

The Transactional Lawyer

A Publication of the Commercial Law Center



Restricting Amendment of a Debtor’s LLC Operating Agreement

Allen Benson & Stephen L. Sepinuck

The 2013 amendments to the Revised Uniform Limited Liability Company Act (“RULLCA”) added a provision that transactional attorneys for secured lenders might wish to exploit. Specifically, § 107(a) now provides:

An operating agreement may specify that its amendment requires the approval of a person that is not a party to the agreement An amendment is ineffective if its adoption does not include the required approval.

At least a dozen jurisdictions have enacted this rule and Delaware has something similar.¹

Using this provision, a prospective lender might require the members of a limited liability company that seeks to borrow funds to amend the operating agreement to: (i) prohibit acts that might interfere with the perfection or priority of the lender’s security interest; and (ii) require the lender’s consent to any future amendment of these provisions of the operating agreement.

Unfortunately, the efficacy of this tactic is subject to some question. The remainder of this article explores whether this tactic works by focusing on three different restrictions:

- a prohibition on a name change;
- a prohibition on a relocation or merger;
- a prohibition on the grant of a security interest to anyone else.²

Prohibition on Name Change

Section 9-507(c) of the Uniform Commercial Code provides that a filed financing statement which becomes seriously misleading as a result of a change in the debtor’s name is not effective to perfect a security interest in collateral acquired more than four months after the name change.³ As a result, lenders with a security interest in collateral that turns over frequently – such as inventory or accounts – must regularly check to see if the debtor’s name has changed. If so, the lender must file an amendment to the financing statement.

At first glance, RULLCA § 107(a) appears to offer lenders a way to avoid the hassle and cost of monitoring the debtor’s name by making the creditor’s consent necessary for a change in the debtor’s name. However, it is unlikely that a term in an LLC operating agreement requiring the lender’s consent to a name change would be effective.

Under Article 9, the name of a registered organization, such as an LLC, is the name “stated to be the registered organization’s name on the public organic record” most recently filed with or issued by the registered organization’s jurisdiction of organization.⁴ Article 9 then defines “public organic record” as a record available to the public for inspection and “filed with or issued by a State . . . to form or organize an organization . . . [or] amend[] or restate[] the initial record.”⁵ An operating agreement neither forms the LLC nor is it generally filed with the state. In most states, a certificate of formation or an amended certificate of formation, is the public organic record for an LLC.

Thus, § 107(a), which deals with amendments to the operating agreement, would not seem relevant to a change in a company’s name. This should be so even if the company’s operating agreement specifies the company’s name and purports to require the lender’s consent to any change of that name. Put simply, for the purposes of Article 9, if an authorized representative files an amended certificate of formation changing the company’s name, the name is changed regardless of what the operating agreement states; the absence of the lender’s consent to the change would not and could not prevent the change from occurring.⁶

Contents	
<i>Restricting Amendment of a Debtor’s LLC Operating Agreement</i>	1
<i>Sometimes a Declaration Is Better Than a Covenant</i>	4
<i>Recent Cases</i>	6

Prohibition on a Relocation or Merger

To perfect a security interest in most types of collateral, Article 9 requires that a financing statement be filed in the jurisdiction where the debtor is located.⁷ If the debtor later moves to a different jurisdiction, a secured party generally has four months to file in the new jurisdiction in order for its security interest to remain perfected.⁸

Until recently, it was difficult for an LLC or other registered organization to move to a different state. That was because, for the purposes of Article 9, a registered organization is deemed to be located in the state under whose law it is organized.⁹ It does not matter where the company's business is conducted, where its chief executive office is located, or where its members are located. For the purposes of perfection of a security interest, a limited liability company or other registered organization is located in the jurisdiction under whose law it is organized. While a limited liability company or other registered organization could "reincorporate" in a different state – that is, the members could form a new entity in a different state and cause the two entities to merge, with the new entity as the survivor – the law generally, and Article 9 in particular, treated such a merger not as a relocation, but as a transfer of assets from the original debtor to a new debtor.¹⁰

RULLCA, however, permits a limited liability company organized in one state to "domesticate" into a different state, and treats the surviving entity as the original entity, not as a transferee.¹¹ It also permits the merger of domestic and foreign limited liability companies, and seems to treat the survivor as a continuation of the merged companies.¹² As a result, a secured lender to a limited liability company must either periodically check to see if the debtor has relocated or accept the risk that its security interest might become unperfected. A lender that could effectively prevent the debtor from relocating to a new jurisdiction could avoid this burden and risk.¹³

An operating agreement that prohibited domestication or interstate merger without the lender's prior written consent would seem to prevent the domestication or merger from occurring, and thus allow the lender not to have to monitor for such actions. However, it is not clear that a domestication or merger constitutes or requires an amendment to the operating agreement, so it is not clear that § 107(a) would be applicable at all.¹⁴ Even if § 107(a) does apply, another provision of RULLCA makes it even less certain that the lender's refusal to consent would prevent the domestication or merger from occurring.

Section § 107(d), adopted in most of the states that have enacted § 107(a),¹⁵ provides:

if a record delivered by a limited liability company to the [Secretary of State] for filing becomes effective and conflicts with a provision of the operating agreement:

(1) the agreement prevails as to members, persons dissociated as members, transferees, and managers; and

(2) the record prevails as to other persons to the extent they reasonably rely on the record.

This provision suggests that a domestication or merger for which the lender's consent was required but not given might nevertheless be effective against other persons who reasonably rely on the public record. Whether it would or would not depends on whether the filed record relating to the merger "becomes effective" and whether and how this provision, which apparently speaks only to records filed within the state that enacted the provision, applies in a multi-state transaction.¹⁶ There are no known cases dealing with these issues, so transactional lawyers should counsel their lender clients not to rely too heavily on an operating agreement that requires the lender's consent to a relocation by domestication or merger.

Prohibition on the Grant of a Security Interest

Even a lender with a properly perfected security interest must occasionally be concerned about losing priority to a subsequent secured party. For example, a seller or lender who later acquires and perfects a purchase-money security interest can obtain priority over the earlier lender with respect to the purchase-money collateral.¹⁷ A lender to an LLC could avoid this risk if the debtor's operating agreement prohibited the debtor from creating or granting a security interest without the lender's consent and that prohibition were effective.

Indeed, such term in the operating agreement is likely to be effective. An operating agreement that prohibits the creation of a security interest without a lender's consent would undoubtedly be effective among the members and would no doubt deny the manager and members actual authority to bind the company to a security agreement. Consequently, the only ways the company could grant a security interest in some of its property, would be if: (i) the lender consented; or (ii) under traditional principles of agency law, the manager or member acting for the company could nevertheless bind the company. The first is obviously within the control of the lender, and thus should not be of great concern. The second is also a minimal risk. The operating agreement would, by its terms, deny the member or manager *actual* authority to

bind the company to a security agreement to which the lender did not consent. Moreover, while a prospective secured party can in some cases rely on an agent's *apparent* authority, such authority must come from the actions of the principal, not the agent.¹⁸ In most cases, there would be no such actions by the limited liability company itself. Even in the rare cases where there might be,¹⁹ the new secured party would be able to benefit from this rule only to the extent that it acted reasonably in not reviewing the operating agreement. Thus, a seller of an isolated piece of equipment who retains a purchase-money security interest in the equipment sold *might* benefit from the doctrine of apparent authority; a bank or other sophisticated lender providing working capital financing – which would normally be expected to review the operating agreement as part of its due diligence – could not.

Nothing in RULLCA alters this analysis or result. Specifically, § 107(d) would not be relevant to the issue. Even if the company delivered a financing statement identifying the new secured party to the Secretary of State for filing,²⁰ § 107(d) would, at most, make the *financing statement* effective. It would do nothing to make the *security agreement*, which is not filed with the Secretary of State, effective.

Similarly, U.C.C. § 9-406 and § 9-408 would not override the restriction in the operating agreement. Those sections trump the terms in an agreement between the debtor and an account debtor that purport to prevent the debtor from granting a security interest or that require the account debtor's consent to the creation of a security interest.²¹ However, the lender is not an "account debtor,"²² and a limited liability company's operating agreement is not an agreement between the company and an account debtor. Indeed, the company is usually not a party to its own operating agreement; the agreement is one among the members. As a result, the anti-assignment rules of § 9-406 and § 9-408 would simply not apply. If this seems like a hyper-technical reading of those sections, it is one supported by a draft commentary by the Permanent Editorial Board of the UCC.²³

Conclusion

Section 107(a) of RULLCA appears to provide secured lenders to limited liability companies with an opportunity to protect their interests by restricting the company's powers. However, it probably does little in this regard. Section 107(a) probably cannot eliminate or alleviate the need to monitor for a change in the company's name. It is questionable whether it can reduce the risk of a relocation to a different jurisdiction. Finally, while restrictions in an operating agreement might prevent the company from granting a security interest to

a competing lender, nothing in § 107(a) speaks to this. Perhaps more to the point, if the operating agreement can prevent the grant of a security interest, all secured lenders should be examining it as part of their due diligence.

Allen Benson is a third-year student at Gonzaga University School of Law.

Stephen L. Sepinuck is a professor and associate dean at Gonzaga University School of Law and director of the Commercial Law Center.

Notes

1. See, e.g., [Cal. Corp. Code § 17701.12\(a\)](#); [Del. Code Ann. Tit. 6, § 18-302\(e\)](#); [D.C. Code § 29-801.09\(a\)](#); [Fla. Stat. § 605.0107\(1\)](#); [Idaho Code § 30-25-107\(a\)](#); [Iowa Code § 489.112\(1\)](#); [Minn. Stat. § 322C.0112\(1\)](#); [Neb. Rev. St. § 21-112\(a\)](#); [N.J. Stat. § 42:2C-13\(a\)](#); [N.D. Cent. Code § 10-32.1-15\(1\)](#); [Utah Code § 48-3a-114\(1\)](#); [Vt. Stat. tit. 11, § 4003\(k\)](#); [Wyo. Stat. § 17-29-112\(a\)](#).
2. The authority granted by § 107(a) might also be useful in other ways, such as preventing a significant change in the company's business. E.g., *Overhoff v. Scarp, Inc.*, [812 N.Y.S.2d 809](#) (N.Y. Sup. Ct. 2005) (the company's sale of assets and termination of employees was null and void because the action was not, as the operating agreement required, approved by all members).
3. U.C.C. § 9-507(c). This rule would not apply if the new collateral were proceeds of other collateral in which the security was perfected. See U.C.C. § 9-315(c), (d).
4. U.C.C. § 9-503(a)(1).
5. U.C.C. § 9-102(a)(68)(A).
6. Section 302 of RULLCA, drawn from § 303 of the Revised Uniform Partnership Act (1997), allows an LLC to file a statement limiting the authority of specified persons or company office holders. However, this provision is principally concerned with real estate records, and would, in any event, not prevent someone from filing – or the filing office from accepting – an amended certificate of formation. See RULLCA § 302, cmt.
7. See U.C.C. §§ 9-301(1), 9-310(a).
8. U.C.C. § 9-316(a)(2), (h).
9. U.C.C. § 9-307(e).
10. See U.C.C. § 9-316 cmt. 2, ex. 4.
11. See RULLCA § 1056(a)(1)(B), (2) (the domesticated entity is the same as the domesticating entity and "all

property of the domesticating entity continues to be vested in the domesticated entity without transfer, reversion, or impairment”). See also [Del. Code. tit 6, § 18-214\(f\), \(g\)](#).

12. See RULLCA § 1026(a)(3) (“all property of each merging entity vests in the surviving entity without transfer, reversion, or impairment”). RULLCA also permits a corporation organized under one state’s law to convert to a limited liability company organized under a different state’s law, and treats the surviving entity as the original entity. See § 1046(a)(2) (“all property of the converting entity continues to be vested in the converted entity without transfer, reversion, or impairment”).

13. If the survivor of a domestication or an interstate merger or conversion is treated as a transferee, a secured party perfected by filing would have one year to file a financing statement in the new state with respect to collateral owned by the original debtor prior to the move, see U.C.C. § 9-316(a)(3), and four months to file in the new state with respect to collateral acquired by the new debtor after the merger, see U.C.C. § 9-316(i). Consequently, the monitoring burden would be about the same.

14. Moreover, the rules on domestication and merger contain no cross-reference to § 107 or other suggestion that the consent of anyone other than the members is needed. See §§ 1023, 1053.

15. See, e.g., [Cal. Corp. Code § 17701.12\(d\)](#); [D.C. Code § 29-801.09\(d\)](#); [Fla. Stat. § 605.0107\(4\)](#); [Idaho Code § 30-25-107\(d\)](#); [Iowa Code § 489.112\(4\)](#); [Minn. Stat. § 322C.0112\(4\)](#); [Neb. Rev. St. § 21-112\(d\)](#); [N.J. Stat. § 42:2C-13\(d\)](#); [N.D. Cent. Code § 10-32.1-15\(4\)](#); [Utah Code § 48-3a-114\(4\)](#); [Vt. Stat. tit. 11, § 4003\(n\)](#); [Wyo. Stat. § 17-29-112\(d\)](#).

16. In other words, for the lender’s consent to matter, § 107(a) of RULLCA needs to be enacted in the state under whose law the original limited liability company was formed. For the limiting effect of § 107(d) to apply, it is unclear whether it must be enacted in that state, the state in which the new limited liability company is formed, or both.

17. See U.C.C. § 9-324.

18. See [RESTATEMENT \(THIRD\) OF AGENCY § 3.03](#), cmt. b (2006) (“Apparent authority is present only when a third party’s belief is traceable to manifestations of the principal”); Hepp v. Ultra Green Energy Services, LLC, [2015 WL 1952685](#) (N.D. Ill. 2015) (the managing member of an LLC did not have actual authority to bind the LLC to a note and security agreement and might not have had apparent authority, which requires conduct by

the principal that causes a third party to believe that the agent is authorized).

19. See *United Bank v. Expressway Auto Parts, Ltd.*, [2015 WL 6697469](#) (Ohio Ct. App. 2015) (even if the individual who signed the security agreement on behalf of the debtor, a limited liability company of which he identified himself as a member, was neither a member nor a manager of the LLC, and thus lacked actual authority to bind the LLC, he had apparent authority and the LLC ratified his action by reporting the secured obligation as a liability on its federal income tax returns and making monthly payments for eight years).

20. This assumes that the office listed in the state’s enactment of § 107(d) is the same office in which financing statements are filed. That might not be true. Moreover, normally the secured party, not the debtor, files the financing statement.

21. See U.C.C. §§ 9-406(f), 9-408(d).

22. See U.C.C. § 9-102(a)(3) (defining “account debtor”).

23. See PEB, [Draft Commentary on the Application of UCC Sections 9-406 and 9-408 to Transfers of Security Interests in Unincorporated Business Organizations](#) (Feb. 1, 2012).



Sometimes a Declaration Is Better Than a Covenant

Stephen L. Sepinuck

Your client plans to acquire an exclusive license to some encryption technology, with the intention of providing funds to the licensor to improve the technology. The draft, prepared by counsel for the licensor, provides as follows:

All updates, modifications or improvements to the Licensed Technology developed by Licensor and paid for by Licensee will be the property of Licensee. Licensor shall assign to Licensee when each update, modification, or improvement to the Licensed Technology is first reduced to practice or first fixed in a tangible medium all right, title and interest in and to such update, modification, or improvement.

This language might be effective as between the parties, but is it effective to defeat a security interest in after-acquired property granted by the licensor? No, according to the United States Court of Appeals for the Sixth Circuit. The case, *Cyber Solutions International, LLC v. Priva Security Corp.*,¹ pitted the licensor's secured party against the licensee. Although an exclusive licensee of collateral normally takes subject to a perfected security interest,² the licensee in this case argued that the licensor never had rights to the improvements, and hence the security interest could not attach to them despite the after-acquired property clause in the security agreement.³

The court mentioned the first sentence of the clause in the license agreement about improvements,⁴ but focused on the second. It ruled that the second sentence, by requiring the licensor to assign rights to improvements, implied that the licensor would have rights to improvements. It therefore concluded that the secured party's security interest did attach to the improvements at issue.

The purpose of this article is not to critique or criticize the court's analysis. Instead it is to highlight what is a common drafting problem. Consider the essence of the first sentence:

All updates, modifications or improvements to the Licensed Technology will be the property of Licensee.⁵

This is a declaration: a statement as to which the parties agree. Now consider the essence of the second sentence:

Licensor shall assign to Licensee all right, title and interest in and to [each] update, modification, or improvement.

This is a covenant: a promise to do something. The two sentences are in some tension with each other. The first states as fact that the licensee will – apparently automatically – be the owner of improvements, implying that the licensor will have no rights to them. The second requires the licensor to assign rights to improvements to the licensee, implying that the licensor does (or at least might) have rights to them. The court, for undisclosed reasons, chose to give primacy to the latter.⁶

Obviously, good drafting would avoid such a contextual ambiguity. But the point here is not merely to avoid writing agreements and clauses that are susceptible to more than one reasonable interpretation. After all, if the license agreement in this case had omitted the first sentence, the ambiguity would not have existed but the licensee would still have lost. The point is to allow declarations to do their job. Had the license agreement in this case included the declaration and omitted the covenant, the result might have been different.

Declarations can be found in almost all written agreements. Definitions and choice-of-law clauses are merely two of the many common examples. More to the point, they are just as enforceable as any other type of contract clause. Indeed, to some extent they are better because they operate automatically. If a contract term is drafted as a covenant, the obligated party might or might not perform.⁷ In contrast, a declaration cannot be breached.

Stephen L. Sepinuck is a professor and associate dean at Gonzaga University School of Law and director of the Commercial Law Center.

Notes

1. [2016 WL 106087](#) (6th Cir. 2016).
2. See U.C.C. §§ 9-201, 9-321.
3. See U.C.C. § 9-203(b)(2) (requiring that the debtor have rights in the collateral or the power to transfer rights in it for a security interest to attach).
4. The actual wording of the parties' license agreement differed slightly; it has been simplified here to enhance readability.
5. The parties' actual agreement used "shall" instead of "will." While "shall" often signifies a promise to do or to refrain from doing something – a covenant – because the sentence lacked an actor, the sentence was nevertheless a declaration. This use of "shall" was improper – an example of the false imperative – but did not change the nature of the sentence. See STEPHEN L. SEPINUCK & JOHN F. HILSON, *TRANSACTIONAL SKILLS: HOW TO STRUCTURE AND DOCUMENT A DEAL* 21-22 (2015).
6. It might have been possible to harmonize the two sentences. For example, the first appears to be limited to updates, modifications, and improvements paid for by Licensee. The second is not so limited and thus could be deemed to cover all other updates, modifications and improvements. Because the case involved improvements funded by the licensee, that might have led to a different result. Alternatively, the second sentence could have been intended merely to clear up any problems with record ownership. In other words, the first sentence specified who had rights to improvements while the second sentence required the licensor to provide whatever documentation was needed to prove that. Of course, if that was the purpose of the second sentence, it could have been drafted much more clearly.

7. So, for example, a transactional lawyer should not draft a security agreement so as to have the debtor promise – that is, covenant – to grant a security interest. The debtor might or might not perform that duty, and if not, no security agreement arises. *See* *In re Jojo’s 10 Restaurant, LLC*, [455 B.R. 321](#) (Bankr. D. Mass. 2010) (interpreting the phrase “said Note and Commercial Lease Agreement shall be secured by a standard form UCC Security Agreement”). *See also* *LHPT Columbus, LLC v. Capitol City Cardiology, Inc.*, [24 N.E.3d 712](#) (Ohio Ct. App. 2014) (clause in wind-up agreement providing that “[t]he real estate leases . . . shall be assigned . . . by an Assignment of Lease . . . substantially in the form attached hereto” did not in fact assign the leases). Instead, the agreement should include a present transfer of rights – *i.e.*, granting language – although a declaration might suffice. *See* *In re Amex-Protein Dev. Corp.*, [504 F.2d 1056](#) (9th Cir. 1974).



Recent Cases

SECURED TRANSACTIONS

Perfection Issues

In re Southeastern Stud and Components, Inc.,
[2015 WL 7750209](#) (Bankr. M.D. Ala. 2015)

A deposit account control agreement need not specify the accounts subjected to control. Discrepancies between the account numbers referenced in the control agreement and those actually maintained by the debtor at the bank did not undermine control, given that the debtor and the bank were aware of the accounts to which the control agreement applied and, because a financing statement filed by the secured party identified deposit accounts as the collateral, a third party would have inquiry notice regarding secured party’s security interest.

Priority Issues

Classic Harvest LLC v. Freshworks LLC,
[2015 WL 9593621](#) (N.D. Ga. 2015)

Although a commercially reasonable true sale of accounts by a produce buyer does not violate the PACA statutory trust, and removes the accounts from the trust, the factoring arrangement in this case was not a true sale

because the produce buyer continued to bear the risk of its customers’ non-payment or underpayment of the factored accounts and the factor’s risk was limited to certain narrow circumstances under which a customer was financially unable to pay or was not creditworthy. Accordingly, the accounts and their proceeds remained trust assets and the factor was not entitled to priority over the PACA claimants.

Enforcement Issues

Santander Bank v. Durham Commercial Capital Corp.,
[2016 WL 199408](#) (D. Mass. 2016)

The agreement by which a law firm sold its accounts receivable to a factor was not void as against public policy even though the agreement required the law firm to forward to the factor copies of invoices that contained information regarding the names of a bank client’s borrowers, their addresses, their account numbers, and a description of actions taken by the firm in representing the bank. Even if these disclosure violated the firm’s duty of confidentiality, it did not render the factoring agreement void. Although the factor’s notification to the bank client instructing it to make payment to the factor included a signature line for the bank’s representative to accept, and the bank did not, the notification was nevertheless effective. However, the bank client had a claim in recoupment for the law firm’s breach of its confidentiality agreement, and because the amount of the bank’s damages was in dispute, summary judgment was not proper on the factor’s claim against the bank for paying the law firm after it received the instruction to pay the factor. The bank’s conduct in making payments to the firm did not unequivocally waive its right to recoupment, especially given that many of the facts giving rise to its recoupment claim had yet to occur.

BANKRUPTCY

In re Sentinel Management Group, Inc.,
[2016 WL 98601](#) (7th Cir. 2016)

The bank that loaned hundreds of millions of dollars to a cash management firm and obtained a security interest in the assets that the firm maintained for its customers did not act in good faith because it had reason to know that the firm was pledging its customers’ assets. Accordingly, the bank had no good faith defense under § 548(c) to avoidance of the security interest as an intentionally fraudulent transfer. Nevertheless, the bank’s negligence was not a sufficient basis for equitably subordinating the bank’s claim.

LENDING & CONTRACTING

VLM Food Trading Intern., Inc. v. Illinois Trading Co.,
[2016 WL 241367](#) (7th Cir. 2016)

Because contracts for the sale of goods between a Canadian supplier and an Illinois purchaser were, pursuant to the CISG, made when the supplier sent email confirmations in response to the purchaser's purchase orders, and none of those documents referred to the purchaser's duty to pay the supplier's attorney's fees, the contract included no provision on such fees. References to such fees in the invoices that the supplier mailed after the purchaser received the goods were not part of the contract. The invoices were not counter-offers because the contract had already been formed. The supplier did not assent to the terms expressly and its actions in paying the invoices did not signify assent because it was already obligated to pay. Moreover, there would have been no consideration for a modification because the supplier had already completely performed.

In re Energy Future Holdings Corp.,
[540 B.R. 96](#) (Bankr. D. Del. 2015)

Under New York law, a prepayment premium is not due after default unless the agreement expressly requires it. The language in the indenture providing for payment of "all principal of and premium, if any," after default, was not sufficiently clear. Moreover, the prepayment premium, which was due upon optional redemption of notes, was not triggered by the automatic acceleration of the notes when the debtor filed for bankruptcy protection. Even if the debtors repay the notes in bankruptcy, such repayment would not be "optional" because the notes were accelerated under the terms of the indenture.

Lease Finance Group LLC v. Indries,
[2015 WL 8544338](#) (N.Y. Cty. Ct. 2015)

The forum selection clause in a lease of a credit card processing machine was unconscionable because the lease was entered into in California between a California lessor and a California individual who operated a small business there, the lessee was not a sophisticated business entity, but an immigrant whose first language is not English and whose education level is equivalent to the eighth grade in the United States, and the lessee would be required to travel 2,700 miles from California to New York City to defend himself in a case seeking roughly \$2,600.

Sparta Commercial Services, Inc. v. DZ Bank Ag Deutsche Zentral-Genossenschaftsbank,
[2015 WL 9302831](#) (S.D.N.Y. 2015)

New York law distinguishes indemnification clauses that cover attorney's fees incurred in a dispute between the contracting parties from those that cover attorney's fees incurred by one contracting party in a suit by a non-party to the contract, and will not readily interpret the latter as covering the former. Because the parties' revolving credit agreement required the loan servicer to notify the borrower of any claim – which would be pointless in connection with suits between the parties – the clause did not apply to litigation between the servicer and the borrower.

DNAML PTY, Ltd. v. Apple, Inc.,
[2015 WL 9077075](#) (S.D.N.Y. 2015)

Although a federal antitrust claim is transferable, an effective transfer must either make specific reference to the antitrust claim or make an unambiguous assignment of causes of action in a manner that clearly encompasses the antitrust claim. An asset purchase agreement, by which an entity alleged to have been injured by an antitrust violation assigned "all of the assets owned by the [entity] and used in connection with the Business," did not satisfy this standard. Thus, the buyer lacked standing to pursue the antitrust claim.

**Edited By:**

[Stephen L. Sepinuck](#)

Professor & Associate Dean for Administration
Director, Commercial Law Center
Gonzaga University School of Law

[Scott J. Burnham](#)

Frederick N. & Barbara T. Curley Professor
Gonzaga University School of Law

This newsletter is intended to provide accurate information on the subjects covered. The newsletter is provided for informational purposes only; its publication and distribution do not constitute the provision of legal or professional advice or services by either the authors or the publisher. If legal or professional services are required, the services of a competent professional should be sought.