Accordingly, if the clause is to be effective to exclude damages for personal injury, something needs to be added to demonstrate that the clause is not unconscionable. This will be difficult and nothing that can be added is sure to be effective. Adding a representation by the customer that the customer has health insurance to cover the expenses associated with treatment for any injury resulting from the goods might help. So too might including a declaration that the price would be higher if the limitation were not included. It might also be desirable to have the customer separately assent to the limitation of liability, in an effort to minimize the procedural unconscionability associated with a contract of adhesion.

Here is a revised version of Clause 5, which includes all of these suggestions:

**5. LIMITED REMEDIES. If Home Depot incurs any liability to Customer arising out of or in connection with this Agreement, whether in tort or contract, Customer’s only remedy will be, at Customer’s option, a refund of the Rental Price or repaired or replacement tool(s) for a term equal to the Rental Period. Because the Rental Price would be significantly more if Home Depot were potentially liable for personal injury, and because Customer represents that Customer has adequate health insurance to cover the cost of treatment for injury, in no event will Home Depot be liable for any personal injury arising from or in connection with the tool(s).**

\_\_\_\_\_  
Customer’s Signature

*Conclusion*

Transactional lawyers frequently use multiple nouns or verbs in a single clause to cover the same general concept. For example, it is common for lawyers to use “null and void,” “convey, transfer, and assign,” and a whole host of similar phrases. This practice, likely rooted in the Norman Conquest, after which lawyers had to use both English and French terms in their documents, reflects a cautious approach to drafting. It helps ensure that nothing intended to be covered is inadvertently omitted. Nothing in this article is intended to denigrate that practice and, assuredly, nothing in this article will stop it.

However, anyone reading carefully the clauses in the Home Depot agreement cannot help but wonder if the drafter really

understood the various exculpatory terms the agreement contained. Clearly the court did not and it is doubtful that the litigators did either. This lack of understanding is unfortunate because there are limits on the enforceability of almost every type of exculpatory clause. To navigate around those limitations, a transactional lawyer needs to distinguish among

the various types, and not conflate a warranty disclaimer with a limitation on damages, or confuse either with a term designed to limit tort liability. The following chart might be useful in this regard. It is far from complete. There are many other sources of law that can limit the effect of an exculpatory clause. Still, it might provide some guidance.

Method of Exculpation	Type of Liability to Which Exculpation Applies	Limit on Exculpation
Warranty Disclaimer	Contract: Express Warranty	UCC §§ 2-316(1), 2A-213(1)
	Contract: Implied Warranty	UCC §§ 2-316(2), (3), 2A-214(2), (3)
Limitation on Amount or Type of Damages (e.g., no consequential damages; only repair or replacement)	Contract: Any Breach	UCC §§ 2-719(2), (3), 2A-503(2), (3)
Liquidated Damages	Contract: Any Breach	UCC §§ 2-718(1), (3), 2A-504
Indemnification	Contract or Tort: Third Party’s Personal Injury or Property Damage	
Release	Tort: Negligence	Restatement (Second) of Contracts § 195
Assumption of the Risk	Tort: Negligence or Strict Liability	Restatement (Second) of Contracts § 195 Restatement (Second) of Torts § 402A



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**Notes:**

1. Home v. Electric Eel Mfg. Co., [987 F.3d 704](#) (7th Cir. 2021).
2. *Id.* at 710.
3. *Id.* at 711.
4. *Id.* at 712 n.3.
5. *Id.* at 714.
6. *Id.* There was also some question about whether Home Depot had provided an older rodder, rather than the fairly new one described in the rental agreement, but Home was later deemed to have admitted that he received the rodder described in the agreement. *Id.* at 714-15.

7. *Id.* at 717.
8. *Id.* at 718.
9. *Id.*
10. *Id.* at 719.
11. *Id.*
12. *Id.* at 719-20.
13. *Id.* at 721-23.
14. *Id.* at 724.
15. *Id.* at 722.
16. See U.C.C. § 2-316(3)(a), 2A-214(3)(a).
17. See U.C.C. §§ 2-316(1), 2A-214(1).
18. While some might argue that “as is” is inconsistent with any express warranty, it is important to remember that express warranties arise from any statement of fact which relates to the

goods and becomes part of the basis of the bargain, *see* U.C.C. §§ 2-313(1)(a), 2A-210(1)(a), and need not relate to the quality of the goods. Most sale and lease agreements that use the phrase “as is” nevertheless identify the goods sold or leased, and thus create an express warranty that the goods meet that description. For example, the lease agreement in this case described the rodder by its part number, and that number corresponded to a make and model. Therefore, the lease probably did expressly warrant that the goods would be of that make and model, despite the “as is” clause. While it might be unusual to use the phrase “as is” while also making an express warranty of quality, there is no necessary conflict in doing so.

19. *See* U.C.C. § 2-719 cmts. 1, 3. Because § 2A-503 is modeled on § 2-719, the same is no doubt true under Article 2A.

20. [987 F.3d at 729-34](#).

21. *See* U.C.C. § 2-719(3), 2A-503(3).

22. Neither of the provisions is cited in the appellee’s brief or the appellant’s reply brief. The appellant’s initial brief is not available on Westlaw.

23. *See* U.C.C. §§ 2-316(1), 2A-214(1).

24. *See* U.C.C. §§ 2-316(2), 2A-214(2). Although each of these provisions is expressly subject to the subsection that follows it, and those following subsections provide that the language “as is” is effective to disclaim implied warranties without expressly requiring that such language be conspicuous, courts have almost universally – and correctly – concluded that conspicuousness is required. *See, e.g.*, Board of Directors of the City of Harriman Sch. Dist. v. Southwestern Petroleum Corp., [757 S.W.2d 669](#) (Tenn. Ct. App. 1988); Leland Indus., Inc. v. Suntek Indus., Inc., [362 S.E.2d 441](#) (Ga. Ct. App. 1987); Fairchild Indus. v. Maritime Air Serv., Ltd., [333 A.2d 313](#) (Md. 1975); Osborne v. Genevie, [289 So. 2d 21](#) (Fla. Ct. App. 1974); Woodruff v. Clark Cty. Farm Bureau Co-op. Ass’n, [286 N.E.2d 188](#) (Ind. Ct. App. 1972).

25. As reprinted in the court’s opinion, the full text of Clauses 3 and 5 (not merely the titles) were in all capital letters. Clauses 1, 2 and 4 were not reprinted in all capitals.

26. *See* [Restatement \(Second\) of Contracts 164\(1\)](#).

27. *See* [Restatement \(Second\) of Contracts § 196](#).

28. *See* U.C.C. §§ 2-313(1)(a), 2A-210(1)(a).

29. *See* U.C.C. §§ 2-316(1), 2A-214(1).

30. For advice on drafting a severability clause, *see* STEPHEN L. SEPINUCK & JOHN F. HILSON, TRANSACTIONAL SKILLS: HOW TO STRUCTURE AND DOCUMENT A DEAL 76-78 (2d ed.2019); Nick Fay, *The Unintended Consequences of a Severability Clause*, [3 The Transactional Lawyer 3](#) (Dec. 2013); TINA L. STARK,

NEGOTIATING AND EXECUTING CONTRACT BOILERPLATE, 548-49 (2003).

31. *See, e.g.*, [Restatement \(Second\) of Contracts § 84](#) cmt. b.

32. *See* Leon v. Family Fitness Center, Inc., [71 Cal. Rptr. 2d 923](#), 926-27 (Cal. Ct. App. 1998) (recognizing that the terms are often, albeit inappropriately, viewed as “interchangeable”).

33. For discussion of the distinction between an indemnification clause and a hold-harmless clause, *see* Charles Brocato, Jr., *Drafting Indemnification Clauses*, [1 The Transactional Lawyer 1](#) (Oct. 2011).

34. *See* [Restatement \(Second\) of Contracts § 195](#). *But cf.* [Restatement \(Second\) of Torts § 496B](#).

35. Moreover, it is likely that the customer pays the rental fee up front, before receiving the goods, further obviating the need for the agreement to belabor liability for it.

36. *See* U.C.C. §§ 2-719(3), 2A-503(2).

37. *See* U.C.C. §§ 2-719(3), 2A-503(3).



## Recent Cases

### SECURED TRANSACTIONS

#### *Attachment Issues*

*In re Ricca,*

[2021 WL 810253](#) (Bankr. E.D. Pa. 2021)

A modification to two loan agreements, signed by the debtor and his wife and which provided that “[t]he Debt is partially guaranteed by a Security Interest in inheritance in the estate of [the debtor’s father],” was sufficient to create a security interest in the debtor’s rights as a beneficiary under his deceased father’s will. The language adequately described the collateral and the parties agreed that the debtor’s intent was to pledge his inheritance. The security interest was automatically perfected under § 9-309(13).

*Blessing v. Sandy Spring Bank,*

[2021 WL 653161](#) (Md. Ct. Spec. App. 2021)

A security agreement purporting to grant a security interest in property of both a limited liability company and its subsidiary, but signed only on behalf of the LLC, was presumptively ineffective to convey a security interest in property of the subsidiary. A security interest might have been conveyed if: (i) treating the parent and its subsidiary as the same entity is necessary to prevent fraud; (ii) the subsidiary was a mere instrumentality of its parent; or (iii) the subsidiary consented.

### ***Enforcement Issues***

*FTUTB, Inc. v. Wisconsin Surgery Center LLC*,  
[2021 WL 1017051](#) (E.D. Wis. 2021)

The administrative agent for a \$100 million secured loan, which received the security interest for the benefit of the lenders and which, under the credit agreement, had the right to bring lawsuits on behalf of the lenders for violations of applicable law and breaches of the credit agreement, was not the real party in interest with respect to claims the agent brought against the CEO of the debtor, another employee of the debtor, and a company controlled by the CEO for fraud, conversion of collateral, and tortious interference with contract arising from their engaging in competition with the debtor, in violation of the CEO's and employee's employment contracts with the debtor. The lawsuit accused the defendants of wrongfully diverting a revenue stream and earning potential that belonged to the debtor, and which was pledged as collateral, and therefore the alleged injury was suffered by the lenders, not by the administrative agent.

*111 West 57th Investment LLC v. 111 W57 Mezz Investor LLC*,  
[2021 WL 1179529](#) (N.Y. Sup. Ct. App. Div. 2021)

A member of the debtor LLC was not someone who was entitled to notification of the secured party's proposal to accept the collateral – an interest in an entity engaged in constructing a \$400 million luxury condominium – in satisfaction of \$25 million in debt or someone who could object to the proposal. The member therefore had no cause of action against the secured party for breach of Article 9. However, the member stated a derivative cause of action for breach of the duty of good faith by alleging that the secured party suborned insiders to consent to the acceptance of collateral by promising that they would remain the construction managers. The cause of action was not barred by the exculpatory clause in the parties' agreement because liability for intentional bad acts are not subject to waiver, and it was not barred by the 3-month limitation period provided for in the agreement because the defendant's own actions precluded compliance with that limitation.

### ***Liability Issues***

*Cassidy v. Signature Bank*,  
[2021 WL 1159641](#) (Ill. Ct. App. 2021)

A bank that received a security interest in a depositor's two IRA deposit accounts to secure a corporate debt was liable for breach of contract when it set off the funds in the deposit accounts following default because the IRAs were exempt under state law from "judgment, attachment, execution, distress for rent, and seizure for satisfaction of debts," and they did not lose that status when the depositor granted the security interest.

*Commonwealth v. Credit Acceptance Corp.*,  
[2021 WL 1147444](#) (Mass. Super. Ct. 2020)

The Commonwealth stated causes of action for usury and inaccurate disclosure of the interest rate charged against a finance company that purchased car loans initiated by dealers who marked up the price of the vehicles sold, thereby disguising interest as part of the sales price. The dealers did this in response to the finance company's policies regarding how it priced and paid for the loans. The Commonwealth also stated a cause of action against the finance company for requiring vehicle buyers to buy service contracts in connection with their purchases. Even though the finance company instructed dealers not to have such a requirement, because the dealers were the finance company's agents, the finance company is liable for the dealers' conduct.

### **BANKRUPTCY**

#### ***Claims & Expenses***

*In re Orexigen Therapeutics, Inc.*,  
[2021 WL 1046485](#) (3d Cir. 2021)

The \$7 million debt of a company to the debtor and the \$9 million obligation of the debtor to the company's subsidiary were not "mutual" debts subject to set off under § 553 even though the contract between the company and the debtor expressly permitted the company to set off amounts the debtor owed to the company's affiliates. The mutuality requirement in § 553 excludes triangular setoff, even setoff authorized by contract.

#### ***Discharge, Dischargeability & Dismissal***

*In re Martin*,  
[2021 WL 825142](#) (9th Cir. BAP 2021)

A \$50,000 debt secured by an unperfected security interest in two paintings and a Porsche was nondischargeable under § 523(a)(2)(A) to the extent of \$10,000, due to the debtor's actual fraud in selling the Porsche, knowing it was collateral, and not using the proceeds to pay the secured party. It did not matter that the bankruptcy court denied relief under § 523(a)(6) after concluding that the debtor did not willfully and maliciously injure the secured party because the state of mind needed for fraud does not require such a malicious intent.



## LENDING, CONTRACTING &amp; COMMERCIAL LITIGATION

*In re Ablitt,*[161 N.E.3d 421](#) (Mass. 2021)

A lawyer violated the rules of professional conduct and would be disbarred for, among other things: (i) disclosing confidential client information to a factor that purchased the accounts of the law firm that the lawyer managed; and (ii) failing to get clients' consent to the factoring agreement even though the firm's agreement with the clients prohibited nonconsensual assignment.

*Holman v. Gentner,*[244 A.3d 690](#) (D.C. 2021)

A term in a law firm's operating agreement that reduced a departing member's equity payout by 50% if the member took any firm clients violated D.C. Rule of Professional Conduct 5.6(a), which prohibits a lawyer from entering into an agreement that restricts the lawyer's right to practice law after termination of the relationship, and was therefore unenforceable.

*In re Citibank August 11, 2020 Wire Transfers,*[2021 WL 606167](#) (S.D.N.Y. 2021)

Lenders that received more than \$500 million in mistaken payments from a bank acting as administrative agent on a \$1.8 billion unmatured term loan – payments from the agent's own funds – were not obligated to return the funds even though they received notification of the mistake in less than 24 hours. The lenders were entitled to the "discharge-for-value" defense to the agent's unjust enrichment claim, and therefore did not have to demonstrate that they changed their position in detrimental reliance on the funds received.

*Zuniga v. Major League Baseball,*[2021 WL 976958](#) (Ill Ct. App. 2021)

An arbitration clause mentioned on the reverse side of a baseball ticket but accessible only by accessing a web page identified on the ticket was procedurally unconscionable – and therefore unenforceable – even though ticket holders were entitled to reject the arbitration clause by notifying the team within seven days after the game.

*JC Aviation Investments, LLC v. Hytech Power, LLC,*  
[2021 WL 778043](#) (Wash. Ct. App. 2021)

A clause in an LLC operating agreement providing for arbitration of "any dispute hereunder" was narrow and did not apply to one member's action for a decree of judicial dissolution pursuant to statute. The arbitration clause also did not cover the member's request for appointment of a receiver because that request was based on the security agreement between the member and the LLC, which did not have an arbitration clause, rather than on the LLC agreement.

*Jackson v. Harvest Capital Credit Corp.,*[2021 WL 865298](#) (2d Cir. 2021)

A subordination agreement, which limited the amount of additional senior debt the debtors could incur but specified that the agreement would terminate upon "the indefeasible payment in full in cash" of the senior creditor, was not breached by a "netting transaction" pursuant to which the senior lender received approximately \$1.5 million in cash and \$2 million in new debt, and released its security interest. The transaction was the economic equivalent of full payment of the \$3.2 million debt and was structured as it was to reduce transaction costs; thus the subordination agreement had terminated.

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