

# The Transactional Lawyer

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## The Marginal Usefulness of an Express Representation of Corporate Authority

**Kenneth D. Downey**

The documents for a sale by or loan to a corporation often contain a clause by which the corporation represents and warrants that it “has full corporate power and authority to bind itself to all terms of this Agreement.” At first blush, such a clause seems pointless. If the corporation does indeed have the authority to enter into the transaction, then the representation is true but immaterial; it adds nothing to the agreement. If the corporation lacks that authority, the representation does not somehow provide the authority that is lacking. Nonetheless, the clause might remain marginally useful in a narrow set of circumstances by reducing the risk that the transaction could be enjoined by the corporation’s shareholders.

Representations of corporate authority probably originated when *ultra vires* acts could more readily be challenged than they can today. However under the Model Business Corporations Act, which has been adopted in some form by more than half the states, *ultra vires* actions are largely insulated from attack or avoidance. Neither the corporation nor the counter-party to the contract can seek to avoid contract liability on the basis that the corporation lacked the authority to enter into the contract or consummate the transaction. See Model Bus. Corp. Act § 3.04(a); see also 2 Fletcher Corp. Forms § 9:7 (5th ed.) (“the defense of *ultra vires* has lost most of its significance as a matter of private corporate law”).

## The Clause May Prevent Shareholders from Enjoining the Corporate Action

However, shareholders retain the right to challenge the corporation’s *ultra vires* action. In states that have enacted the Model Business Corporations Act, this right is limited; the court may enjoin or set aside the act only if it is “equitable” to do so. Model Bus. Corp. Act § 3.04(b)(1), (c). The official comment suggests that this limitation means that a court should not enjoin the corporation’s acts or set aside a transaction unless the corporation’s counter-party, who is a necessary party to the shareholder action, was “specifically aware that the corporation’s action was *ultra vires*.” Model Bus. Corp. Act § 3.04 cmt. Assuming this is an accurate statement of the law, a representation in the transaction documents that the corporation has authority to enter into the transaction might have some utility. Such a clause implies – although it does not prove – that the counter-party lacks knowledge that the transaction is *ultra vires*, and thus reduces the risk that a shareholder can enjoin or set aside the corporate action.

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## Court Limits Secured Creditor’s Right to Credit Bid

**Stephen L. Sepinuck**

In a potentially distressing decision, the Bankruptcy Court for the District of Delaware has limited a secured creditor’s right to credit bid at an auction of substantially all of the debtors’ assets to the \$25 million that the creditor paid for the secured claim. *In re Fisker Automotive Holdings, Inc.*, [2014 WL 210593](#) (Bankr. D. Del. 2014). The decision has important ramifications for secured creditors and their counsel.

### Contents

<i>The Marginal Usefulness of an Express Representation of Corporate Authority</i> .....	1
<i>Court Limits Secured Creditor’s Right to Credit Bid</i> .....	2
<i>An Update on Binding Guarantors to a Forum-Selection Clause</i> .....	4
<i>Recent Cases</i> .....	5

### Background Facts

The debtors were founded in 2007 with the goals of designing and manufacturing premium hybrid electric vehicles in the United States. They were impelled to file for Chapter 11 bankruptcy protection by a series of financial setbacks, including safety recalls, the loss of a material portion of their existing inventory during Hurricane Sandy, and the loss of their primary lending facility.

The debtors' primary lender was the U.S. Department of Energy, which had a \$168.5 million claim secured by most of the debtors' assets. Shortly before the bankruptcy, Hybrid Tech Holdings, LLC purchased the DOE's position for \$25 million. The debtors then entered into an Asset Purchase Agreement with Hybrid, pursuant to which Hybrid would acquire substantially all of the debtors' assets for a small amount of cash and \$75 million in the form of a credit bid. The debtors moved for permission to sell their assets to Hybrid under § 363.

The Creditors' Committee objected to the sale, and in particular to the sale process, and proposed instead that the debtors conduct an auction of their assets. It further proposed that Hybrid either not be permitted to credit bid at all or that its credit bid be limited to \$25 million. The Creditors' Committee made two main arguments in support of its position.

First, the Creditors' Committee argued that the assets to be sold included some property that was either not subject to Hybrid's security interest or as to which Hybrid's security interest was unperfected. This non-collateral or unperfected collateral included, allegedly, commercial tort claims, D&O insurance, avoidance actions, six automobiles, and some foreign intellectual property. Citing COLLIER ON BANKRUPTCY ¶ 363.09[3] (16th ed.), the Committee argued that because Hybrid did not have a perfected lien on all the assets to be sold, Hybrid was, as a matter of law, not entitled to credit bid. Omnibus Objection of the Official Committee of Unsecured Creditors' at 16-17 (Dec. 30, 2013).

Second, because Hybrid had acquired the DOE loan through an auction process, and the winning \$25 million bid reflected "a market-tested (and Government-approved) valuation of the underlying DOE Loan collateral," the Creditors' Committee argued it was appropriate to limit Hybrid's credit bid to \$25 million.

### Stipulations

The court was asked to rule before several issues were resolved. It therefore relied on some important stipulations by the debtors and the Creditors' Committee:

1. If Hybrid's ability to credit bid were capped at \$25 million, there is a strong likelihood that there would be an auction that has a material chance of creating material value for the estate over and above the present Hybrid bid.
2. If Hybrid's ability to credit bid is not capped, there is no realistic possibility of an auction.
3. Therefore, limiting of Hybrid's ability to credit bid would likely foster and facilitate a competitive bidding environment.
4. The assets offered for sale include: (i) material assets on which Hybrid has a properly perfected lien; (ii) material assets in which Hybrid does not have a properly perfected lien; and (iii) material assets as to which there is a dispute as to whether Hybrid has a properly perfected lien.

### Court's Ruling

The court began its analysis by citing the Supreme Court's decision in *Radlax Gateway Hotel, LLC v. Amalgamated Bank*, [132 S. Ct. 2065](#) (2012), for the proposition that a secured creditor is entitled to credit bid its allowed claim. The only issue remaining was in what amount Hybrid would be entitled to credit bid.

Noting that § 363(k) of the Bankruptcy Code provides that a court may limit the right to credit bid "for cause," the court treated the stipulations as providing such cause (even though Hybrid was not a party to the stipulations). In doing so, it relied on two principal points. First, that the evidence established that there would be no bidding and hence no auction – not merely the chilling of bidding – if Hybrid's right to credit bid was not capped. Second, that the amount of Hybrid's secured claim was uncertain. In an effort to distinguish the Third Circuit's decision in *In re SubMicron Systems Corp.*, [432 F.3d 448](#) (3d Cir. 2006), the court wrote:

In *Submicron* the issue was not the classification of the claim but the value of the collateral the

claim secured. The Court of Appeals held that although the secured debt had no actual/economic value, the secured creditor was nonetheless entitled to credit bid its entire secured claim. The *Submicron* facts are distinctly different than the facts here. In *Submicron* the classification of the claim to be credit bid was clear. The claim was secured, albeit the secured collateral was deficient as to the entirety of the claim. But here we do not yet know how much of Hybrid's claim is secured. The law leaves no doubt that the holder of a lien the validity of which has not been determined, as here, may not bid its lien. *Submicron* addresses an allowed claim. No one knows how much of the claim Hybrid purchased from DOE will be allowed as a secured claim.

### Analysis

The court's first point is suspect. Certainly § 363(k) contains an exception to the right to credit bid for cause. Moreover, the Supreme Court's decision in *Radlax* in no way deprecated this limitation. *Radlax* ruled merely that the right to credit bid could not be replaced with some "indubitable equivalent" under § 1129(b)(2)(A)(iii). However, the idea that cause exists if the right to credit bid would make the auction pointless is questionable. Credit bidding by the senior secured party almost always chills bidding by others. Indeed, when the senior secured debt greatly exceeds the value of the collateral, the right to credit bid will often lead to the absence of any competitive bidding. These economic realities should not be cause to prevent credit bidding. After all, if the collateral were truly worth substantially less than the amount of the debt it secures, then the estate has no equity in the collateral and will not be injured by a sale of the collateral, regardless of whether credit bidding is permitted at that sale. Without the possibility of injury, there can be no cause. Moreover, if perceived under-collateralization constituted cause to deny credit bidding, then an important right that the secured party can use to protect its interests would be eviscerated.

This is not to say that cause never exists to eliminate credit bidding. Misconduct by the prospective bidder might be cause to deny credit bidding. See *In re Aloha Airlines*, [2009 WL 1371950](#) (Bankr. D. Haw. 2009). So too might the creditor's failure to follow the court-ordered procedures to determine lien priority. See *Greenblatt v. Steinberg*, [339 B.R. 458](#) (N.D. Ill. 2006). But no prior authority

has ruled that credit bidding may be denied merely because of its alleged effect on bidding at a public sale. There is merely one unsupported statement in a treatise that a chill on bidding at a *privately negotiated* sale might be cause to deny credit bidding, see 3 Collier on Bankruptcy ¶ 363.09[1] (16th ed.), and two approving citations to that statement in dicta, see *In re Philadelphia Newspapers, LLC*, [599 F.3d 298](#), 316 n.14 (3d Cir. 2010) (omitting reference to the private nature of the sale); *In re River Road Hotel Partners, LLC*, [2010 WL 6634603](#), \*2 (Bankr. N.D. Ill. 2010) (same and noting that no evidence was offered other than the point that credit bidding generally chills other bids).

The court's second point is even more troubling. In *SubMicron*, the Third Circuit ruled that a secured creditor's right to credit bid exists even if the claim is completely underwater: that is, even if the creditor's interest in the collateral is worth nothing. The court in *Fisker* attempted to distinguish *SubMicron* by stating that "here we do not yet know how much of Hybrid's claim is secured." But *SubMicron* tells us unequivocally that the amount of the secured claim is irrelevant.

Perhaps what the court in *Fisker* was trying to say was not that the *amount of Hybrid's secured claim* was unknown, but that the *extent of the collateral subject to its lien* was unknown. This is not what the court actually stated, but it could have been what it meant and it would have been a far more valid point. After all, a secured creditor has a right to credit bid in a sale of its collateral, but not in a sale of other assets. Even Hybrid agreed with this basic point. Limited Objection of Hybrid Tech Holdings, LLC to Motion of Creditors' Committee at 7 (Jan 1. 2014). Because the proposed sale is to include assets that are not subject to Hybrid's perfected lien and other assets that might not be subject to Hybrid's perfected lien, this presents a significant problem. Hybrid has no right to credit bid on the former and possibly no right to credit bid on the latter.

Hybrid's response to this was to complain that if credit bidding were denied merely because the sale included a few unencumbered assets, the right to credit bid would be eviscerated because in every complex case there are random assets that have escaped even the most diligent secured creditor's attempts to perfect. *Id.* at 9. True, but given that a § 363 sale of virtually the entire estate is essentially a way to circumvent the bankruptcy process, complaining that it may not be

possible in large cases is hardly a basis for interpreting the Code to allow it in questionable cases.

Nevertheless, while this problem – the inclusion of non-collateral in the sale – might have been a basis to deny credit bidding, it does not support the court’s decision to cap credit bidding. The Creditors’ Committee argued for the \$25 million cap because that figure was the amount that Hybrid had paid for the DOE’s secured loan at auction and thus reflected a “market-tested . . . valuation of the underlying collateral.” That argument is both wrong and irrelevant. It is wrong because the amount Hybrid paid the DOE might represent the value of the *loan*, but there is no reason to think that it represents the value of the *collateral*. The value of the loan might be less than the value of the collateral for a whole host of reasons, including the interest rate on it, the time and expense needed to collect, and the risk of non-collection due to disputes about perfection or priority. The argument is irrelevant because, as *SubMicron* dictates, secured creditors have a right to credit bid the full amount of the debt owed to them regardless of the value of their collateral. In other words, while it *might* make sense to reduce the maximum amount of the credit bid by the value of the non-collateral – although even this would seem to violate *SubMicron* and the more proper approach would be to require cash for the non-collateral or, in extreme cases, to deny the right to credit bid, *see* 3 COLLIER ON BANKRUPTCY ¶ 363.09[3] (16th ed.) – it is not permissible to cap the credit bid at the value of the collateral.

The debtor has appealed the court’s ruling and asked for expedited review. Regardless of what happens, the case provides a note of caution for secured parties who expect to be able to credit bid at a § 363 sale.

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## An Update on Binding Guarantors to a Forum-Selection Clause

*Chelsey Thorne*

An article in an earlier issue of this newsletter discussed whether and when a guarantor is bound by a forum-selection clause in the agreement between the creditor and the principal obligor and suggested that the wording of the guaranty is often determinative. *See* Stephen L. Sepinuck, *Binding Guarantors to Terms in the Note*, [1 THE TRANSACTIONAL LAWYER 1](#) (June 2011). Several recent cases support this conclusion.

For example, in *KFC v. Wagstaff*, [502 B.R. 484](#) (W.D. Ky. 2013), the court ruled that individuals who guaranteed the full and prompt payment of franchisees’ debts to franchisor, but who did not promise the full performance of all agreements, obligations, or covenants, were not bound by the forum-selection clause in the promissory notes that they did not sign. This conclusion was further supported by following facts: (i) the notes contained both a choice-of-law and choice-of-forum clause but the guarantees contained only the former; and (ii) the guarantees were signed three months before the notes. In contrast, in *Frankford Crossing Shopping Center Dallas, Tx. L.P. v. Pho Partners, LLC*, [942 F. Supp. 2d 366](#) (W.D.N.Y. 2013), the court ruled that an individual guarantor who, contemporaneously with the execution of a commercial lease, executed a broadly worded guaranty covering “the full and faithful performance and observance of all the covenants, terms, and conditions of the Lease” was bound by the forum-selection clause in the lease. In short, a guaranty of “payment” does not bind the guarantor to litigate in the selected forum but a guaranty of “performance” apparently does.

In spite of this, transactional lawyers should be wary of relying on such subtle differences in wording of the guaranty. Some courts may not be persuaded by these differences and will bind a guarantor to a choice-of-forum clause only if it appears in the guaranty. *See Long John Silver’s, Inc. v. DIWA III, Inc.*, [650 F. Supp. 2d 612](#) (E.D. Ky. 2009) (court had no personal jurisdiction over guarantor of franchisee’s obligations even though the franchise agreement included a choice-of-forum clause and a consent to personal jurisdiction because the guaranty did not contain such clauses). *See also Speedway Motorsports Intern. Ltd. v. Bronwen Energy Trading, Ltd.*, [706](#)



[S.E.2d 262](#) (N.C. Ct. App. 2011) (because contracts related to a letter of credit transaction are deemed to be independent, a forum-selection clause in the agreement between the applicant and the issuer was inapplicable to action between the issuer and the confirming bank); *Hendricks v. Bank of America*, [408 F.3d 1127](#) (9th Cir. 2005) (an agreement between the applicant for a letter of credit and the beneficiary to resolve disputes in a particular forum does not prevent suit in another forum against the issuer to enjoin payment). As the prior article stated, it is better practice to include a forum-selection clause in the guaranty because this should eliminate the likelihood of a dispute about the issue.

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## Recent Cases

### SECURED TRANSACTIONS

#### *Attachment Issues*

*In re McKenzie*,

[737 F.3d 1034](#) (6th Cir. 2013)

Creditor did not have a security interest in the debtor's LLC interest because the LLC operating agreement expressly provided that no member could transfer such an interest without the prior written consent of the board and that any attempted transfer without consent was void, and the creditor's evidence of *subsequent* consent did not prove that the requisite *prior* consent was given.

*Southern Fid. Mgmt. Agency v. Citizens Bank & Trust*,  
[2014 WL 129336](#) (D. Kan. 2014)

Regardless of whether the participation interests in a loan secured by shares of stock were sales of a fractional interest or secured loans, the participants acquired a security interest in the stock because the participation agreements expressly so provided and those security interests were perfected under § 9-310(c) because the originator's interest was perfected by possession. The originator's subsequent subordination agreement with another secured party was not binding on the participants because the participation agreement required the participants' consent to any subordination agreement.

*LaVoy v. Morris*,

[2013 WL 6844770](#) (D. Nev. 2013)

Lenders who funded malpractice litigation did not have a security interest in the recovery because the loan agreement provided merely that the loan would be repaid if the suit were successful; there was no indication that the payment was to come from the recovery itself or that the borrower granted a security interest in the claim or in the recovery.

*Williams v. Farm Sources Int'l Capital, LLC*,

[2013 WL 6844282](#) (Ariz. Ct. App. 2013)

Tenant that granted a security interest in crops to an irrigation district and then entered into a partnership to farm the land – which partnership purported to grant a security interest in the crops to a lender in return for financing – had no basis for claiming that the lender's security interest did not attach due to the lack of the tenant's signature given that the tenant joined the irrigation district in signing a subordination agreement acknowledging the priority of the lender's security interest in the crops.

*In re Anderson*,

[2014 WL 172222](#) (Bankr. D. Utah 2014)

Despite a state statute providing that water shares – rights to use water evidenced by shares of stock in a corporation – shall be transferred pursuant to U.C.C. Article 8, such shares remain real property, not personal property, and hence a security interest in them can be perfected through a properly recorded deed of trust.

*In re Killgrove*,

[2013 WL 7018546](#) (Bankr. E.D. Mich. 2012)

Bank did acquire a security interest in dentist's patient records – effectively, a right to approach the patients and seek their consent to continuance of the relationship with another dentist – even if under 42 U.S.C. § 17935 and 45 C.F.R. 164.508 the bank could not have repossessed confidential patient information.

#### *Priority Issues*

*City of Minneapolis v. RW Farms, LLC*,

[2013 WL 6839711](#) (Minn. Ct. App. 2013)

Surety that subcontractors on city project, and was thereby subrogated to the contractor's right to collect from the city, had priority over a lender with a security interest in the contractor's accounts because, upon paying the subcontractors, the surety's interest related back to issuance of the surety bond, which occurred before the lender perfected.

*Davis v. F.W. Financial Services, Inc.,*

[2013 WL 6834954](#) (Or. Ct. App. 2013)

Secured party with a perfected security interest in the debtor's accounts had priority in funds that a judgment creditor had garnished and received from account debtors and a claim for conversion for the judgment creditor's refusal to turn those funds over. The secured party had not waived its security interest by not accelerating the debt or demanding payment from the account debtors.

*CIMC Raffles Offshore Ltd. v. Schahin Holding S.A.,*

[942 F. Supp. 2d 425](#) (S.D.N.Y. 2013)

Because collateral agent for senior lender group had a perfected security interest in debtors' deposit accounts and LLC interests, the funds in the deposit accounts were controlled by the collateral agent and needed to pay the senior lenders, and thus the debtors could not assign or transfer the funds of LLC interests, judgment creditor was not entitled to order requiring turnover of the funds or the LLC certificates.

### ***Enforcement Issues***

*395 Lampe, LLC v. Kawish, LLC,*

[2014 WL 221814](#) (W.D. Wash. 2014)

A secured party with a security interest in the debtor's one-third ownership of an LLC did not, merely by transferring to itself after default title to that ownership interest, effect a disposition or an acceptance of the collateral. There was no disposition because a secured party cannot buy at a private sale and there was no public sale. There was no acceptance because there was no proposal therefor and the debtor had objected. As a result, there was no reason to determine the value of the LLC interest to determine what deficiency or surplus existed.

*Mfrs. & Traders Trust Co. v. Minuteman Spill Resp., Inc.,*

[2013 WL 6622929](#) (W.D. Pa. 2013)

Although the parties' loan agreement authorized the appointment of a receiver of the collateral "without the necessity of proving either inadequacy of the security or insolvency of the [debtors]," the secured party was seeking appointment of a receiver to take possession and control of the debtors and their operations, not to manage or collect the collateral, and thus the contractual clause was inapposite. Despite the debtor's payment default, the Commonwealth's seizure of most of the debtor's assets and records pursuant to a criminal investigation, and allegations that the debtor was transferring collateral without the secured party's

approval, the secured party was not entitled to the appointment of a receiver. The payment default was minor and the secured party had frozen a deposit account with a balance in excess of the arrearage. The Commonwealth had returned many of the business records. The debtor's breach of loan covenants by opening deposit accounts at another bank was not fraudulent. The only significant asset that the debtor had sold – a helicopter – was not a fire sale price and the secured party had control over the proceeds. There was insufficient evidence to show that the secured party was undersecured. And the secured party retained its legal remedies, including the right to foreclose.

*Auto-Owners Ins. Co. v. Randy B. Terry, Inc.,*

[2013 WL 6583959](#) (N.D. Ala. 2013)

Issuer of performance bond that had security interest in contractor's equipment, accounts, and general intangibles to secure the contractor's indemnification obligation was entitled to a preliminary injunction requiring the contractor to deposit with the court \$263,000 (the amount already paid out by the issuer), to allow the issuer access to all its records, and to not sell or encumber any collateral.

*Dallman v. Felt & Lukes, LLC,*

[2013 WL 6628996](#) (W.D. Wis. 2013)

While parties are free to opt into the Wisconsin Consumer Act for transactions in excess of \$25,000 and thus not otherwise covered, the mere fact that the parties' agreement referred to: (i) "any right you have under applicable state law to cure your default"; (ii) the creditor's right to change the terms of the agreement under the Act; and (iii) the borrower's obligation after cancellation, "except to the extent that [this] liability is limited by" the Act, were insufficient to indicate that the parties had chosen to subject the transaction to the Act. Therefore, the secured party had no duty to notify the debtor prior to repossessing the vehicle.

*Waithe v. Citigroup, Inc.,*

[2013 WL 6797630](#) (N.Y. Sup. Ct. 2013)

It is unclear whether § 9-611(f) – a non-uniform notification rule that creates a condition to conducting a sale of shares in a cooperative apartment – requires: (i) notification to be sent both by regular mail and by registered or certified mail; and (ii) an affidavit of service. A notification that mentioned the right to an accounting of the secured obligation but did not expressly mention the charge therefor substantially complied with § 9-613, especially given that the debtor did not request an accounting.

*Guarantee Ins. Co. v. Brand Mgmt. Serv., Inc.*,  
[2013 WL 6768641](#) (S.D. Fla. 2013)

While a secured party is generally permitted to proceed against the collateral or to ignore the collateral and proceed against the debtor on the secured obligation – *i.e.*, its remedies are not mutually exclusive – once a secured party has chosen a remedy, it must pursue that remedy to fruition, and only afterwards may it pursue another method. Because the secured party had possession of the collateral, it was therefore not entitled to a judgment against the debtor until it foreclosed.

*In re Shuaney Irrevocable Trust*,  
[2013 WL 6983382](#) (Bankr. N.D. Fla. 2013)

The actions of a bank with a security interest in certificated securities in causing the indenture trustee, after the debtor's default, to designate the bank as the registered owner did not constitute a disposition of collateral. Accordingly, the requirements of notification before and commercial reasonableness in conducting a disposition were not applicable.

## BANKRUPTCY

*In re NobleHouse Technologies, Inc.*,  
[2013 WL 6816129](#) (Bankr. N.D.N.Y. 2013)

Secured creditor's claim would not be equitably subordinated under § 510(c) merely because an account debtor mistakenly ignored instructions to make payment to a lockbox set up to protect an unsecured supplier and the debtor, then under the management of the secured creditor's representatives, used the funds to pay the secured creditor. As an unsecured creditor, the supplier did not suffer a particularized injury and, even if it did, the secured creditor's use of the funds, in which it had a security interest, was not unfair.

*In re Vega*,  
[2013 WL 3157516](#) (Bankr. E.D. Mich. 2013)

Automobile repair shop that had possession of a motor vehicle on which it had performed repairs, and which had a common-law possessory lien for the charge for those repairs, did not violate the automatic stay by refusing to return the vehicle after the owner filed a Chapter 13 petition because possession was necessary to maintain perfection and thus the shop's action was exempt from the stay by § 363(b)(3).

*In re American Home Mortg. Holdings, Inc.*,  
[501 B.R. 44](#) (Bankr. D. Del. 2013)

A creditor's contractual right to setoff its obligations to the debtor under a swap agreement against obligations owed by the debtor to an affiliate of the creditor under

a repurchase agreement is not enforceable post-petition. A triangular setoff lacks mutuality and is, therefore, not authorized under the Bankruptcy Code.

*In re Shapiro*,  
[2014 WL 68998](#) (9th Cir. 2014)

Because § 542(a) expressly authorizes recovery of "the value" of estate property in a person's "possession, custody, or control," a bank that post-petition honored checks drawn by the debtor prepetition was liable for the amount of the checks even though the bank lacked possession, custody, or control at the time the action was brought.

## GUARANTIES & RELATED MATTERS

*McLane Foodservice, Inc. v. Table Rock Rests., LLC*,  
[736 F.3d 375](#) (5th Cir. 2013)

Guaranty agreement that covered "any and all indebtedness . . . to Creditor now or hereafter existing" and that defined "Creditor" as a specified entity and its affiliates did cover credit extended by a second-generation assignee of the Creditor even though the guaranty agreement also provided that it shall inure to the benefit of and be enforceable by Creditor's assigns.

*In re Cook*,  
[2014 WL 68574](#) (8th Cir. BAP 2014)

Fact that guaranty agreement stated that it was unsecured, which was true when signed, did not render the dragnet clause in a subsequently created deed of trust latently ambiguous or prevent the deed of trust from securing the guaranty obligation.

## LENDING & COMMERCIAL CONTRACTING

*Bay Venture Elyria, LLC v. Adv. Plastics Recl., LLC*,  
[2013 WL 6568795](#) (N.D. Ohio 2013)

Note holder had a good faith belief that the prospect for payment was impaired, and therefore could accelerate the debt, because the maker lost its capital funding, had liquidated the equipment connected with its plant, and ceased operations there. The fact that the note holder waited 18 months to accelerate the debt was immaterial because the note contained a "no waiver" provision, which is enforceable under New York law. A clause in the limited guaranty providing that it would become a full guaranty if a representation that all patent applications had been disclosed was not true was enforceable. Because the guaranty agreement expressly stated that the representation was material and that the note holder had relied upon it, the parol evidence rule barred evidence of an alleged oral agreement not to list certain other patent applications.

*Zacadia Fin. L.P. v. Fiduciary Trust Int'l of Cal.*,  
[2014 WL 69618](#) (Cal. Ct. App. 2014)

Lender could not accelerate loan to trust and demand payment of all future, unaccrued interest – which would amount to a forfeiture – because the trust's breaches of the loan agreement were not material. Although the trust did make an unauthorized distribution of 14% of its assets, which were worth about \$40 million and served as collateral for the loan, failed to respond to a request for information, and failed to pay a \$1,648 bill from the creditor, none of these actions was material. The loan was heavily oversecured and became more so during the litigation, when the trust's assets appreciated and the distributed assets were reacquired.

*Brennan v. Brennan*,  
[2013 WL 6502497](#) (5th Cir. 2013)

Because stockholder entered into a credit sale of his stock with the corporation, rather than a redemption, the stockholder did not retain the right to vote the shares until final payment.

*Community Shores Bank v. Rimar Development, Inc.*,  
[2013 WL 6690672](#) (Mich. Ct. App. 2013)

Lenders that agreed with bank that the debtor could make payments on the investors' loan as long as the payments were not from the sale of the collateral could not retain the \$260,000 paid to them because the evidence indicated that the funds were proceeds from the debtor's sale of collateral. The bank was not required to apply payments it did receive to the senior indebtedness because the subordination agreement allowed the bank to "take or omit any and all actions with respect to the [bank's loan] . . . without affecting whatsoever" its rights under the agreement and the debtor had instructed the bank to apply the funds to other debt.

*Wells Fargo Bank v. Webster Business Credit Corp.*,  
[2014 WL 241738](#) (N.Y. App. Div. 2014)

Because the clause in a credit agreement providing for each lender to indemnify the agent applied only to the extent that the borrower failed to satisfy its indemnification duty, and the clause dealing with indemnification by the borrower contemplated third-party litigation against the lenders, the lenders had no duty to indemnify the agent for the costs the agent incurred in successfully defending an action brought by some lenders.

*Nissan Motor Accept. Corp. v. Superior Auto. Group*,  
[2014 WL 185718](#) (Cal. Ct. App. 2014)

Debtors were entitled to admit parol evidence that the creditor fraudulently entered into a forbearance agreement, pursuant to which the debtors offered additional collateral, by promising additional financing that the creditor did not intend to provide. The California Supreme Court's decision in *Riverisland Cold Storage, Inc. v. Fresno-Madera Prod. Credit Ass'n*, [291 P.3d 316](#) (Cal. 2013), ruling that the fraud exception to the parol evidence rule is not limited and can include fraud directly at variance with a promise in the writing, is not prospective only but also applies retrospectively.

*In re Denver Merchandise Mart, Inc.*,  
[2014 WL 291920](#) (5th Cir. 2014)

Although the default clause in promissory note provided for acceleration of "all sums, as provided in this Note," and the note also contained a clause providing for a prepayment penalty, that prepayment penalty did not become due upon default and thus was not part of the bank's claim in the note maker's bankruptcy because the note did not clearly make the prepayment penalty due upon acceleration.



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