ACCEL

THE TRANSACTIONAL LAWYER

Volume 14 – February 2024

LESS MIGHT NOT BE MORE BUT IT IS OFTEN BETTER

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This article is about verbosity. It endeavors to provide guidance to transactional lawyers on when wordiness is necessary, when it is innocuous, and when it is dangerous.

SUPERFLUITY – USUALLY HARMLESS BUT OCCASIONALLY ESSENTIAL

Transactional lawyers frequently use two or more nouns or verbs in a single clause to cover the same concept. For example, it is common for lawyers to use such phrases as "null and void," "cease and desist," "free and clear," and "right, title and interest." Some scholars have suggested that this practice dates back to the Norman Conquest, after which lawyers started using both English and French terms in their documents.[1] Another attributes the practice to the time when English lawyers were paid by the word.[2] Both camps lament the practice and urge transactional lawyers to eliminate unnecessary words.[3]

In many situations, this advice is sound. Some couplets and triplets contain words that are synonymous, so that a phrase using only one of the words conveys the same meaning as a phrase using both or all of them. This is common when, as in the examples above, the words come from different root languages. In other situations, the words had different connotations at one time but those differences have been lost. For example, it was common in a will to have the testator "give, devise, and bequeath" specified property because "give," "devise," and "bequeath" historically had different meanings.[4] But modern usage is different,[5] and the single word "devise" is sufficient.

Contents

In still other cases, the words might have slightly different meanings but one of them is broad enough to encompass all the others. For example, the granting clause of a draft security agreement that I recently reviewed stated that the debtor "hereby pledges, collaterally assigns, mortgages, transfers and grants" a security interest to the secured party. The word "pledge" in that context might have a narrow meaning, referring to a bailment for security, and thus be limited to situations in which the secured party takes possession of the collateral.[6] The word "mortgage" seems archaic, perhaps a leftover from when security interests in personal property were called chattel mortgages. But each of the words "transfer" and "grant" is sufficiently broad to encompass the meaning of the entire string, with the result that the phrase could be shortened to "hereby transfers" or "hereby grants" without any reduction in meaning.

There is also a benefit to reducing the phrase to a single word in these situations. Doing so makes it easier to be consistent throughout the document. If the drafter uses the entire string of verbs or nouns in one place and then, in another place, inadvertently omits one or more of the words, an interpretive problem arises. A court might endeavor to ascribe different meanings to the phrases because of their different wording.[7]

But there are countervailing considerations. Sometimes, the words in a common litany have different meanings, and those differences are important. For example, representations and warranties of fact differ in virtually every respect: the types of facts they can cover, the elements needed to assert a claim or defense if the fact is untrue, and the remedies available if the fact is untrue.[8] Consequently, it is *not* redundant for a contracting party to both represent and warrant the same fact, and a drafter should not pare down the phrase "represents and warrants" unless the drafter intends to limit the effect of the clause.[9] Similarly, many indemnification clauses are drafted so as to require the indemnitor to "indemnify, defend, and hold harmless" the indemnitee. These words have different meanings and each might be needed or desired.[10]

The conclusion to draw from this discussion is clear. If the nouns or verbs in a commonly used string are redundant, by all means feel free remove some of them. That makes the document shorter and easier to read, and it reduces the risk of using inconsistent wording. But aside from those minor benefits, redundancy is innocuous and need not be avoided. Moreover, it is critical not to omit words that have independent and important meaning. For a transactional lawyer pressed for time – or the lawyer's client who pays based on the time the

lawyer works on a matter – it might be impractical or undesirable for the lawyer to research the precise meaning of each word in a customary list. And the cost might not be isolated to one client. If the change is made to a form document that others use and are familiar with, editing the form might impel others to spend time reviewing the changes.

DEFINITIONAL REDUNDANCY – HARMLESS BUT UNDESIRABLE

The granting clause in the draft security agreement that I recently reviewed was a whopping 539 words. The central portion of the clause contained a description of collateral. It consisted of 248 words to do what Article 9 of the UCC makes clear can be accomplished in just 22. That is because, subject to a few exceptions, a description of collateral that uses a term defined in the UCC is sufficient to cover all property that falls within that term.[11] Consequently, the clause's express inclusion of "goods," made its additional references to defined and undefined subclasses of goods – "equipment," "fixtures," "inventory," "vehicles," and "accessions" – entirely superfluous. Similarly, by expressly covering "investment property," there was no reason for the clause to also list "pledged stock, "securities accounts, commodities accounts," and " all . . . investments deposited or required to be deposited in any of the foregoing." In short, the draft agreement of which this granting clause was a part used defined terms – both by creating definitions for some terms and by expressly incorporating the UCC's definitions for other terms – but then refused to rely on the definitions to carry the meanings ascribed to them.

Someone inclined to be charitable might regard drafting in this manner as thoughtful, because it helps to ensure that nothing is inadvertently omitted. Nevertheless, to create or incorporate definitions and then effectively ignore them creates two problems. First, it leads the reader to question whether the drafter truly intended the definitions to apply. There is an old maxim that "superfluity does not vitiate."[12] In other words, that redundancy is not a sufficient reason to negate or narrowly interpret one of the redundant terms. But there is an equally powerful maxim that every term in an agreement is to have independent meaning and effect.[13] While this interpretive principle is rather dubious at the level of individual words,[14] courts apply it at that level regularly.[15] So, to create or incorporate definitions but then use the defined terms in ways that create redundancy is to invite a court to disregard the definitions.

Second, such careless use of definitions and defined terms might prompt a reader to question the writer's understanding of the words the writer put on the page. In all good legal writing – whether objective or persuasive, litigation-related or transactional – the writer should cultivate the reader's trust in the writer's knowledge and expertise. Drafting that undermines that trust is counterproductive.

LIMITING PHRASES – VERBOSITY WITH A BITE

Most contractual terms that use a series or verbs or nouns – such as the couplets and triplets discussed in the first section of this article and the description of collateral discussed in the second section of this article – do so to be expansive and inclusive. The redundancy in such terms can occasionally be problematic but it is typically intended and usually innocuous.

Adjectival and adverbial phrases, however, tend to be limiting. When writing such phrases, transactional lawyers need to be particularly careful. Superfluous words in such a phrase can be calamitous for the drafter. To illustrate that, the remainder of this article discusses five cases, each taken from the world of commercial finance, that involved a few "extra" words that created an interpretive problem and, in some of the cases, caused significant harm to the client of the drafter.

Case One – "sold . . . by [the secured party]"

In *Shelby County State Bank v. Van Diest Supply Co.*,[16] a bank and a supplier each claimed a security interest in the inventory of an agricultural chemicals retailer. The supplier's security agreement described the collateral as follows:

> ***[a]ll inventory***, including but not limited to agricultural chemicals, fertilizers, and fertilizer materials ***sold to Debtor by [the supplier]*** whether now owned or hereafter acquired, including all replacements, substitutions and additions thereto, and the accounts, notes, and any other proceeds therefrom.

The supplier claimed a security interest in all of the retailer's inventory. The bank claimed that the supplier's collateral was limited to goods that the supplier had sold to the debtor. After concluding that the language was ambiguous – the phrase "sold to the Debtor by [the supplier]" (in blue above) might or might not modify "all inventory" (in red above), the bankruptcy court ruled that the clause had the narrower meaning that the bank advocated and that the supplier's collateral was limited to goods that the supplier had sold to the debtor. The district court reversed but the Seventh Circuit agreed with the bankruptcy court and reversed the district court. As a result, the entire "including" clause – everything from the word "including" through the reference to the supplier – limited the scope of the collateral.

From there, things got even worse for the supplier. Because it was deemed to have a security interest in only some of the debtor's inventory, but that portion of inventory was not segregated or otherwise readily matched to the transactions giving rise to proceeds (such as through use of a universal product code), none of the debtor's receipts from the sale proceeds were "identifiable" proceeds of the supplier's collateral.[17] In short, the supplier claimed to have a security

interest in all the debtor's inventory but it ended up having a security interest in only some unidentified portion of the inventory and in none of the proceeds.

The problem for the supplier was that the description of collateral had too many words. There would have been no issue and no problem if the security agreement described the collateral as follows:[18]

> [a]ll inventory, whether now owned or hereafter acquired.

Had the supplier used eight words, rather than 41, the supplier would have had all the collateral it claimed and it would have avoided all the expense of litigation.[19] Less would indeed have been more.

Case Two – "Purchase Money Security Interest in all New Trailers"

In *In re K & L Trailer Sales and Leasing, Inc.*,[20] decided late last year, two banks each claimed to have had a security interest in all of the debtor's trailers, and each asserted priority in approximately $375,000 as proceeds of nine trailers. The security agreement for one of the banks purported to grant a "Purchase Money Security Interest in all New Trailers." However, that bank had not actually financed the debtor's acquisition of the nine disputed trailers, and therefore, if the bank did have a security interest in the trailers, the security interest was not a purchase-money security interest ("PMSI").[21] Seizing upon this, the other bank argued that the grant was limited to transactions that gave rise to a PMSI.

The court disagreed, concluding that the words "purchase money" did not in fact reduce the scope of the collateral. So, the bank avoided loss as result of those words. But had the security agreement omitted those words, the bank would have saved the time and expense of litigating the issue.

This alone does not prove that the words should have been omitted. If the words serve some other purpose, it might be desirable to include them and either put up with the resulting interpretive issue or find some other way to avoid it. But these words do nothing. PMSI status is determined by the facts, not by the language used in the security agreement or by the parties' intent. Transacting parties can label a security interest as a PMSI, but that label in the security agreement is meaningless.[22]

We cannot be sure why the drafter of this agreement included the words "purchase-money." In all likelihood, the drafter was attempting to clarify what the drafter understood would be the case. What the drafter failed to appreciate, however, is that the "clarification" was, at best, meaningless and could be interpreted as a limitation.

Case Three – "subject to the control of, Lender"

In *Berkshire Bank v. Kelly*,[23] also decided last year, Thomas Kelly signed a Commercial Pledge Agreement that purported to grant to Berkshire Bank a security interest in Kelly's investment account at Merrill Lynch to secure a business loan that the bank made to Kelly's sister. The security agreement described the collateral as follows:

> all of Grantor's property . . . ***in the possession of, or subject to the control of, Lender*** . . . , whether existing now or later and whether tangible or intangible in character, including without limitation each and all of the following:
>
> A ***first priority perfected*** security interest in the following property owned by Thomas John Kelly: Merrill Lynch Investment Management Account XXXX7779 . . . .

Notice that the words "first priority perfected" (in red above) have the same problem that "purchase-money" had in the *K & L Trailer Sales* case. Perfection and priority are legal conclusions based on the facts, and intent is irrelevant to each of them. So, using those words in the description of collateral serves no purpose and might even cause a problem.[24] But those words were not what the parties were fighting about.

After the sister defaulted, the bank sought to foreclose on the investment account. The debtor resisted, arguing that, because the bank did not have control of that account, the security interest did not attach. In other words, the introductory phrase (in blue above) limited the collateral to property in the possession or control of the bank, and the express "including" clause did not alter or create an exception to that limitation. The court agreed with the debtor that the initial language was limited to the property in the bank's possession and control, and the court implicitly ruled that the subsequent descriptive language (beginning with "including without limitation) did not expand on the initial language. Among other things, this case, like *Van Diest*, shows the danger of relying on an "including" clause to pick up something that the general language does not in fact cover.

How should this agreement have been drafted? The answer to that is affected by § 9-108(c) of the UCC, which provides that a description of collateral as "all of the debtor's assets" or "all of the debtor's personal property" is ineffective in a security agreement. Consequently, simply deleting the problematic language in blue and describing the collateral as "all of Grantor's property, whether existing now or later" would have solved one problem but created another. In short, the phrase "all property" is ineffective. The phrase "all property in possession or control of Lender" is likely to be effective,[25] but is limited.

What is needed is language that will not run afoul of § 9-108(b) while at the same time covering the Merrill Lynch investment account and any other property that the debtor turns over to the bank (by delivering possession or control). The simplest way to ensure that the Merrill Lynch account is adequately described is to move the reference to the investment account, placing it before the words describing other property possessed or controlled by the bank. The following description should work:

> (i) Grantor's Merrill Lynch Investment Management Account XXXX7779; and
>
> (ii) all property of Grantor, whether now existing or hereafter acquired, in the possession of or subject to the control of Lender.[26]

It is perhaps worth noting that the problem in this case is more about the sequence of the words in the clause, not about excess words. Presumably, the parties really did intend to limit the collateral to the Merrill Lynch account and anything else that the debtor had turned over to the bank.[27] Nevertheless, the case illustrates a danger posed by limiting language and the care a transactional lawyer needs to take with it.

Case Four– "subject to collection"

In *Better Holdco, Inc. v. Pierce*,[28] an employee borrowed a total of $2,277,000 from her employer to exercise stock options that the employer had granted to her. The promissory notes executed as part of the transaction provided that 49% of the entire amount was non-recourse as to the employee. As to that portion, the employer was limited to foreclosing on the collateral: the purchased shares of stock. The notes became due 120 days after her employment ended, and the employer sued to collect.

In entering summary judgment against the employee, the court ruled that she could satisfy the nonrecourse portion by returning the pledged shares of stock. Nevertheless, a dispute remained about the interest that was owing. A term in the notes provided for default-rate interest as follows:

> [u]npaid principal and interest ***subject to collection*** will bear interest at the maximum rate allowed under New York law for nonexempt lenders

Focusing on the words "subject to collection" (in blue above), the court ruled that the language was ambiguous with respect to the non-recourse portion of the debt because, while that amount was due, the employee had no personal liability for it and the employer could not collect from any assets of the employee other than the collateral.[29] Then, interpreting the language against the drafter, which was the employer, the court ruled that default interest accrued only on the recourse portion of the debt.[30]

The decision seems correct. It is difficult to imagine what "subject to collection" could have meant other than the recourse portion of the debt. Nevertheless, if the intent was otherwise, using fewer words would have avoided any ambiguity and accorded the employer greater rights.

Case Five – "Installment of"

Karmely v. Wertheimer[31] involved the meaning of a mezzanine loan agreement between a borrower and a lender affiliated with the majority owners of the borrower. The agreement authorized foreclosure after default and defined "default" as follows:

> . . . the failure by the Borrower to pay any ***installment of*** principal, ***interest, or other payments*** required under the Note when due.

After the senior lender granted an extension, the mezzanine loan matured but was not paid. The mezzanine lender then foreclosed on the collateral – the owners' equity interests in the borrower – thereby wiping out the interest of the minority owner. Litigation ensued, with the now-ousted minority owner claiming that there was no default.

On appeal of a dismissal for failure to state a claim, the Second Circuit ruled that the language was ambiguous and thus the case should not have been dismissed. According to the court, it was unclear if the phrase "installment of" (in blue above) modified only "principal" or also modified "interest, or other payments" (in red above).[32] In other words, although the borrower had failed to pay the amount due at maturity, it was unclear if that amount was an "installment" – because installments are typically a fraction of the debt, not the entire amount due – and whether default was limited to nonpayment of installments.

The language would have been far more clear – and given the mezzanine lender all the rights it claimed to have – if it had been shorter:

> . . . the failure by the Borrower to pay when due any amount required under the Note.

CONCLUSION

Etymologists will attest that "superfluity" shares a root with "influenza." This seems apt. Superfluity is a disease, spread by transactional lawyers, that infects many transactional documents.[33] But when superfluity consists simply of a string of similar nouns or verbs, it is generally not serious. Far more

dangerous – occasionally even fatal – is verbosity in a limiting phrase. Every word in such a phrase can restrict the scope of the clause, occasionally in an unintended and undesired way. So be on guard. Make sure that limiting phrases are positioned properly, so that they apply only to what is intended. Above all, remember that using fewer words is almost always clearer and is often better.

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Notes:

1. *See* DAVID MELLINKOFF, THE LANGUAGE OF THE LAW 121-22 (1963) (also noting that some paired synonyms are both rooted in the same language); TINA L. STARK, DRAFTING CONTRACTS: HOW AND WHY LAWYERS DO WHAT THEY DO 204 (Wolters Kluwer 2007).

2. *See* BRYAN A. GARNER, GARNER'S GUIDELINES FOR DRAFTING AND EDITING CONTRACTS 59 (West Academic 2019).

3. *See* TINA L. STARK, *supra* note 1, at 204; BRYAN A. GARNER, *supra* note 2, at 59. *See also* DAVID MELLINKOFF, *supra* note 1, at 331-33, 349-60 (urging that each of the phrases "last will and testament," "fit and proper," "force and effect," and "give, devise, and bequeath" be shortened).

4. A gift can be either *inter vivos* or testamentary. Bequests and devises are testamentary transfers. Historically, a bequest dealt with personal property whereas a devise transferred real property. *See* BLACK'S LAW DICTIONARY 202, 359 (rev. 4th ed. 1968).

5. *See* BLACK'S DICTIONARY (11th ed. 2019) ("In the United States today, it is pedantry to insist that the noun devise be restricted to real property."); RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS §§ 3.1 cmt. d ("A devise is a disposition of property, real or personal, in a will. . . . In older usage, the terms 'devise' and 'devisee' were reserved for dispositions of land by will. A disposition of personal property was a 'legacy' or 'bequest,' and the recipient was a 'legatee.' Today these words are commonly used interchangeably. The Uniform Probate Code defines the word 'devise' as 'a testamentary disposition of real or personal property.' This Restatement adheres to the newer usage and refers to testamentary dispositions of land or personal property as 'devises' and the recipients as 'devisees.' "), 5.1 cmt. a ("As used in this Restatement, the term devise refers to a testamentary disposition of either real or personal property.").

6. *See* BLACK'S LAW DICTIONARY 1312-13 (rev. 4th ed. 1968).

7. *See* STEPHEN L. SEPINUCK & JOHN F. HILSON, TRANSACTIONAL SKILLS: HOW TO STRUCTURE AND DOCUMENT A DEAL 172-74 (3d ed. 2022).

8. *See id.* at 33-37; Stephen L. Sepinuck, *The Virtue of "Represents and Warrants": Another View*, BUS. LAW TODAY 1 (Nov. 2015). *See also* Stephen L. Sepinuck, *The Timing of Representations & Warranties*, 7 THE TRANSACTIONAL LAWYER 5 (Dec. 2017).

9. *See, e.g.*, TINA L. STARK, *supra* note 1, at 205.

10. *See* SEPINUCK & HILSON, *supra* note 7, at 96-99; Charles Brocato, Jr., *Drafting Indemnification Clauses*, 1 THE TRANSACTIONAL LAWYER 1 (Oct. 2011).

11. *See* U.C.C. § 9-108(b), (e). As a result of these rules, in a transaction that is not a consumer transaction, the phrase "all accounts, chattel paper, deposit accounts, documents, general intangibles, goods, instruments, investment property, letter of credit rights, letters of credit, and money" in a document that incorporates the UCC definitions for the terms would cover all types of Article 9 collateral other than commercial tort claims, for which greater specificity is required. Adding the words "existing or after-acquired" after "all" would expand the clause to cover property the debtor acquires rights in after authenticating the security agreement.

There is some question, however, whether additional words are needed to cover property in which the debtor does not have or acquire rights but, by operation of law, has or acquires the power to transfer rights in. *Compare* In re Salander-O'Reilly Galleries, LLC, 2014 WL 7389901 (S.D.N.Y. 2014) ("now owned or hereafter acquired . . . goods" did not include goods consigned to the debtor because the debtor did not own the goods), *with* In re TSAWD Holdings, Inc., 565 B.R. 292, 303-04 (Bankr. D. Del. 2017) (rejecting the conclusion and analysis of *Salander-O'Reilly Galleries* due to the failure of the court in that case to consider the debtor's power, pursuant to § 9-319(a), to transfer rights in consigned goods). *See also* UCC § 9-203(b)(2) (indicating that the debtor must have rights in the collateral or the power to transfer rights in the collateral for the security interest to attach).

12. California has codified this maxim, *see* Cal. Civ. Code § 3537, and courts have applied it to the interpretation of contracts. *See, e.g.*, Lopez v. Bank of New York Mellon, 2017 WL 2794198 (Cal. Ct. App. 2017); Huong Que, Inc. v. Luu, 58 Cal. Rptr. 3d 527 (Ct. App. 2007); Crow Irvine #2 v. Winthrop Cal. Investors Ltd P'ship, 128 Cal. Rptr. 2d 644, 652 (Ct. App. 2002). *See also* Brett v. Mastroianni, 2014 WL 2580670 (Conn. Super. Ct) (applying the maxim to a promissory note).

13. *See* RESTATEMENT (SECOND) OF CONTRACTS § 203(a); Cal. Civ. Code § 1651. *See also, e.g.,* Wells Fargo Bank v. Cherryland Mall Ltd. P'ship, 812 N.W.2d 799 (Mich. Ct. App. 2011).

14. The principle that each *word* should have independent meaning might be a corruption of the canon requiring that no *part or provision* be inoperative or superfluous. *See, e.g.*, Yates v. United States, 574 U.S. 528, 543 (2015); Corley v. United States, 556 U.S. 303, 314 (2009). At that broader level, the canon probably makes sense. It is premised on the notion that drafters choose their language carefully (and when applied to a statute, reflects the courts' subservient role to the legislature). At the level of individual words, however, the principle flies in the face of common experience. As discussed above, lawyers often include multiple synonymous or overlapping nouns or verbs in a single clause to ensure that nothing intended to be covered is inadvertently omitted. This practice reflects a cautious approach to drafting. To insist that each word have independent meaning is to presume that drafters never employ redundancy and the type of careful drafting it represents. It therefore presumes precisely what the canon is designed to reject: that drafters are sloppy and do not take care in their work. *See* Sterling Nat'l Bank v. Block, 984 F.3d 1210, 1217–18 (7th Cir. 2021) (although courts try to give meaning to every provision of the contract "we should also recognize that drafters of contracts, like drafters of statutes, may 'intentionally err on the side of redundancy to capture the universe.' ") (quoting Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside – an Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 934 (2013)).

15. *See, e.g.*, Maxus Cap. Group, LLC v. Liberty Surplus Ins. Corp., 2014 WL 4809430 (N.D. Ohio 2014); Ted Ruck Co. v. High Quality Plastics, Inc., 1991 WL 1559 (Ohio Ct. App. 1991) ("In construing a contract, a court must endeavor to give meaning to every paragraph, clause, phrase and word, omitting nothing as meaningless, or surplusage"); Littlefield v. Acadia Ins. Co., 392 F.3d 1, 10 (1st Cir. 2004) (declining to interpret an insurance policy in a manner that would render a word superfluous). *See also* Queen Villas Homeowners Ass'n v. TCB Prop. Mgmt., 56 Cal. Rptr. 3d 528, 534 (Ct. App. 2007) (noting the conflict between this interpretive principle and the maxim that superfluity does not vitiate).

16. 303 F.3d 832 (7th Cir. 2002).

17. *See* Van Diest Supply Co. v. Shelby Cty. State Bank, 425 F.3d 437 (7th Cir. 2005) (applying old § 9-306(2), the predecessor to revised § 9-315(a)(2)).

18. For a discussion of interpretive issues that can arise from an "including" clause, see Stephen L. Sepinuck, *"Including without Limitation,"* 9 The Transactional Lawyer 4 (Feb. 2019).

19. The suggested language omits reference to "proceeds" because it is unnecessary; a security interest attaches to identifiable proceeds of collateral even if the security agreement does not mention proceeds. *See* U.C.C. § 9-315(a)(2). Including a reference to proceeds would not be harmful, however, and is quite common.

20. 655 B.R. 728 (Bankr. E.D. Tenn. 2023).

21. *See* U.C.C. § 9-103 (defining "purchase-money security interest").

22. As Benjamin Franklin said in the musical *1776*, "to call me [an Englishman] without those rights is like calling an ox a bull. He's thankful for the honor, but he'd much rather have restored what's rightfully his."

23. 296 A.3d 742 (Vt. 2023).

24. It might, however, be desirable for the debtor to represent or warrant perfection or priority status, or to have the lack of perfection or priority constitute a default, and many security agreements do contain such terms.

25. An analogous issue has arisen under U.C.C. § 9-108(e)(2), which provides that a description of collateral "only by type of collateral defined in" the UCC is insufficient in a consumer transaction to describe consumer goods, a security entitlement, a securities account, or a commodity account. Applying that rule, the court in In re Cunningham, 489 B.R. 602 (Bankr. D. Kan. 2013), ruled that a credit card application that purported to grant a security interest in "the goods purchased on your Account." was ineffective. But "goods purchased on your Account" or "goods purchased with your card" is not a description "only" by collateral type; it is far more limited. Moreover, the *Cunningham* decision effectively prevents – or at least significantly obstructs – parties from entering into a transaction such as this at the outset, when they do not know what the cardholder will purchase with the card. The case therefore interprets Article 9 in a way that undermines the UCC's objectives. *See* U.C.C. § 1-103(a).

For these reasons, another judge in the same court ruled to the contrary just two months later, *see* In re Murphy, 2013 WL 1856337 (Bankr. D. Kan. 2013), as have other courts dealing with the issue. *See* In re Dabbs, 2021 WL 374628 (Bankr. D.S.C. 2021); In re Deese, 618 B.R. 566 (Bankr. M.D. Fla. 2020); In re Thrun, 495 B.R. 861 (Bankr. W.D. Wis. 2013); In re Dalebout, 454 B.R. 158 (Bankr. D. Kan. 2011); In re Martinez, 179 B.R. 90, 94 (Bankr. N.D. Ill. 1994). *Contra* In re Shirel, 251 B.R. 157 (Bankr. W.D. Okla. 2000) (a description of collateral in a credit card application as "all merchandise purchased on [the] account" was ineffective).

The same reasoning should apply to a description of collateral as "all debtor's property in the possession or control of the secured party." Such a description is far narrower than phrases such as "all assets," and the secured party's possession or control provides additional objective evidence of the parties' intent that such property be encumbered. *But cf.* In re Gene Express, Inc., 2013 WL 1787971 (Bankr. E.D.N.C. 2013) (a commercial real estate lease that purported to grant the landlord

a security interest in "any personal property belonging to Tenant and left on the Premises" did not adequately describe the collateral because "personal property" is not a permissible description and because it refers to property that might be abandoned in the future, rather than property that is currently identifiable).

26. If the drafter is concerned that a description of collateral as "property in the possession or control Lender" might be ineffective under § 9-108(c), the description could be modified slightly to reference the defined types of collateral that might be possessed or controlled:

> . . . all of the following property of Grantor, whether now existing or hereafter acquired, in the possession of or subject to the control of Lender: chattel paper, deposit accounts, documents, goods, instruments, and investment property.

If desirable, the types of collateral listed could be expanded to include "controllable accounts," "controllable electronic records," and "controllable payment intangibles." Each of these is defined in the 2022 UCC Amendments and a security interest in each can be perfected by control. *See* U.C.C. §§ 9-102(a)(27A), (27B), 9-310(b)(8), 9-314(a), 12-102(a)(1).

27. If that were not the case, and the intent was to cover all property of the debtor regardless of whether it was in the bank's possession or control, the clause should have omitted all reference to possession and control, and should have used the types of property defined in the UCC to describe the collateral, as discussed above. *See supra* note 11 and accompanying text.

28. 2024 WL 64782 (S.D.N.Y. 2024).

29. *Id.* at *2.

30. *Id.*

31. 737 F.3d 197 (2d Cir. 2013).

32. *Id.* at 204-05. Actually, "installment" is a noun, not an adjective. Properly phrased, the issue is whether "installment" is modified by a complex phrase ("of principal, interest or other . . .") or by a single phrase ("of principal").

33. Oddly, "innocuous" and "inoculate" are not etymologically related. The former is derived from *in* and *nocuus* (not injurious); the later is derived from *in* and *oculus* (into eye or bud).

■ ■ ■

Recent Cases

SECURED TRANSACTIONS

Priority Issues

North Star IP Holdings, LLC v. Icon Trade Services, LLC,
2024 WL 36978 (S.D.N.Y. 2024)

An Article 9 disposition of the debtors' trademarks terminated the rights of a sublicensee, thereby making the sublicensee's continued use of the marks an actionable infringement. Because the sublicense granted the sublicensee the exclusive right to use the marks throughout the world in connection with the manufacture, marketing, distribution and sale of specified products, the sublicense was exclusive and the sublicensee could not be a "licensee in ordinary course of business" that acquired its license rights free of the security interest pursuant to § 9-321. It did not matter that third partes had licenses to use the marks with respect to other categories of goods.

United States v. Dunn,
2023 WL 8599389 (D. Kan. 2023)

A seller of motor vehicles, which retained purchase-money security interests in the vehicles, had priority over the federal tax liens as to which notices were filed against the buyer before the sales. Although the federal tax lien statute does not grant priority to subsequent PMSIs, a revenue ruling does and, though that ruling is not binding, it is consistent with the statute and case law. Although the seller did not perfect its security interests by sending a notice of security interest to the Kansas Division of Vehicles, the security interests were perfected when the buyer applied for and received new titles that noted the seller's security interest. It did not matter that perfection occurred more than 20 days after the debtor received possession of the vehicles because priority is governed by the federal tax lien statute, 26 U.S.C. § 6323, not by U.C.C. § 9-324(a). Accordingly, the IRS had no conversion claim against the seller for disposing of the vehicles after the buyer defaulted.

Enforcement Issues

Mitchell v. Auto Mart, LLC,
2024 WL 50235 (D. Nev. 2024)

The debtor on a car loan was entitled to a default judgment on her claims for breach of contract, negligence, and conversion against the secured party based on her allegation that she was not in default when the secured party repossessed her car, but that fact did not support judgment on her claim for deceptive trade practices because she did not allege facts that the secured party knowingly hid a material fact or that it knowingly violated the law. Nor did she allege a claim for violation of §§ 9-609, 9-610, 9-611, or 9-616 because those provisions apply after default and her entire theory relied on the fact that she was not in default. The secured party did not demonstrate good cause

to set aside the default because it did not show that it had a meritorious defense. Even if the debtor's payment was late, she would not be in default under the agreement until thirty days after payment was due, and her was repossessed before then. And although the parties' contract prohibited the debtor from taking the car out of state without the secured party's written permission, the contract did not indicate that doing so triggered a default.

North Star IP Holdings, LLC v. Icon Trade Services, LLC, 2024 WL 36978 (S.D.N.Y. 2024)

A buyer of the debtors' trademarks at an Article 9 disposition acted in good faith and, therefore, acquired the marks free of subordinate interests. It did not matter if the buyer sought to "usurp" the existing sublicenses because the UCC expressly contemplates that a buyer will take the collateral free of subordinate interests. Thus, the fact that the buyer knew of the sublicenses prior to the sale and had discussed licensing opportunities with the debtors did not call into question the buyer's good faith. The buyer did nothing to prevent the sublicensee from exercising its rights prior to or during the Article 9 sale process. There was no evidence that the buyer was involved in negotiating the repossession agreement between the debtors and the secured party or any authority indicating that such involvement would constitute bad faith. Negotiation between a secured party, cooperating debtors and a transferee in a private disposition of collateral does not necessarily make the disposition collusive. The fact that the sale was allegedly "rushed" and that the buyer hired or offered membership interests to individuals formerly affiliated with the debtors also did not implicate the buyer's good faith.

Labadie v. Nu Era Towing and Service, Inc., 2023 WL 8708421 (2d Cir. 2023)

A repossession agent did not breach the peace while repossessing the debtor's car even though the agent initially used a vehicle to block debtor's access to her car in a shopping area parking lot and later repossessed the car over the debtor's objection. Objecting to repossession does not make the agent's conduct a breach of the peace in the absence of other actions that result in violence or are likely to cause violence, and combining her objection with the agent's act in blocking access to the car was not sufficient to constitute conduct that was likely to produce violence. Although the use of a law enforcement officer without the benefit of judicial process is not permitted, there was no claim that the repossession agent ever contacted the police or that the police were involved in the repossession, merely that the agent threatened to call the police.

Other Issues

Corsicana Industrial Foundation, Inc. v. City of Corsicana, 2024 WL 118969 (Tex. Ct. App. 2024)

A city's pledge of sales tax revenues for the development of one store in a retail center, which was contingent on the opening of the store, served a public purpose only for so long as the store was open. When the store closed eleven years after opening, the public purpose was extinguished. Because the public purpose was extinguished and there was inadequate control over the funds to ensure that a public purpose was achieved – there was control over how the funds were spent to develop the facility but no control to ensure that the public purpose of remaining open was maintained – the pledge violated the Texas Constitution.

BANKRUPTCY

Property of the Estate

In re Medley, 2024 WL 49806 (9th Cir. 2024)

A putative buyer of a portion of a real estate broker's right to a commission was in fact a secured lender because the broker had full liability if the transaction did not close and the transfer of risk is the primary factor in determining whether a transaction is a sale or a loan. Therefore, the commission was property of the broker's bankruptcy estate and the putative buyer violated the automatic stay by contacting the broker and the broker's client in an effort to ensure that it would receive the commission from the escrow company.

Claims and Expenses

In re Jasper Pellets, LLC, 2023 WL 9062959 (Bank. D.S.C. 2023)

Neither an indenture trustee's security interest in the debtor's personal property nor its mortgage on the debtor's real property attached to the earnest money deposit that a buyer provided in connection with a failed purchase of the collateral. Even if a "forfeited" deposit is proceeds of the collateral, the sale in this case was never approved by the bankruptcy court and the prospective buyer claimed the right to have the deposit returned.

GUARANTIES & RELATED MATTERS

AVT California, L.P v. Bizarro, 2024 WL 127992 (D. Utah 2024)

A lender was not entitled to summary judgment on its action against an individual who allegedly guaranteed an equipment lease because a factual issue remained about whether the individual signed the guaranty. The signature on the guaranty was executed electronically via DocuSign and the credit

manager declared that, during the underwriting process for the lease, the individual agreed to guarantee the lease. The creditor also presented automated emails from DocuSign suggesting that the individual opened the emailed guaranty, and a DocuSign Certificate of Completion suggesting that the individual signed two of the three documents related to the lease. This evidence was probative but not conclusive. Because the authenticity of the individual's signature remained in dispute, the lender was also not entitled to summary judgment on its claim to foreclose on the security interest purportedly granted in the guaranty agreement.

Senior Care Living VI, LLC v. Preston Hollow Capital LLC, 2023 WL 8262772 (Tex. Ct. App. 2023)

The Noteholder Representative under a Master Indenture for four tiers of bonds issued to finance an assisted living center had the right to enforce the notes underlying the bonds but no right to enforce the guaranty. The guaranty was issued to the "Guaranteed Parties," which included the Master Trustee and the "Holders." The indenture defined "Holders" as the registered owners of any Obligation, which was defined to include the notes. Although the Noteholder Representative purchased bonds, there was no evidence that it was the registered owner of the notes, which were payable to the Bond Trustee. Under Texas law, a guarantor may require that the terms of a guaranty be strictly followed and a guaranty may not be extended beyond its precise terms by construction or implication.

LENDING, CONTRACTING & COMMERCIAL LITIGATION

Contract Formation

AREPIII Property Trust, LLC v. Relevant Group, LLC, 2023 WL 8824797 (Cal. Ct. App. 2023)

A prospective lender stated claims for breach of contract, breach of the implied covenant of good faith, and fraud in the inducement by alleging that a developer breached its promise in the parties' term sheet not to negotiate with other potential lenders during the stated exclusivity period. The term sheet was not an illusory contract because it impliedly obligated the prospective lender to undertake the due diligence necessary to decide whether to make the prospective loan. The prospective lender adequately alleged a breach because the term sheet obligated the developer both not to negotiate with other potential lenders during the exclusivity period and to pay a breakup fee if it did enter into a contract for alternative financing during that period. Although the developer did not enter into a contract for alternative financing until the day after the exclusivity period ended, the developer allegedly did breach its promise not to negotiate with others. The prospective lender adequately pled that it performed its own obligations even though it did not assert its readiness to close the loan during the exclusivity period; such a readiness was merely a condition to entitlement of the breakup fee and the prospective lender was not seeking the breakup fee. The complaint adequately alleged that the prospective lender suffered damages because even though the term sheet provided for the breakup fee as liquidated damages, and the breakup fee was not due, the term sheet did not state that those were the only damages available. Indeed, the term sheet expressly stated that the breakup fee would be in addition to any other amounts "payable [to the prospective lender] hereunder."

Contract Interpretation

Better Holdco, Inc. v. Pierce, 2024 WL 64782 (S.D.N.Y. 2024)

A term in a partially non-recourse note that provided for default-rate interest on "[u]npaid principal and interest subject to collection," did not apply to the non-recourse portion of the debt. The phrase "subject to collection" was ambiguous and would be interpreted against the drafter, which was the creditor.

LeBlanc v. LeBlanc, 2024 WL 201923 (Mich. Ct. App. 2024)

An individual who agreed to sell his interests in two limited liability companies back to the companies had no defense based on a term in the operating agreements requiring the consent of all members to any transfer of a membership interest because that term applied only to transfers to a third party, not to a redemption.

Breach

Stobba Res. Assocs., L.P. v. FS Rialto 2019-FL 1 Holder, LLC, 2023 WL 8542590 (Pa. Super. Ct. 2023)

A lender of a commercial loan was entitled to summary judgment on the borrowers' claim for breach of the covenant of good faith in connection with the lender's refusal to consider or denial of the borrowers' requests for forbearance. The duty of good faith does not require a lender to surrender its rights under the contract. The Loan Agreement in this case gave the lender final absolute discretion in the matter and the lender had no obligation to even consider the forbearance request.

Remedies

Senior Care Living VI, LLC v. Preston Hollow Capital LLC, 2023 WL 8262772 (Tex. Ct. App. 2023)

The debt on promissory notes issued to finance an assisted living center was not properly accelerated. For acceleration to be effective, the holder of the note must notify the maker of both the intent to accelerate and of the acceleration. The former must be clear and unequivocal. The notification in this case stated that if the defaults were not timely cured, the holder "shall declare an Event of Default under each of the related

Bond Documents and accelerate (subject to further election and notice to you). The parenthetical phrase prevented the notification from being unequivocal.

Compass-Charlotte 1031, LLC v. Prime Capital Ventures, LLC, 2024 WL 260507 (N.D.N.Y. 2024)

The court could and would appoint a receiver to maintain the status quo of the defendant's assets and business despite the existence of an arbitration clause in the parties' agreement. The arbitration clause stated that it did "not preclude Parties from seeking provisional remedies in aid of arbitration from a court of appropriate jurisdiction." It did not matter that the authorized interim relief had to be "in aid of arbitration" and that an arbitrator also had authority to appoint a receiver.

Other

Mile High, LLC v. Flying M Aviation, Inc., 2024 WL 57451 (Ala. Ct. App. 2024)

A company that was obligated to pay $50,000 pursuant to a settlement did not discharge that obligation by wiring funds to an imposter. Although the company wired the funds pursuant to email instructions it received, ostensibly from the creditor's lawyer, it was the lawyer's email system that was spoofed, and there was nothing in the email message that made it obvious that the message came from an imposter. Pursuant to the "imposter rule" the person in the better position to prevent the loss must bear it. The company could have called to verify the wiring instructions before sending payment.

■ ■ ■

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