

# The Transactional Lawyer

A Publication of the Commercial Law Center



## Avoiding Ambiguity: Part One – Contextual Ambiguity

**Stephen L. Sepinuck**

Most articles on avoiding ambiguity discuss how ambiguity arises, provide examples, and offer the reader the banal advice to avoid creating it. Some provide suggestions on how to remove ambiguity where it exists. Unfortunately, judging by the frequency with which ambiguity in transactional documents is the focus of litigation, this rather general advice does not seem to be working.

There are probably two reasons for this. First, it is quite possible that ambiguity is an inevitable byproduct of the use of the English language, given the imprecise and multiple meaning of so many words and the complex structure of sentences often used in transactional documents. Thus, merely telling authors to write unambiguous documents is a bit like telling dieters to eat less. It is good advice but not particularly effective. Second, offering suggestions on how to redraft ambiguous terms presupposes that the author has identified a term as ambiguous. In my experience, most transactional attorneys can readily remove ambiguity when they find it. They can and do, for example, define terms that are unclear or would otherwise have multiple meanings. They tabulate clauses to more clearly identify to which clause a modifying phrase applies. They remove or rewrite a term that conflicts with another. The problem appears to be, however, that too often the ambiguity goes undetected, at least until a dispute arises between the parties.<sup>1</sup>

This article – the first in a series – offers more concrete and strategic advice on how to avoid ambiguity. Unfortunately, there are at least three different types of ambiguity – semantic, syntactic, and contextual.

Semantic ambiguity exists when a word or phrase has multiple meanings and more than one of those meanings could reasonably apply. One classic contracts case involved semantic ambiguity in the word “chicken”: was the term in an agreement between a domestic seller and a foreign buyer limited to only young birds suitable for broiling and frying or did it also include older – and less expensive – fowl, best suited for stewing?<sup>2</sup>

Syntactic ambiguity arises from sentence structure, most frequently from the misplacement of a modifier so that it is unclear to what word or phrase a modifying word or phrase refers. For example, a settlement agreement that releases “all claims for the avoidance or recovery of transfers in the amount of \$59,999.99 or less” is ambiguous: the specified amount might modify “claims” or “transfers,” and that distinction can matter if a single claim concerns multiple transfers.<sup>3</sup>

Future articles in this series will return to these types of ambiguity and strategies for avoiding them. This article focuses on the third type of ambiguity: contextual ambiguity.

### Explaining Contextual Ambiguity

Contextual ambiguity can arise in two distinct ways. First, it is created when two or more statements or clauses in the same agreement or in related agreements are inconsistent. For example, consider an agreement that calls for “payment of \$75,000 in six monthly installments of \$15,000.” Six payments of \$15,000 will, of course, total \$90,000. So, does the agreement require payment of \$75,000 or \$90,000?

Although the conflict in the example above is patent, contextual ambiguity can occasionally be latent. That is, the ambiguity might not be apparent on the face of the document and instead become evident only after reference to external facts. The facts of one recent case are illustrative. It involved a marital settlement agreement that required the husband to pay alimony to the wife “until 2/20/20, Yasmine’s 18th birthday.” As it so happens, the specified date would be the 18th birthday of the couple’s youngest daughter, Myriam. The couple’s middle daughter, Yasmine, turned 18 on August 1, 2015. So, which date controls? Put another way, did the couple err by misstating the date their daughter Yasmine would turn eighteen or did they err by confusing two of their daughters?<sup>4</sup>

### Contents

<i>Avoiding Ambiguity: Part One – Contextual Ambiguity</i> .....	1
<i>Recent Cases</i> .....	5

Note, in both of the examples above, the conflicting statements were contained in a single sentence. More commonly, contextual ambiguity arises from the interaction of two different sentences. For example, consider this slightly simplified example from a loan agreement that was the subject of a recent judicial decision:<sup>5</sup>

**Choice of Forum.** All judicial proceedings arising out of or relating to this Agreement shall be brought in a court of competent jurisdiction in the District of Columbia, and Borrower accepts the exclusive jurisdiction of the aforesaid courts and waives any defense of forum non conveniens. Nothing herein shall limit the right of Lender to bring proceedings against Borrower in the courts of any other jurisdiction

Obviously, if the first sentence is, as it purports to be, a statement mandating a forum for the litigation of disputes, the second sentence is in conflict. A similar ambiguity arises if an agreement provides for arbitration of all disputes between the parties but also contains a clause on venue for some actions.<sup>6</sup>

To make matters worse, conflicting statements might not be in close proximity. Consider this other recently litigated example. A written agreement dated June 2014 between an insurance company and a broker, for the broker to market and the insurance company to issue a new type of life insurance policy, contained the following terms:

**Term of Agreement.** This Agreement will continue indefinitely, until terminated by either party upon thirty days written notification.

**Commitments.** Insurer shall accept at least \$100,000,000 of premiums for each twelve-month period from July 1, 2014 until June 30 2017.

The first sentence purports to give either party the right to terminate at any time, upon thirty days notification. The latter purports to obligate the insurer for three years. This conflict prevented summary judgment about what the contract requires.<sup>7</sup>

The second method in which contextual ambiguity is created is through the juxtaposition of terms, so that the language of one affects the meaning of another. Put simply, context matters. Courts have long recognized that the meaning of words and terms can be affected by those around them. Indeed, this recognition underlies the classic interpretive canons of *noscitur a sociis* and *ejusdem generis*.

The former, *noscitur a sociis*, states that a word is known by the company it keeps. That is, a word will be given a more precise meaning by the neighboring words with which it is associated. Thus, for example, a Master Sale and Purchase Agreement providing that the buyer assumed product liability claims caused by “accidents or incidents” after closing, had to be interpreted so that the words “accidents and “incidents” have different meanings, “but that these meanings should be conceptually related.”<sup>8</sup> The latter, *ejusdem generis*, applies when a specific enumeration of items is accompanied by a general catchall phrase. For example, a sales agreement might include a clause excusing the seller “in the event that a fire, flood, tornado, or other unanticipated event interferes with production.” The canon calls for the catchall phrase – “other unanticipated event” – to be interpreted to include only things of the same genre or with the same characteristics as the specific items listed.<sup>9</sup>

But context can just as easily create a problem as it can help resolve one. Consider the following clause, which appears in the agreement between Uber and its drivers:

**Dispute Resolution.** You and Company agree that any dispute, claim or controversy arising out of or relating to this Agreement will be settled by binding arbitration. **You acknowledge and agree that you and Company are each waiving the right to a trial by jury or to participate as a plaintiff or class member in any purported class action or representative proceeding.** Further, unless both you and Company otherwise agree in writing, the arbitrator may not consolidate more than one person’s claims, and may not otherwise preside over any form of any class or representative proceeding.

In isolation, the middle sentence in red appears to be a waiver of a right to bring or participate in a class action. However, because the clause was sandwiched between two sentences dealing with arbitration, the Southern District of New York ruled last month that the waiver was limited to arbitration proceedings and did not apply to actions as to which arbitration had been waived.<sup>10</sup>

Now consider the following clause from a commercial lease:

**Alterations.** After Tenant's Initial Build-Out (as defined below), Tenant shall not make any alterations involving structural, weight bearing changes, changes which affect any building systems, or changes to the storefront . . . without securing Landlord's written consent, which consent shall not be unreasonably withheld, conditioned or delayed. After Tenant's Initial Build-Out, Tenant may make all other alterations or additions, including, without limitation, non-weight bearing alterations to the Premises as Tenant may desire . . . without obtaining Landlord's written consent. **Any alterations or additions made by Tenant will be made in compliance with all applicable laws, in a good workmanlike manner without cost to Landlord.**

The third sentence (in red) appears to refer to all alterations. However, the prior two sentences both refer to alterations made "after Tenant's Initial Build-Out." Accordingly, last month a federal court was unwilling to decide at the pleading stage, whether the third sentence applies to alterations made during Tenant's Initial Build-Out.<sup>11</sup>

### Techniques to Avoid Contextual Ambiguity

**1. Avoid Repetition.** Repetition in a transactional document is – at best – unnecessary. But that does not mean it is innocuous. When the repeated statements are not phrased identically, an interpretive problem arises. One common principle used in interpreting written agreements is that clauses and phrases are to be construed so as to give meaning and effect to each.<sup>12</sup> As a result, a court might labor to find a way to interpret repeated clauses or phrases to express different things, so as to give each independent import. This can easily lead to an interpretation at odds with the parties' intent.

In extreme cases, such repetition leads to contextual ambiguity. Recall the first two examples of contextual ambiguity described above. The first phrase, "payment of \$75,000 in six monthly installments of \$15,000," is ambiguous because the author chose to express a single concept – the amount – in two different and inconsistent ways. Obviously, the ambiguity could have been avoided if the amounts stated had been consistent. Either of the following formulations would have removed the problem (in each, the change is noted in red):

"payment of \$75,000 in **five** monthly installments of \$15,000."

"payment of **\$90,000** in six monthly installments of \$15,000."

But no ambiguity would have arisen if the author had simply expressed the amount once:

"payment of \$75,000."

"payment of six monthly installments of \$15,000."

It is precisely for this reason that an article in this newsletter recommended against stating numbers or amounts in both words and numerals.<sup>13</sup>

The second example, "until 2/20/20, Yasmine's 18th birthday," is similarly repetitive. The author could have written either "until 2/20/20," or "until Yasmine's 18th birthday," but instead chose to express a date in two different and inconsistent ways. Avoiding repetition eliminates one breeding ground for contextual ambiguity.

**2. Make Sure Headings Accurately Describe the Content Below.** When a heading does not match the content beneath it, contextual ambiguity results. It is occasionally possible to prevent this by including in the agreement a declaration that "caption headings are used in this Agreement only as a matter of convenience and for reference and do not define, limit, or describe either the scope of this Agreement or the intent of any provision." However, as another article in this newsletter pointed out, "[i]t is not clear how much weight courts will give to such a provision."<sup>14</sup> Moreover, if the clause is a term – such as a disclaimer of implied warranties – that the law requires be conspicuous, the misleading caption might impel a court to rule that the disclaimer is ineffective.<sup>15</sup>

**3. Organize by Topic, Not by Party.** When conflicting statements are in close proximity, it is fairly easy to notice and correct the problem. Consider, for example, a lease of office space that contains the following two provisions:

Tenant shall maintain the Leased Premises.

Landlord shall maintain the Building.

Assuming that the Leased Premises are within the Building, there is a bit of a conflict: both parties have the duty to maintain the Leased Premises. If these two statements were in the same provision of the lease, such as one dealing with maintenance, it is far more likely that the author would spot the inconsistency or conflict than if the provisions were in separate portions of the agreement, such as one detailing the tenant's duties and another documenting the duties of the landlord.

**4. Specify Which Document Controls.** If a transaction involves more than one document – such as a promissory note, mortgage, security agreement, and guaranty; or a purchase and sale agreement, IP license, and non-competition agreement – contextual ambiguity can result if a term in one document conflicts with a term in another. One useful technique for dealing with this possibility is to include in each document a term specifying which documents control. For example, most intercreditor agreements are likely to have clause that

specifies that, “[i]n the event of any conflict between the provisions of this Agreement and the provisions of the Senior Loan Documents or the Junior Loan Documents, the provisions of this Agreement control.”<sup>16</sup> Note, however, that this technique does not avoid the conflict, it merely resolves it.

**5. Limit Each Paragraph to One Topic.** To avoid or minimize the risk that a court will apply the canon *noscitur a sociis* in an undesirable manner, such as in the examples above regarding the waiver of classwide proceedings and alterations by a tenant, restrict each paragraph to one topic. For example, if the waiver of classwide proceedings was placed in its own paragraph, rather than between two sentences dealing with arbitration, the court would likely not have restricted its application to arbitration proceedings.

**6. Take Extra Care when Importing Terms from Another Document.** Contextual ambiguity often results when a transactional attorney borrows a clause from one document or form and incorporates it into another. The source document might define terms differently or might simply contain language at odds with something else in the recipient document.

### Conclusion

These techniques will not eliminate all contextual ambiguity in transactional documents, but they should reduce it. Be advised, however, that these techniques offer little protection against semantic and syntactic ambiguity. For guidance in dealing with those problems, stay on the lookout for the next article in this series.

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

### Notes:

1. The dispute might not initially be about or focus on the ambiguous language. Instead, it might involve something completely different but prompt each of the parties’ lawyers to scrutinize the written agreement for any interpretive issue that might benefit their client.

2. See *Frigalment Imp. Co. v. B.N.S. Int’l Sales Corp.*, [190 F. Supp. 116](#) (S.D.N.Y. 1960). The court resolved the dispute by concluding that the plaintiff buyer had failed to prove that the narrower meaning was correct, a result that might simply put the loss on whichever party happens to be the plaintiff.

3. This example is derived from *In re Evergreen Solar, Inc.*, [2014 WL 300965](#) (Bankr. D. Del. 2014), in which a claim was brought to avoid eleven preferential transfers totaling \$200,000. The amount of each transfer was less than \$60,000.

4. See *Hussein-Scott v. Scott*, [298 P.3d 179](#) (Alaska 2013) (also discussing various principles that could be used to resolve such an irreconcilable conflict between the two statements). Another case with this problem is *In re Johnson*, [2016 WL 3034739](#) (Bankr. D. Kan. 2016) (interpreting a reorganization plan providing for adequate protection if the “outstanding loan balance is 80% or more (\$59,200 or more) of the market value (\$74,000)”).

5. This example is based on *KC Ravens LLC v. Nima Scrap, LLC*, [2016 WL 1614174](#) (Kan. Ct. App. 2016).

6. See *Siljan, Inc. v. Filet Menu, Inc.*, [2007 WL 2429941](#) (Cal. Ct. App. 2007).

7. *Life Plans, Inc. v. Security Life of Denver Ins. Co.*, [800 F.3d 343](#) (7th Cir. 2015). For additional recent cases involving contextual ambiguity resulting from conflicting statements in different parts of a written agreement, see *McDonald Data Servs., Inc. v. Secure One Data Solutions, LLC*, [2016 WL 866731](#) (E.D. Tex. 2016) (subordination agreement); *One Source Envtl., LLC v. M + W Zander, Inc.*, [2015 WL 7428572](#) (D. Vt. 2015) (marketing agreement between manufacturer and distributor).

8. *In re Motors Liquidation Co.*, [447 B.R. 142](#), 148 (Bankr. S.D.N.Y. 2011). For other recent cases applying this canon when interpreting a contract, see *In re Meridian Sunrise Village, LLC*, [2014 WL 909219](#) (W.D. Wash. 2014); *Severstal Dearborn, LLC v. Praxair, Inc.*, [899 F. Supp. 2d 667](#) (E.D. Mich. 2012).

9. As a result, in this example the general phrase might be limited to natural disasters and exclude human-caused events, such as a strike, embargo or war. For an interesting discussion of *ejusdem generis*, see *Maxus Cap. Group, LLC v. Liberty Surplus Ins. Corp.*, [2014 WL 4809430](#) (N.D. Ohio 2014), in which the court ruled that the doctrine was not relevant to the interpretation of an insurance policy that defined “claim” to mean “receipt of a civil action, suit, proceeding or demand.” According to the court, the interpretive principle applies only when a series of specific terms is followed by a general term but the word “demand” was not a general term. Moreover, the court noted, the general term must normally be linked to the specific terms, such as by the word “other” in the phrase “fishing rods, nets, hooks, bobbers, sinkers, and



other equipment.” In the definition at issue, there was no explicit link to demonstrate that the word “demand” was connected conceptually to the words that preceded it.

10. *Meyer v. Kalanick*, [2016 WL 2659591](#) (S.D.N.Y. 2016).

11. *Kinney Building Assocs., LLC v. 7-Eleven, Inc.*, [2016 WL 2855063](#) (D.N.J. 2016).

12. 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).

13. See Charles Nichols, *The Danger of Writing Amounts in Both Words and Numerals*, [4 THE TRANSACTIONAL LAWYER 1](#) (Oct. 2014).

14. See Scott J. Burnham, *Section Captions in Contracts*, [2 THE TRANSACTIONAL LAWYER 4](#), 7 (Apr. 2012).

15. See, e.g., *Latimer v. William Mueller & Son, Inc.*, [386 N.W.2d 618](#), 625 (Mich. Ct. App. 1986); *South Carolina Elec. and Gas Co. v. Combustion Eng’g, Inc.*, [322 S.E.2d 453](#), 456 (S.C. Ct. App. 1984); *Mallory v. Conida Warehouses, Inc.*, [350 N.W.2d 825](#), 827 (Mich. Ct. App. 1984); *Hartman v. Jensen’s Inc.*, [289 S.E.2d 648](#), 649 (S.C. 1982); *Blankenship v. Northtown Ford, Inc.*, [420 N.E.2d 167](#), 170-71 (Ill. Ct. App. 1981); *Seibel v. Layne & Bowler, Inc.*, [641 P.2d 668](#), 670 (Or. Ct. App. 1982); *Massey-Ferguson, Inc. v. Utley*, [439 S.W.2d 57](#), 59 (Ky. Ct. App. 1969); *Mack Trucks of Ark., Inc. v. Jet Asphalt & Rock Co.*, [437 S.W.2d 459](#), 463 (Ark. 1969).

16. Statutes also occasionally have an express hierarchical ranking. For example, § 1-303(e) of the Uniform Commercial Code provides:

[T]he express terms of an agreement and any applicable course of performance, course of dealing, or usage of trade must be construed whenever reasonable as consistent with each other. If such a construction is unreasonable:

- (1) express terms prevail over course of performance, course of dealing, and usage of trade;
- (2) course of performance prevails over course of dealing and usage of trade; and
- (3) course of dealing prevails over usage of trade.



## Recent Cases

### SECURED TRANSACTIONS

#### Attachment Issues

*Russell Road Food and Beverage, LLC v. Galam*, [2016 WL 1465330](#) (D. Nev. 2016)

The bank that received from a guarantor a security interest in the guarantor’s property “in the physical possession of or on deposit with the Lender” did not thereby acquire a security interest in the guarantor’s trademark, which was not in the bank’s possession.

*In re Southeastern Stud and Components, Inc.*, [2016 WL 2604535](#) (Bankr. M.D. Ala. 2016)

A steel supplier that obtained a security agreement from a customer and filed a financing statement identifying itself as the secured party, but which provided the steel through a wholly owned subsidiary, had an attached and perfected security interest. The subsidiary was acting as the steel supplier’s delegate given that the bills were in the steel supplier’s name and all the debtor’s payments were made to the steel supplier. Thus, the debtor’s obligation to pay the purchase price was an obligation owed to the steel supplier. Even if the subsidiary was not a delegate, it was the steel supplier’s agent.

*In re World Imports, Ltd. Inc.*, [2016 WL 1580730](#) (3d Cir. 2016)

A carrier could by agreement modify its maritime lien on goods in its possession to secure not only the charges for shipping those goods but also the charges for earlier shipments of goods that the carrier had released to the debtor, even though the maritime lien is a secret lien with priority over consensual security interests.

#### Perfection Issues

*In re Southeastern Stud and Components, Inc.*, [2016 WL 2604535](#) (Bankr. M.D. Ala. 2016)

Although a deposit account control agreement between the debtor, a secured party, and a bank was terminated when the debt was paid off, the control agreement was ratified when new obligations arose. The control agreement was effective despite a discrepancy between the account numbers listed and the debtor’s actual account numbers because all the parties knew and acted as if the agreement applied to the debtor’s actual deposit accounts. Even if the control agreement were not effective, the deposit accounts contained only identifiable proceeds of the secured party’s other collateral.

**Priority Issues**

*In re Energy Future Holdings Corp.*,  
[548 B.R. 79](#) (Bankr. D. Del. 2016)

Even if the waterfall in an intercreditor agreement covered distributions under the debtor's bankruptcy plan – and it did not because the waterfall in the agreement dealt only with payments out of the proceeds of collateral pursuant to the exercise of remedies – the first-lien lenders who funded the debtor's Deposit L/C Loan Collateral Account did not have priority over the other first-lien lenders because the intercreditor agreement gives all the first-lien lenders *pari passu* priority in all the collateral. While the credit agreement gives priority in the Deposit L/C/ Loan Collateral Account to pay "Deposit L/C Obligations," the first-lien lenders who funded that account are not owed such obligations.

*In re Radio Shack Corp.*,  
[2016 WL 2865125](#) (Bankr. D. Del. 2016)

The restructuring of an ABL credit facility that, pursuant to an intercreditor agreement, was supported by a first lien on the debtor's Liquid Collateral and a second lien on the debtor's Fixed Collateral, did not require the consent or impermissibly impair the position of the term-loan lenders who had the reverse priority. Specifically, the conversion of a revolving loan into a term-out revolver did not reduce the debt outstanding or ABL lenders' commitment. Moreover, because all of the debt was outstanding at the time of the restructuring, the term-loan lenders cannot show that the restructuring negatively affected them.

*Abbas Corp. (PVT) Ltd. v. Michael Aziz Oriental Rugs, Inc.*, [2016 WL 1574030](#) (D. Mass. 2016)

The entity that a guarantor formed and funded to buy a secured note from the secured party did not thereby acquire priority over a judgment creditor in the borrower's assets. Instead, the transaction was effectively – and would be treated as – a payoff of the secured obligation, leaving the collateral unencumbered and subject to execution by the judgment creditor.

*Northwest Bank v. McKee Family Farms, Inc.*,  
[2016 WL 2841205](#) (D. Or. 2016)

A supplier that had an Oregon grain producer lien and that, when extending the lien did not provide notice to a bank with a security interest in the debtor's crops perfected by a financing statement filed in Pennsylvania, nevertheless had priority in the crops because notification need be sent only to those required to register with the Oregon Secretary of State, and the bank was neither required to nor did so register.

**BANKRUPTCY****Property of the Estate**

*In re WEB2B Payment Solutions, Inc.*,  
[815 F.3d 400](#) (8th Cir. 2016)

A retailer that offered check-cashing and payday loan services, and which had hired the debtor to process checks received from its customers, was not entitled to the \$800,000 in check proceeds that the debtor had on the petition date. The funds were not held in an express trust because the agreement contained neither a requirement to segregate the retailer's funds nor an explicit declaration of trust. There was no resulting trust because the parties did not intend to create a trust. Imposition of a constructive trust was not warranted because the checks were properly negotiated to the debtor and thus the retailer had no property rights in them.

**Avoidance Powers**

*In re Big Drive Cattle, LLC*,  
[2016 WL 1270987](#) (D. Neb. 2016)

The owner of cattle who was a member of an LLC that operated a feedlot, who guaranteed the feedlot's line of credit, and who in his capacity as a member signed a security agreement granting a security interest in funds on deposit, thereby allowed the security interest to attach to the proceeds of cattle that the owner had delivered to the feedlot for feeding and sale. Because of that, the feedlot did not hold the proceeds as a bailee and the feedlot's prepetition payments to the owner were transfers of the feedlot's property and avoidable preferences.

*In re Ajax Integrated, LLC*,  
[2016 WL 1178350](#) (Bankr. N.D.N.Y. 2016)

A secured party that sent to the debtor notice of lien forms regarding 30 vehicles that served as collateral, but which forms the debtor never signed, did not have a perfected security interest in the vehicles. Even if the secured party were entitled to an equitable lien, that lien would not subvert the trustee's strong-arm powers. The secured party was not entitled to a constructive trust in part because it failed to take basic precautions and exercise due diligence when it made the loan without having the debtor sign the notice of lien forms at that time.

*In re Tribune Co. Fraudulent Conveyance Litigation*,  
[2016 WL 1226871](#) (2d Cir. 2016)

Even if creditors' state-law fraudulent transfer claims revert to creditors after the stay is lifted if the trustee has declined to pursue them, the immunity from avoidance provided by § 546(e) for settlement payments applies. It would be anomalous to interpret the Code as staying these claims in favor of the trustee, who is expressly barred from bringing them, only to allow the creditors to pursue them later, and such an interpretation is not consistent with the congressional purpose of protecting the finality of transactions in the financial markets.

### ***Other Bankruptcy Matters***

*In re Lake Michigan Beach Pottawattamie Resort LLC*,  
[547 B.R. 899](#) (Bankr. N.D. Ill. 2016)

A term in an LLC operating agreement making mortgage lender a "special member" of the LLC whose consent was required for the LLC to file a bankruptcy petition, and further providing that the lender in so doing had no duty to consider factors affecting the LLC or its members, was void as against public policy. Under Michigan law, a successful blocking structure requires that the manager be subject to normal fiduciary duties.

### **LENDING & CONTRACTING**

*Lesca, LLC v. Family Trust of Kimberley and Alfred Mandel*, [2016 WL 1446770](#) (N.D. Cal. 2016)

A term in a debt subordination agreement by which the junior lenders promised not to "commence, or cause to commence, prosecute or participate in any administrative, legal or equitable action against Borrower" until the senior debt was paid in full covered only claims relating to the subordinated debt; it did not prohibit the junior lenders from bringing a cross-claim against the debtor for fraud and negligent misrepresentation.

*Schwartz-Earp v. Advanced Call Center Techs., LLC*,  
[2016 WL 899149](#) (N.D. Cal. 2016)

By providing her cell phone number in an application for a store credit card, the applicant consented to being contacted on her cell phone about matters related to her credit card, including by third-party debt collectors.

*Becker v. The Bank of New York Mellon Trust Co.*,  
[2016 WL 1178072](#) (E.D. Pa. 2016)

The indenture trustee for revenue bonds could be liable to bond holders for both negligence and breach of contract for its failure to maintain the perfected status of the security interest in the debtor's collateral after the debtor changed its name. While an indenture trustee's fiduciary duties are normally defined by the agreements, after the debtor's default, an indenture trustee's fiduciary duties become more like those of a traditional trustee.

*Parsons v. Associated Banc-Corp.*,  
[2016 WL 2637446](#) (Wis. Ct. App. 2016)

To be enforceable under Wisconsin law, a pre-litigation, contractual jury waiver must be knowingly and voluntarily made. Applying this standard, a term in a promissory note relating to a construction project that purported to waive the borrower's and the lender's rights to a jury in any action relating to the relationship of the parties was not enforceable. Although the term was in all capital letters, there was no negotiation about the term and the borrower was given no time to review the documents or to consult with his lawyer about the documents. In addition, the jury waiver was both procedurally and substantively unconscionable.



### **Edited By:**

[Stephen L. Sepinuck](#)

Frederick N. & Barbara T. Curley Professor,  
Associate Dean for Administration,  
Director, Commercial Law Center  
Gonzaga University School of Law

**Scott J. Burnham**

Former 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.*