

THE TRANSACTIONAL LAWYER

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KNOW YOUR AUDIENCE

Stephen L. Sepinuck

Most written agreements are written primarily for the parties who will sign them. Their purpose is to detail the duties and rights the parties will have.¹ To be sure, any agreement might one day be the focus of a dispute, and require interpretation by a judge or arbitrator. Accordingly, the lawyer who drafts the agreement should therefore anticipate that such an interpreter might be, if not the primary audience for the document, at least a secondary audience. The lawyer should therefore bear in mind the interpretive principles that a court or arbitrator might use.²

In contrast, some types of documents drafted by a transactional lawyer are written expressly for a court. A will, for example, provides guidance to an executor or personal representative, but for the most part is written to the applicable probate court.³

Finally, some other transactional documents are written primarily to third parties, and in many cases the identity of those third parties is unknown when the document is drafted. Prospectuses are one example. Financing statements are another. Transactional lawyers need to be particularly careful when drafting such a document. If the document is to have its intended effect, it must speak in terms that the third party will understand⁴ and, when so desired, elicit their cooperation or compliance. The document must also otherwise comply with applicable law.⁵

This article is about a document of the last type that was not well drafted. The moral of the article is that transactional lawyers should keep in mind not merely *for whom* a document is written (the client) but *to whom* (the audience).

The Document

Now that our children have reached adulthood, my wife and I decided it was time to review and, if appropriate, revise our wills. Our existing wills were drafted when our children were infants and contain terms that are no longer relevant or desirable. The lawyer who drafted the wills has since retired, so we consulted his successor at the firm where he worked. While meeting with our new lawyer, we asked about updating our durable powers of attorney for health care and inquired if we should also execute durable powers of attorney for financial and other matters. In due course, our new lawyer drafted for each of us a new will and two powers of attorney. The Durable Powers of Attorney for Property Management (hereinafter, “POA”) he drafted for us were problematic in two respects, each attributable to the fact that the lawyer did not properly take into account who the audience is for those documents.

Problem One – Length & Overall Approach

Each POA was just shy of seven, single-spaced pages. Like many legal documents, it suffered from three related problems that made it unnecessarily long: (i) redundancy; (ii) excessive specification; and (iii) opacity.

Redundancy. As I noted in the April issue of this newsletter, “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.”⁶ I attributed this practice to the Norman Conquest, after which lawyers had to use both English and French terms in their documents, and suggested that the practice “reflects a cautious approach to drafting” by helping to ensure that nothing intended to be covered is inadvertently omitted.⁷

Cautious, perhaps, but nevertheless unnecessary. The POA was replete with this type of redundancy. Here are two examples:

I . . . hereby appoint [my wife] my attorney-in-fact . . . for me and in my name, place, and stead . . .

gifts or other gratuitous transfers . . .

There would no difference in meaning if the former simply stated, “I . . . here by appoint [my wife] as my attorney-in-fact” and the latter were shortened to “gifts.”

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Excessive Specification. Like many transactional documents, the POA frequently accompanied a broad statement or grant of authority with a list of specific things that unquestionably fell within the broad statement or grant. Again, here are a few specific examples (with the general language highlighted):

my property, and any interest therein, including all real, personal, mixed, tangible and intangible property, wherever situated, and whether held by me outright or as community property, or jointly or as tenant in common with any other party or parties, including my attorney-in-fact

[s]ell, contract to sell, mortgage, encumber, exchange, lease or rent or otherwise dispose of any real estate

Buy, contract to buy, accept, sell, exchange, mortgage, pledge, lease or rent, contract for the repair of and in any and every manner deal in and with any and all personal property

More globally, though, the entire POA followed this approach. The opening paragraph authorized my attorney-in-fact “to do and perform all acts concerning my property,” yet most of the remainder of the document consisted of separate sections, each detailing the authority granted over one of the following: real property, personal property, banking transactions, investment and business transactions, “government documents, vouchers and checks,” “personal transactions,” as well as miscellaneous terms on claims, hiring, contracts, and taxes. It was as if the document was trying to convince the reader that the broad grant was truly intended.

Opaque Terms. Transactional lawyers frequently start with a precedent document, often one prepared for an earlier transaction (in this case, it was a POA prepared by the lawyer’s predecessor), and over time add to it. But, for reasons discussed below, they rarely remove anything. As a result,

Forms tend to grow by accretion, with many persons adding paragraphs and clauses without much understanding of what has gone before. The result is frequently a form whose numerous intricacies and subtleties are invisible to all sides.⁸

The POA drafted by my lawyer was no exception. Here is one of its more opaque clauses:

I hereby ratify and confirm all lawful acts done and caused to be done by my attorney-in-fact pursuant to this Power of Attorney.

It is unclear what this clause is intended to do, but whatever that may be, this clause probably does not do it. To the extent the clause is directed to actions that predate the POA (and which I might potentially “ratify” by signing the POA), it is highly unlikely that those action could have been taken “pursuant to” the POA. To the extent that the clause concerns future act, how can I, when signing the POA, ratify things that have not yet occurred? Moreover, if acts are done later pursuant to the authority granted in the POA, then what purpose would ratification serve?

The POA contained other terms that, if not quite opaque, seemed inapposite or undesirable, including granting my attorney-in-fact authority to sub-delegate the authority to anyone else and a clause on access to my health care records, even though there will be a separate Durable Power of Attorney for Health Care.

There are probably two reasons why forms grow but never get pruned. First, as one notable commentator observed:

The temptation is strong to believe that if we leave out some bit of a document we don’t understand, we shall be visited with a legal catastrophe. Fear prevents us deleting bits that are no longer needed.⁹

The term “fear” might be a bit too harsh. Another respected commentator has described this reluctance somewhat more charitably as “cognitive conservatism.”¹⁰ But the fact remains that transactional lawyers are often reluctant to tamper with language if they do not fully understand it or lack confidence in their ability to assess the impact of its removal.

Second, there is a transactional cost to creating shorter transactional documents. Few clients want to pay for a lawyer to draft a document from scratch and few lawyers want to invest their own time into doing so. Similarly, neither wants to invest the resources needed to condense a lengthy precedent document into an acceptable shorter version. So, they rely on precedent documents, and hope (or is it “pray”?) that such reliance is well placed.

In short, there is a logic – or at least a rationale – to why legal documents are too long. Transactional lawyers tend to regard redundancy, excessive specification, and opacity as either useful or innocuous. So framed, the choice before them is easy: retain the language and at worst it will do no harm or delete the language and risk omitting something that was important. But that choice is false.

Redundancy is benign only if the terms are truly synonymous or are interpreted as cumulative. If, however, two clauses state similar but slightly different things, then an ambiguity can arise as to which meaning prevails.¹¹

Excessive specification might serve a purpose in some cases by providing comfort that the specified things are indeed

covered. For example, a buyer of my real property might be reluctant to accept a deed signed only by attorney-in-fact unless the POA expressly granted the attorney-in-fact the authority to transfer my real property.¹² But that does not mean that everything should be specifically mentioned. Moreover, excessive specification does no harm only if it is truly exhaustive of what is intended or the more general statement is given effect. But if something important is omitted from the list, a court might dredge up the old canon of *expressio unius est exclusio alterius* with respect to the lengthy list and the maxim *ejusdem generis* to limit the scope of the more general statement.

And opacity is a more serious problem for obvious reasons. A term the transactional lawyer does not understand might just as easily be harmful to the client as helpful. This problem has not gone unnoticed. One commentator's colorful description of contractual boilerplate applies equally to opaque terms:

Unfortunately, the ancient provisions don't come with commentary. An associate plodding through the firm's form file is unlikely to know what assumptions underlie the provisions. Perhaps an obscure phrase is there to deal with a legal problem that remains formidable. This possibility renders many lawyers reluctant to tamper with the hallowed hokum. But the obscure provision may just as likely have been written to deal with bustles or buggy whips.

The conclusion is depressing: Safety does *not* lie in reciting the standard phrases. Perhaps the provisions were drafted by geniuses, but those geniuses may have been wearing powdered wigs. . . . The only solution is to think clearly and act bravely.¹³

Another wrote:

[M]iscellaneous contract provisions become a bit like barnacles. "Encrusted" on documents, they are hard to remove Individually, they may be innocuous – harmless to the hull of the ship, so to speak – but in the aggregate may cause it to decay or otherwise fail.¹⁴

And, as Professor Bayless Manning famously observed in discussing the Internal Revenue Code, additional language is rarely harmless:

Elaboration in drafting does not result in reduced ambiguity. Each elaboration introduced to meet one problem of interpretation imports with it new problems of interpretation.¹⁵

Problem One – The Solution

Because I could invest my own time into revising the POA, I decided to see if I could eliminate the redundancy, excessive specification, and opacity. I started by reviewing the state

statutes that addressed durable powers of attorney.¹⁶ I quickly found that a POA that grants to the attorney-in-fact authority to do all the acts that a principal could do, or contains similar words to that effect, gives the attorney-in-fact all the authority described in specified statutory sections.¹⁷ Alternatively, a reference in the POA to any of those statutory sections incorporates the entire sections as if it were reproduced in full in the POA.¹⁸

After reviewing each of these statutory provisions to determine which dealt with authority I wished to bestow, I then replaced the long, detailed provisions of my lawyer's draft with a simple reference to the desired statutory sections. The POA went from seven pages to one. It went from 2374 words (not counting the signature and notarization blocks) to 304.

So far so good. But what, you might ask, does this have to do with the audience for the POA? Well, I am glad you asked. Although confident that my short version works as a legal matter, I was uncertain if it worked as a practical matter. In other words, will third parties presented with the short POA respect the actions taken on my behalf by my attorney-in fact? This empirical question required empirical testing, so I contacted three businesses that might be asked to deal with my attorney-in-fact: (i) an investment broker (Fidelity), (ii) a retirement plan administrator (TIAA); and (iii) my depository bank (Washington Trust). Admittedly, this is a small and unrepresentative sample. So, the results are not reliable. Nevertheless, they were informative.

Perhaps due to their size, I was unable to reach the legal departments at Fidelity or TIAA. Instead, I spoke with a customer service representative of each company. I learned that each of these companies has its own POA forms for the company's clients to sign. The companies' forms, which are accessible on their web pages, also require the attorney-in-fact to sign and, thereby, make various representations and warranties to the company. However, the representative for each company informed me that the company would honor a properly executed POA that was not on the company's form (although, I assume, the company would still require the attorney-in-fact to make the required representations and warranties). More important, I learned that the company's legal department – not merely a customer service representative – would review a POA not on the company's form. From this I concluded that the short form would in fact work. If the legal department was going to review the form, someone in that department should be able to check the references to Washington law and confirm the nature of the authority granted to my attorney-in-fact.

At Washington Trust, I was quickly put in touch with a lawyer in the bank's legal department. She too informed me that the bank's legal department would review any POA provided to it. She also indicated that a short POA was

preferred and that most POAs the bank receives are 1-2 pages long. I concluded that the bank would readily accept my short POA.

Problem Two – Contingency

The second, and arguably more important, way in which the POAs failed to consider their intended audience was in how they addressed the possibility that a successor agent might need to be appointed. For example, the POA our lawyer drafted for me appointed my wife as my attorney-in-fact (hers appointed me) and contained the following backup appointment:

If [my wife] is unable to serve as my attorney-in-fact, I appoint [my sister-in-law] to serve as my successor attorney-in-fact for property management.

Superficially, this makes a great deal of sense. My wife might predecease me or be incapacitated at a time when it would still be desirable for someone to be able to exercise on my behalf the powers granted in the POA. And this clause might well work if the audience were a court or my sister-in-law. But the real audience of the POA is a third party – such as Fidelity, TIAA, or Washington Trust Bank – that will be asked to treat as mine the actions taken on my behalf by my attorney-in-fact. Yet how is such a third-party to know if my wife is “unable to serve”? No doubt her death would make her unable to serve, but what if she were merely in an assisted living facility? What if she resided in or was vacationing in another country? Can her inability be something that is only temporary or is it limited to things that are permanent? Of course, the meaning of the clause could be litigated, but the principal purpose of the POA is to allow transactions to be consummated on my behalf without judicial involvement.

When I asked my lawyer about this, he responded that the firm has never had a problem with this clause. I took that to mean that the issue had simply never come up, not that the clause actually worked in the sense that third parties honored the actions taken by the back-up. So, I inquired further. I was unable to get information from Fidelity or TIAA, but the lawyer at Washington Trust Bank was very helpful and responsive. She stated that the bank would not honor this clause because the bank would have no way of knowing – absent receipt of a death certificate – that my wife had become unavailable.

So, I re-drafted the provision as follows:

If [my wife] dies or signs a writing irrevocably renouncing her appointment as my attorney-in-fact, I appoint [my sister-in-law] as my successor attorney-in-fact for property management.

Based on what the bank lawyer told me, I believe this clause will work. That is, the audience for whom the POA is designed

will respect actions taken by the back-up attorney-in-fact if provided with the appropriate documentation.

Conclusion

There is a common trope that doctors make the worst patients. I have also heard it said that lawyers make the worst clients. My story might confirm that hypothesis, although in my defense let me note that I was very nice to my lawyer and I paid his bill (moreover, I did not charge him for my time in revising his form documents). But regardless of who makes the best and worst clients, the point of this article is, as stated at the outset, that a transactional lawyer needs to be aware of both for whom and to whom the lawyer is writing. And when writing to a third party, make sure that the third party will accept the document and have the information needed to comply with it.

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Notes:

1. Several states have statutes requiring that agreements in consumer transactions be written in plain language. *E.g.*, [Conn. Gen. Stat. § 42-152](#); [Mont. Code § 30-14-1103](#); [N.Y. Gen. Oblig. Law § 5-702](#); [Pa. Stat. tit. 73, § 2205](#). Such statutes are clearly intended for the benefit of the consumer, and thus are premised on the idea that the consumer is the primary audience of the agreement.

2. There are several interpretive principles courts frequently use when interpreting agreements. These principles include avoiding forfeiture, see [RESTATEMENT \(SECOND\) OF CONTRACTS § 227\(1\)](#) and a preference for the public interest, see [id. § 207](#). They also include several canons of construction known by a Latin term, including: *expressio unius est exclusio alterius*, *eiusdem generis*, and *contra proferentem*, see [id. § 206](#); Scott J. Burnham, *Contracting Around Contra Proferentem*, [3 THE TRANSACTIONAL LAWYER 6](#) (June 2013). Courts also apply numerous rules of explicitness, many of which might frustrate the expectations of one or both contracting parties. See Stephen L. Sepinuck, *Gotcha!: Caught in the Explicitness Trap*, [8 THE TRANSACTIONAL LAWYER 1](#) (June 2018). See also Stephen L. Sepinuck, *Court Rules that Explicitness Rule Is Fundamental Policy*, [10 THE TRANSACTIONAL LAWYER 1](#) (April 2020).

3. Moreover, even when, as in most cases, the parties to a written agreement are the main audience for the agreement as a whole, a judge or arbitrator might be the primary audience for one or more specific terms in an agreement. For example, a term purporting to authorize an equitable remedy such as specific performance or the appointment of a receiver, is really addressed to the judge that will be called upon to decide what

remedy to award. Recitals might be designed to provide a judge or arbitrator with important background about the transaction, perhaps in an effort to show that consideration exists or that the terms are not unconscionable.

4. To illustrate, a security agreement might describe the collateral using one of Article 9's defined terms, but then expressly define the term differently. For example, the agreement might identify the collateral as "existing and after-acquired Accounts" and define "Accounts" to include rights to income tax refunds and the repayment of loans, things that would be "payment intangibles," not accounts, under Article 9. Such a description would no doubt be effective in the security agreement. But if the financing statement identified the collateral as "accounts," or even as "accounts as defined in the security agreement between the parties," it is highly unlikely that the financing statement would be effective with respect to the payment intangibles. That is because the document is addressed to third parties who are not expected to inquire what the security agreement states.

5. Another example of a document with a third-party audience is a letter notifying an account debtor of an assignment of the account debtor's payment obligation and instructing the account debtor to pay the assignee directly. Such a letter must be drafted carefully to achieve its intended purpose. If the letter does not include adequate proof of the assignment, the account debtor may request such proof and, until receipt of it, may discharge the obligation by paying the assignor/debtor. U.C.C. § 9-406(c). The account debtor could do so even if payment were not yet due. Consequently, the letter unaccompanied by proof of the assignment might not work as a collection device.

6. Stephen L. Sepinuck, *Drafting an Exculpatory Clause*, [11 THE TRANSACTIONAL LAWYER 1](#), 5 (April 2021).

7. *Id.*

8. Howard Darmstadter, *Don't Play it Again, Counselor*, [Bus. L. Today 60](#) (June 4, 1995). See also Howard Darmstadter, *In the Petrified Forest*, [Bus. L. Today 40](#) (April 11, 2002) (discussing how the phrase "The guarantor waives protest, presentment and notice of dishonor" might have found its way into a guaranty, and remain there despite a change in applicable law); Howard Darmstadter, *Wrinkles in the Enforceability Boilerplate*, [Bus. L. Today 29](#) (Aug. 10, 2001) (observing that the term "Borrower warrants that this agreement is the legal, valid and binding obligation of borrower, enforceable in accordance with its terms" serves no purpose unless it is read as warranting the enforceability of every term in the agreement).

9. *Id.*

10. Jonathan C. Lipson, *What's Amiss? The Lawyering Interest in "Miscellaneous" Contract Provisions*, [65 CONSUMER FIN. L. QUARTERLY REPORT 151](#), 156 (2011).

11. One principle courts commonly use when interpreting agreements is that they should be construed so as to give meaning to each term. 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). While this interpretive principle is rather dubious at the level of individual words, courts apply it regularly. 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"). As a result, repetition in a written agreement with any variation in language presents a problem: a court might labor to find a way to interpret the repeated phrases or clauses to express different things, so as to give each independent meaning. While this effort is not supposed to result in an unreasonable interpretation, see *FCCD Ltd. v. State Street Bank & Trust*, [2011 WL 519228](#) (S.D.N.Y. 2011) ("[a] small redundancy is preferable to an unreasonable result"), it might nevertheless lead to a result that is not consistent with the parties' intent.

12. Even in such a case, the buyer or title company might insist that the POA be recorded along with the deed.

13. HOWARD DARMSTADTER, *HEREOF, THEREOF, AND EVERYWHEREOF: A CONTRARIAN GUIDE TO LEGAL DRAFTING* 140-41 (2d ed. 2008).

Although time consuming, there is an alternative to clear thinking and brave action: research followed by informed decision making. This is why in our book on transactional lawyering, *TRANSACTIONAL SKILLS: HOW TO DOCUMENT A DEAL* (2d ed. 2015), John Hilson and I have included several exercises that require students to annotate a precedent form. That is, students are tasked with identifying what each of several specified terms in an agreement is designed to do and then determining whether, under applicable law, the term achieves that objective. A less time-consuming alternative would be for the transactional lawyer to outline the key items that should be included in a document before consulting a precedent document. Doing this might give the transactional lawyer the confidence needed to eliminate the excess baggage in the precedent form.

14. Lipson, *What's Amiss*, *supra* note 10, at 156.

15. Bayless Manning, *Hyperlexus and the Law of Conservation of Ambiguity: Thoughts in Section 385*, *36 THE TAX LAWYER* 9, 11 (1982).

16. [Wash. Rev. Code §§ 11.125.101 through 11.125.903](#).

17. [Wash. Rev. Code § 11.125.250\(1\)](#).

18. [Wash. Rev. Code § 11.125.250\(3\)](#).



UPDATE ON DEFAULT INTEREST

Two prior articles in this newsletter discussed agreements that provide for higher rates of interest after default. The first article offered some general advice on drafting contractual terms that provide for higher default-rate interest.¹ The second explored judicial decisions treating such terms as a form of liquidated damages and then invalidating any such term that is not a reasonable measure of the creditor's damages.² Three recent cases shed some new light on this topic.

In *In re 3MB, LLC*,³ a bankruptcy court in California ruled that a promissory note calling for interest after maturity at 4% more than the base rate of 6.27% was enforceable. The court concluded that an agreement for a higher interest rate *after maturity* is not, under California law, a liquidated damages clause that might be an unenforceable penalty. Instead, such a term provides for an alternative performance and compensates the creditor for the lower value of the loan, because the transaction no longer conformed to its stated duration. The court then added that, even if the clause did provide for liquidated damages, it would still be enforceable because the increase in the interest rate was consistent with similar commercial loans, compensates for the increased risk of non-recovery, and determining actual damages would be difficult.⁴

In *In re John Q. Hammons Fall 2006, LLC*,⁵ a bankruptcy court in Kansas concluded that an oversecured creditor was entitled to post-petition interest at the contractual default rate, but for slightly different reasons. The court ruled that the contractual default rate of 9.33% – which was 5% higher than the non-default rate – was enforceable under Missouri law because it was a reasonable liquidated damages clause, not a penalty.⁶ The transaction was a business loan between sophisticated parties. Because such a loan has a reduced market value when it goes into default, as well as some increased costs, not all of which were otherwise compensated under the loan agreement, the higher rate of interest was a reasonable measure of anticipated damages.

Finally, in *In re Family Pharmacy, Inc.*,⁷ the Bankruptcy Appellate Panel for the Eighth Circuit ruled that the bankruptcy court below erred in disallowing post-petition interest at the contractual default rate of 18%. The court concluded that although the non-default interest rates were substantially lower, ranging between 3.65% and 7.5%, under Missouri law the higher, default-rate of interest should not be treated as liquidated damages, and hence cannot be treated as an unenforceable penalty.⁸ The court did not discuss the *John Q. Hammons* case, which had been decided about ten weeks earlier, but it relied in part on the *3MB* case, which dealt with post-maturity interest, not post-default interest.⁹

Transactional lawyers should be careful when drafting a term providing for default-rate interest. Courts continue to disagree on whether to subject such terms to the rigorous rule regarding liquidated damages. A court that does so might well invalidate a clause that substantially increases the interest rate after default.

Notes:

1. Stephen L. Sepinuck, *Very Interesting . . . or Is It: Limitations on Default Interest*, [3 THE TRANSACTIONAL LAWYER 2](#) (Feb. 2013).
2. Stephanie J. Richards, *The Enforceability of Default Interest*, [5 THE TRANSACTIONAL LAWYER 1](#) (Oct. 2015).
3. [609 B.R. 841](#) (Bankr. E.D. Cal. 2019).
4. [Id. at 847–50](#).
5. [612 B.R. 779](#) (Bankr. D. Kan.), *reconsidered and altered on other grounds*, [614 B.R. 371](#) (Bankr. D. Kan. 2020).
6. [Id. at 797–99](#).
7. [614 B.R. 58](#) (8th Cir. BAP 2020).
8. [Id. at 63–65](#).
9. [Id. at 64](#).



Recent Cases

SECURED TRANSACTIONS

Scope Issues

A.Y. McDonald Industries, Inc. v. McDonald,
[2021 WL 3076322](#) (Iowa Ct. App. 2021)

An agreement by which a judgment creditor agreed to cease collection activities in return for the judgment debtor's irrevocable appointment of an attorney-in-fact to forward payments due to the debtor from two spendthrift trusts did not function as a security agreement because the debtor had no power under the spendthrift trusts to collateralize his interests in them. Moreover, the appointment was revocable because otherwise the spendthrift nature of the trusts would be undermined.

Perfection Issues

In re Bryant,

[2021 WL 2326336](#) (Bankr. M.D. Ga. 2021)

Filed financing statements identifying the debtor as “Darren E. Bryant” and “Darren E Bryant” were seriously misleading, and hence not sufficient to perfect, because the debtor’s name, as indicated on his current driver’s license, is “Darren Eugene Bryant,” and the financing statements would not be disclosed in response to a search under that name using the Georgia filing office’s standard search logic. Accordingly, the secured party was not entitled to relief from the automatic stay.

Enforcement Issues

Xynergy Healthcare Cap. II LLC v. Municipality of San Juan,

[2021 WL 2769818](#) (D.P.R. 2021)

A notification of assignment provided to a municipal account debtor, which instructed the account debtor to pay the secured party, was effective even though it was sent a few days before the security agreement was authenticated.

Central Trust Bank v. Branch,

[2021 WL 3159750](#) (Mo. Ct. App. 2021)

A secured party that sent to the debtors by certified mail a post-sale explanation of the deficiency, but that later learned that the explanation had not been delivered, was required to take additional action to inform the debtors of the explanation’s contents, such as by sending the explanation by regular mail. Because the secured party did not take such action, it was not entitled to a deficiency judgment.

Liability Issues

In re Karcredit, LLC,

[2021 WL 2212012](#) (Bankr. W.D. La. 2021)

A bank that perfected a security interest in the debtor’s shares of stock in a corporation by taking possession of the certificate, but which lost priority to a protected purchaser, was entitled to recover its losses from the issuer of the replacement certificate. The debtor had falsely asserted he had lost the certificate, obtained a replacement certificate from the issuer in connection with the issuer’s merger, and then pledged the replacement to the protected purchaser. The issuer failed to abide by its own restrictions on the exchange of shares when it transferred a new certificate to the debtor without surrender of the old certificate; only “holders” were entitled to receive new certificates in connection with the merger and the bank, not the debtor, was the holder. Although, pursuant to § 8-405, the issuer was not required to register for transfer both certificates because an overissue would result, under § 8-201 the issuer was liable for the lesser of the value of the shares or the amount of the debt those shares secured.

Nature’s Comfort, LLC v. First State Bank of Middlebury,
[2021 WL 2346254](#) (Ind. Ct. App. 2021)

The individual who was the sole member of a limited liability company that had granted a security interest in all of its assets to secure a bank loan, and who caused the company to sell substantially all of its assets and use the proceeds to pay unsecured creditors, was liable in conversion to the bank for double the value of the collateral converted.

Grayson v. Westwood Buildings L.P.,

[2021 WL 2583226](#) (Va. 2021)

An individual and the entity he owned, which had a security interest in a law firm’s accounts, did not commit conversion by collecting an account before a landlord’s garnishment summons was delivered to the sheriff.

BANKRUPTCY

Avoidance Powers

In re Philadelphia Entm’t and Dev. Partners LP,

[2021 WL 2666690](#) (3d Cir. 2021)

Because the debtor’s slot machine license was not property under Pennsylvania law, the debtor’s fraudulent transfer action against a state agency for its prepetition revocation of the license did not fall under the bankruptcy court’s in rem jurisdiction and was barred by sovereign immunity.

Pazzo Pazzo, Inc. v. Speedwell Ventures, LLC,

[2021 WL 2493487](#) (D.N.J. 2021)

The expiration of the debtor’s option to buy real property was not a transfer of an interest in property because an option is a right to acquire, not an interest in, real property. Consequently, the expiration could not be avoided as a fraudulent transfer.

Other Bankruptcy Matters

In re 3P Hightstown, LLC,

[2021 WL 3122409](#) (Bankr. D.N.J. 2021)

A limited liability company’s voluntary bankruptcy petition had to be dismissed because the LLC agreement denied the company’s management the authority to file a bankruptcy petition without the preferred members’ prior approval if not all preferred capital had been returned to the holders of preferred units, and such approval was not obtained. Even if the current holder of the preferred units did not comply with the LLC agreement’s notice requirements, and thus was not properly a member, the debtor failed to get the consent of either the current holder or the prior owners, and thus lacked authority to file the petition. Although some contractual restrictions on authority to file a bankruptcy petition are contrary to public policy and void, this was not a situation in which a lender conditioned financing

on having the right to block a bankruptcy filing. Indeed, the current holder of the preferred units acquired an equity stake in the debtor which exceeds the amount of its loan to the debtor. Moreover, because the preferred unit holder was not a manager, it do not owe a fiduciary duty to the other members.

In re GVS Portfolio I B, LLC,
[2021 WL 2285285](#) (Bankr. D. Del. 2021)

The bankruptcy petition filed by a mezzanine borrower whose only asset is its ownership of a subsidiary that in turn owns several operating companies was not filed in good faith. The debtor had no employees or operations, only three unsecured creditors each with a de minimis claim, and the petition was filed on the eve of a scheduled foreclosure of the debtor’s equity in the subsidiary, and thus was filed for the purpose of gaining advantage of what is principally a two-party dispute with the debtor’s secured lender. The debtor’s claim that it stands to lose substantial equity in the collateral following a default consisting of one late but cured payment was something that could be dealt with in state court.

LENDING, CONTRACTING & COMMERCIAL LITIGATION

Kruse by and through Kruse v. Repp,
[2021 WL 2451230](#) (S.D. Iowa 2021)

The lawyers and a bank who assisted a judgment debtor in engaging in fraudulent transfers were not entitled to judgment as a matter of law in a judgment creditor’s actions against them. The bank might have liability under the Iowa Uniform Fraudulent Transfer Act for refinancing a mortgage on real property that the judgment debtor had owned and then transferred to an LLC because the bank knew of the debtor’s substantial tort liability to the judgment creditor, allowed the debtor to inconsistently classify the property as both a personal asset and an LLC asset after learning of the transfer, and made additional loans that encumbered the property with debt that greatly exceeded the face value of the decade-old appraisal upon which the bank formally relied. The lawyers might have liability under RICO because they shared a common purpose of engaging in intentionally fraudulent transfers and they were engaged in a pattern of racketeering activity.

PSFS 3 Corp. v. Seidman,
[2021 WL 2603082](#) (Iowa 2021)

Pursuant to a “floating” choice-of-forum clause in an equipment finance lease, venue and jurisdiction were proper in the state where the assignee of the financier was located, even though the assignee was formed and the assignment made after the case was commenced.

UBEO Holdings, LLC v. Drakulic,
[2021 WL 1716966](#) (Del. Ch. Ct. 2021)

It would be unconscionable to enforce the forum-selection clause in a merger agreement against an individual employee who was a minor shareholder in the target because the individual was not presented with the agreement when he executed the signature page or even later, when informed of a covenant not to compete, and the agreement was negotiated by his supervisors who concealed their conflicts of interest and the existence of terms – such as the covenant not to compete – that were harmful to the employee.

Vegas Valley Growers, LLC v. Medicine Man Techs., Inc.,
[2021 WL 3140388](#) (Nev. 2021)

The trial court erred in awarding post-judgment interest on the portion of the judgment representing pre-judgment interest because that would result in compounding, which is not allowed in the absence of an agreement or statute providing therefor. The agreement provided for interest at the rate of 18% but contained no provision on compounding.



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