

The Transactional Lawyer

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The Limited Efficacy of No-Implied-Waiver Clauses

Stephen L. Sepinuck

Three judicial decisions from this year provide some valuable lessons with respect to no-implied-waiver clauses. These lessons are particularly useful for transactional lawyers who draft such clauses or who advise their clients about agreements that contain one.

Before discussing the cases, however, it is useful to review the law relating to modifications and waivers.

After contracting, parties are of course free to modify their contractual obligations. The requirements for doing so are generally the same as the requirements for entering into a contract: there must be mutual assent and consideration. However, the consideration requirement is not always applied to executory contracts, for which material performance remains due by both parties.¹ It has also been abrogated in contracts for the sale or lease of goods,² and, in some jurisdictions, more generally.³

Waiver, in contrast, does not require mutual assent.⁴ It is instead the unilateral act of one party. Waiver is commonly defined as the voluntary relinquishment of a known right.⁵ That definition is a bit misleading, however. The reference to a “right” suggests that a waiver concerns a covenant or some performance by the other party. More commonly – and more traditionally – however, waiver relates to a condition. For example, a party might waive a default (a condition to the exercise of default remedies).⁶

Claims of modification and waiver frequently go hand-in-hand. For example, if a landlord or lender has repeatedly accepted monthly payments 10 days after the due date, and done so without complaint, the tenant or

borrower might claim that this course of conduct has resulted in a modification or waiver that prevents the landlord or lender from refusing future payments that are no more than 10-days late.⁷

Transactional lawyers frequently try to head off claims of modification and waiver through no-oral-modification clauses and no-implied-waiver clauses. Each of these clauses is of limited efficacy, however. A typical no-oral-modification clause might be phrased as follows:

Modification. No modification of this Agreement will be binding unless it is in writing and signed by [both parties] [the party against whom enforcement is sought].

Although such a clause is very common, courts generally regard it as unenforceable.⁸ The rationale for this conclusion is that, despite the clause, both parties may by agreement or conduct change this requirement or one party may by statement or conduct waive the right to insist on compliance with the clause. Nevertheless, a no-oral modification clause is generally enforceable in contracts for the sale or lease of goods,⁹ and is often enforceable in government contracts.¹⁰ Moreover, some states have validated such clauses by statute.¹¹ However, even in such jurisdictions, waiver or estoppel might provide a basis for enforcing an unwritten modification.¹²

A typical clause purporting to limit or restrict waivers might be drafted as follows:

Waiver. No waiver of any provision of this Agreement will be effective unless it is in writing and signed by [both parties] [the party against whom the waiver is to be enforced]. A waiver is effective, if at all, only with respect to the specific instance involved and does not constitute a waiver of any provision, right, or condition on any future occasion.

Notice that the two sentences in this clause purport to do very different things. The first sentence purports to invalidate unwritten waivers. The second purports to limit the scope of an effective waiver. It does this by purporting to prevent an effective waiver from applying to future events.

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The first sentence is likely to have only limited efficacy for the same reason that no-oral-modification clauses are generally ineffective: parties can orally agree to modify the clause or either party can by statement or conduct waive the requirement of a writing. Thus, in many jurisdictions the first sentence is of dubious validity.¹³ Nevertheless, in some jurisdictions a clause prohibiting unwritten waivers is – or a least can be – effective.¹⁴

Two of the recent cases provide guidance on how to draft a no-implied-waiver clause to make it more likely to be effective.

Be Specific

In *Shields Limited Partnership v. Bradberry*,¹⁵ the Texas Supreme Court dealt with a commercial landlord that sought to evict a long-term tenant. In 2005, the landlord had rented restaurant space to a tenant for seven years, with rent of \$3,000/month. The lease gave the tenant a right to extend the lease term for three successive five-year periods provided the tenant was not in default. During the initial term, the tenant frequently defaulted by paying rent late but the landlord regularly accepted the tenant's late payments without protest. Shortly before the initial lease term ended, the tenant provided the landlord with a notification purporting to exercise its right to extend the lease term. At that time, the tenant was current in its payments but it was late again by the time the extended lease purported to begin. Although the amount of rent was to increase to \$3,340/month during the extended lease term, the tenant continued to pay only \$3,000, and did so untimely and irregularly.

The landlord assessed late fees, claimed that the tenant had not properly extended the lease term, and asserted that the tenant was merely a month-to-month tenant. The landlord then sought to substantially increase future rent. When the tenant refused to pay more, the landlord brought eviction proceedings.

The trial court ruled for the tenant, based partially on the conclusion that the landlord had waived the tenant's defaults due to late payment, and hence the tenant had properly exercised its right to extend the lease term. The court of appeals affirmed but the Texas Supreme Court reversed.

The court began by noting that the lease agreement contained the following clause:

All waivers must be in writing and signed by the waiving party. Landlord's failure to enforce any provisions of this Lease or its acceptance of late installments of Rent shall not be a waiver and shall not estop Landlord from enforcing that provision or any other provision of this Lease in the future.

The court noted that, as a general proposition, non-waiver provisions are binding and enforceable, but can themselves be waived.¹⁶ From this the court concluded that while a non-waiver provision "barring waiver in the most general of terms might be wholly ineffective," a provision can prevent "waiver through conduct the parties explicitly agree will never give rise to waiver."¹⁷ In short, specificity matters. Because the term in the lease expressly indicated that the landlord's acceptance of late payments of rent was not a waiver of the landlord rights, the landlord had not waived the tenant's defaults. Consequently, the tenant had not validly exercised the right to extend the lease term.

The court's analysis makes sense. It respects the parties' freedom of contract by giving some efficacy to a no-implied-waiver clause while nevertheless still allowing for most contractual rights and conditions to be waived. Regardless of the merits of the decision, however, the advice for transactional lawyers is clear. Replace a general no-implied-waiver clause with a more specific clause that expressly indicates what conduct will not operate as a waiver.¹⁸ Thus, for example, a lease or loan agreement should expressly state that the landlord's or lender's acceptance of late or partial payment does not constitute a waiver of the right to full and timely payment of that installment, a waiver of the right to declare a default for that breach, or a waiver of any rights with respect to any future installment.¹⁹

Distinguish the Past from the Future

Seven years ago, the Supreme Court of Arkansas aligned itself with the minority of jurisdictions by indicating that a no-implied-waiver clause could be effective. Specifically, the court wrote that if a contract contains both a no-oral-modification clause and a no-implied-waiver clause, then a creditor that accepts late payments "does not waive its right under the contract to declare default of the debt, and need not give notice that it will enforce that right in the event of future late payments."²⁰ This year, in *Academy, Inc. v. Paradigm Building, LLC*,²¹ the state court of appeals ruled that the efficacy of a no-implied-waiver clause depends on how it is phrased.

The case involved two commercial leases to a charter school. The landlord and tenant disputed whether the tenant had properly exercised a contractual right to extend the lease term and whether the landlord had waived the right to assess and collect late fees that had accrued during the initial term of the leases. As to the late fees, with one or two exceptions early in the lease term, the landlord had not billed the tenant for late fees and did not make any demand therefor until after the lawsuit was filed. Based on this, the trial court concluded that the landlord had waived the right to such fees.

On appeal, the landlord pointed to a clause in the leases providing as follows:

No Waiver. The failure of Landlord or Tenant to seek redress for violation, or to insist upon the strict performance of any covenant or condition of this Lease Agreement, shall not prevent a subsequent act, which would have originally constituted a violation, from having all the force and effect of an original violation. The receipt by the Landlord of Rent with knowledge of the breach of any covenant of this Lease Agreement shall not be deemed a waiver of such breach. No provision of this Lease Agreement shall be deemed to have been waived by Landlord or Tenant unless such waiver be in writing signed by Landlord or Tenant, as the case may be.

The landlord then argued that under the state supreme court's prior ruling, the landlord could not have waived the right to collect late fees.

The court of appeals disagreed. First, the court observed that the earlier case involved whether the landlord's acceptance of late payments waived its right to insist on timely payment *in the future*, whereas this case involved whether silent acceptance of late payments waived the right to impose late fees for those late payments: that is, for a *past breach*. The court then focused on language of the no-implied-waiver in the leases before it – particularly on the first sentence – and interpreted the reference to “a subsequent act” as dealing only with future, rather than past, contractual violations.

The court's analysis is questionable. The second and third sentences of the no-implied-waiver clause are not necessarily restricted to future events but the court completely failed to discuss those sentences. Nevertheless, the court is probably correct in concluding that the language of a no-implied-waiver clause is relevant to its scope. The landlord might well have fared better if the clause had included language such as the following, which expressly distinguishes between and

seeks to negate a waiver of rights for the current default and a waiver of rights to future performance:

Landlord's acceptance of a payment that is late or for less than the full amount due does not constitute a waiver of Landlord's rights with respect to such a payment, including the right to declare a default, the right to receive late fees provided for herein, the right to collect the remaining amount due, or the right to any other remedy.

Landlord's acceptance of one or more installments that is late or for less than the full amount due does not constitute a waiver of Landlord's right to full and timely payment of all future amounts due hereunder.

Beware of Prior Waivers

The final case stands for the proposition that transactional lawyers and their clients should not rely on a no-implied-waiver clause when purchasing an existing contract.

*In re Crystal Waterfalls, LLC*²² involved the purchase of a note secured by a mortgage. In 2011, the debtor borrowed \$7 million to buy real property in California. The promissory note, secured by both real and personal property, provided for variable interest with a floor of 5.75% and an increase of 5.0 percentage points after default. The debtor failed to make 2011 property tax payments on the mortgaged property, allegedly causing a default. However, the lender did not declare a default at that time or charge default-rate interest.

In 2014, the debtor again failed to pay property taxes. The lender declared a default and scheduled a sale of the property in 2015. At that time, the lender provided the guarantor with a preliminary statement of the amount due, based on interest at the original contract rate. The debtor filed for bankruptcy protection shortly before the foreclosure sale was to occur and then the lender sold the note. The buyer filed a claim that included interest at the default rate from the initial default in 2011. The bankruptcy court upheld the debtor's objection to the claim, concluding that the original lender had waived the right to collect default-rate interest for the period that the original lender owned the note, and that this waiver was binding on the buyer. The district court affirmed.

Although the loan agreement expressly provided that the original lender “shall not be deemed to have waived any rights . . . unless such waiver is given in writing and signed [by the original lender],” the court ruled that such a clause can itself be waived if enforcing it would be

inappropriate or unconscionable. The facts presented such a case because: (i) the original lender had provided the debtor with an estimated payoff amount based on the non-default interest rate; (ii) the purchase and sale agreement between the original lender and the buyer, in stating the amount owing, reflected interest calculated at the non-default rate; and (iii) the original lender continued to accept monthly interest payments from the debtor at the non-default rate until the loan was transferred.²³

It is difficult to fault the court for its ruling. After all, the buyer apparently stood to receive what it bargained for given what the purchase agreement indicated was the amount owing on the note. Nevertheless, the case is a reminder for anyone who buys a note or receives an assignment of any contract that a prior waiver of rights by the assignor might be binding on the assignee, and a clause prohibiting waiver in the agreement will not necessarily prevent a waiver from having effect. Such a waiver might apply not merely to past defaults but also to future performance. Accordingly, contract assignees should insist on a representation and warranty from the assignor that no waiver of rights has occurred.

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Notes:

1. See TINA L. STARK, NEGOTIATING AND DRAFTING CONTRACT BOILERPLATE § 16.02[1], at 508 (2003).
2. See U.C.C. §§ 2-209(1), 2A-208(1).
3. See, e.g., [Cal. Civ. Code § 1697](#) (applicable only to oral contracts); [Mich. Comp. Laws § 566.1](#) (but requiring the modification to be in writing); [N.Y. Gen. Oblig. Law § 5-1103](#) (same); [S.D. Codified Laws § 53-8-7](#) (same). See also [RESTATEMENT \(SECOND\) OF CONTRACTS § 89](#) (permitting the modification to be enforced if doing so would be fair and equitable in light of circumstances unanticipated when the parties entered into the original agreement).
4. A waiver also need not be supported by consideration, but the waiver of a future right unsupported by consideration can be retracted provided the other party has not relied to its detriment. See, e.g., U.C.C. §§ 2-209(5), 2A-208(4). See also [RESTATEMENT \(SECOND\) OF CONTRACTS § 84](#) cmt. f.
5. [RESTATEMENT \(SECOND\) OF CONTRACTS § 84](#) cmt. b.
6. It is also worth noting that although a waiver must be voluntary, the person making the waiver need not know of the legal effect of the waiver, merely of the underlying facts. For example, a person who performs despite the failure of a condition precedent need not understand the consequence of doing so, provided the person is or should be aware that the condition has not been satisfied. *Id.*
7. Such claims of modification and waiver might also be accompanied by a claim of equitable estoppel if the tenant or borrower reasonably relied to its detriment on the landlord's or lender's conduct.
8. See, e.g., *Autotrol Corp. v. Continental Water Sys. Corp.*, [918 F.2d 689](#), 692 (7th Cir. 1990) (indicating that such a clause is unenforceable in Texas and that the "Texas approach is by no means idiosyncratic"); *Quality Products and Concepts Co. v. Nagel Precision, Inc.*, [666 N.W.2d 251](#), 257 (Mich. 2003) ("it is well established in our law that contracts with written modification or anti-waiver clauses can be modified or waived notwithstanding their restrictive amendment clauses. This is because the parties possess, and never cease to possess, the freedom to contract even after the original contract has been executed"); *Reid v. Boyle*, [527 S.E.2d 137](#) (Va. 2000); *First Nat'l Bank of Pa. v. Lincoln Nat'l Life Ins. Co.*, [824 F.2d 277](#), 280 (3d Cir. 1987) (applying Pa. law); *Pacific Northwest Group A v. Pizza Blends, Inc.*, [951 P.2d 826](#), 828-29 (Wash. Ct. App. 1998) (involving a lease) (cited approvingly in *Wells Fargo Bank v. Main*, [2011 WL 449562](#) at *3 (Wash. Ct. App. 2011)).
9. See U.C.C. §§ 2-209(2), 2A-208(2). However, in a merchant-non-merchant transaction, such a clause must be separately signed if it is in a form provided by the merchant.
10. See, e.g., *P&D Consultants, Inc. v. City of Carlsbad*, [2010 WL 4680800](#) (Cal. Ct. App. 2010).
11. See [Cal. Civ. Code § 1698\(c\)](#); *Bare v. JPMorgan Chase Bank*, [2013 WL 6073335](#) (Cal. Ct. App. 2013); [N.Y. Gen. Oblig. Law § 15-301\(1\)](#); *Nassau Beekman, LLC v. Ann/Nassau Realty, LLC*, [960 N.Y.S.2d 70](#) (N.Y. App. Div. 2013).
12. See, e.g., [Cal. Civ. Code § 1698\(d\)](#); *Aircraft Services Resales LLC v. Oceanic Capital Co., Ltd.*, [2013 WL 4400453](#) (S.D.N.Y. 2013). See also *Wells Fargo Bank v. Smith*, [2012 WL 1288494](#) (Ohio Ct. App. 2012) (discussing waiver of a no-oral-modification clause); U.C.C. §§ 2-209(4), 2A-208(3) (both acknowledging that an ineffective modification might operate as waiver).
13. See, e.g., *Kamco Supply Corp. v. On the Right Track, LLC*, [49 N.Y.S.3d 721](#), 725 (N.Y. App. Div. 2017) (a seller of goods waived the minimum purchase requirements in its agreement with the buyer, both

retrospectively and prospectively, despite a clause in the agreement purporting to prohibit waiver absent a signed writing and purporting to limit waivers to the specific instance specified); 1301 Properties v. Abelson, [2016 WL 1367908](#) (N.Y. Sup. Ct. 2016) (even though a clause in a commercial lease purported to prohibit a waiver of contractual rights unless in a signed writing, the landlord was equitably estopped from complaining about alleged defects in the financial certifications that the tenant had provided more than nine years earlier and about which the landlord had never complained until it brought suit); Penncro Assocs., Inc. v. Sprint Spectrum L.P., [2006 WL 1320252](#) (D. Kan. 2006).

14. See, e.g., Minor v. Chase Auto Finance Corp., [372 S.W.3d 762](#) (Ark. 2010); Tillquist v. Ford Motor; Credit Co., [714 F. Supp. 607](#), 611-12 (D. Conn. 1989); Van Bibber v. Norris, [419 N.E.2d 115](#), 120-22 (Ind. 1981).

15. [526 S.W.3d 471](#) (Tex. 2017).

16. *Id.* at 483-84.

17. *Id.* at 484.

18. See Glenn West, *What is the Deal with No Oral Modification/Waiver Clauses?* (July 17, 2017), at <https://privateequity.weil.com/insights/no-oral-modification-waiver-clauses/#footnote-11> (offering this advice).

19. Note, this advice is similar to the advice previously given in this newsletter for drafting a merger clause. See Jennifer Niesen, *Drafting a Bullet-Proof Merger Clause*, [2 THE TRANSACTIONAL LAWYER 1](#) (Apr. 2012). As explained in that article, the parol evidence rule does not normally exclude evidence of a misrepresentation offered to show that the agreement is voidable. This is true even if the agreement is fully integrated and has a *general merger clause*. However, the result in at least some jurisdictions will be different if the agreement has a *specific merger clause* expressly negating the alleged misrepresentation. Therefore, to maximize the efficacy of a merger clause, be as specific as possible about what statements were not made.

20. Minor v. Chase Auto Finance Corp., [372 S.W.3d 762](#), 767 (Ark. 2010).

21. [513 S.W.3d 850](#), 858-59 (Ark. Ct. App. 2017).

22. [2017 WL 4736707](#) (C.D. Cal. 2017).

23. *Id.* at *5-6.



The Timing of Representations & Warranties

Stephen L. Sepinuck

A recent decision in the case of *Novia Communications, LLC v. Weatherby*,¹ provides a useful vehicle for reviewing the time when representations and warranties are operative, and hence can be the basis for a cause of action. An understanding of this is essential for transactional lawyers.

The facts of the case can be summarized as follows. In 2014, Novia contracted to purchase the assets of Community Broadcast Group, Inc., which operated a television station in Toledo, Ohio. In Article IV of the Asset Purchase Agreement, CBG represented and warranted that “there is no material litigation pending by or against, or to the best of [CBG]’s knowledge, threatened against [CBG] which relates to the Station or could affect any of the Station Assets.”

In Article VI, CBG covenanted not to cause the Article IV warranties and representations to become untrue and, if an outside force caused those warranties and representations to become untrue, CBG covenanted to notify Novia of that event, in writing.

Article IX made a condition to Novia’s duty to close that each of facts that CBG represented and warranted be true of as of the closing date and declared that the representations and warranties “shall be deemed to be made again on and as of the Closing Date.”

Finally, Article XII provided that if the asset purchase did not close within 270 days, either party not in breach could terminate the agreement.

Shortly after execution of the Asset Purchase Agreement, minority shareholders of CBG brought an action contesting the agreement and also filed a petition with the FCC to deny CBG’s application to transfer its broadcast license to Novia. Because these events delayed consummation of the planned asset purchase transaction, CBG and Novia entered into a new agreement by which Novia agreed to provide CBG with financing needed to operate. Novia dutifully complied with that agreement for almost a year. Then, shortly after the 270-day period expired, CBG in quick succession settled the actions brought by the minority shareholders and terminated the Asset Purchase Agreement.

Novia sued, claiming that CBG could not terminate because it was in breach. The court ruled otherwise.²

Much of the dispute focused on the representations and warranties in Article IV. The court noted that the use of the present tense in those representations and warranties indicated that they dealt with facts “existing at the time the APA was executed.”³ The court then ruled that the statements were true because the minority shareholders had not, at that time, brought suit and there was no claim that they had threatened to do so.

The language in Article IX declaring that CBG restates the representations and warranties at closing meant that the represented and warranted facts also had to be true at closing, but because no closing occurred, CBG could not have breached at that time either. In short, according to the court, the representations and warranties in Article IV had to be complied with on two distinct dates – (i) when the Asset Purchase Agreement was executed; and (ii) on the closing date (which never occurred), but the represented and warranted facts did not have to be true during the period between those dates (the shaded area in the timeline below).



The only continuing obligations CBG had with respect to represented and warranted facts were: (i) not to cause any of them to become untrue; and (ii) to notify Novia if they did become untrue. Novia did not allege CBG failed to fulfill either of those continuing obligations.⁴

The court’s analysis of the Asset Purchase Agreement is generally sound, both as an interpretation of the language used in the Asset Purchase Agreement and the likely intention of the parties. After all, a seller of business assets should know if there is pending or threatened litigation, and thus should be prepared to represent and warrant that there is none. But to promise that there will be no material litigation before closing could be an unacceptable risk because it is not something within the seller’s control.

That said, not every assertion or promise of fact needs to be or should be so limited in time. For some facts that are the subject of standard representations and warranties, it might be desirable for the seller to warrant those facts throughout the pre-closing period (the shaded area in the timeline above).

For example, in most purchase agreements and loan agreements involving a seller or borrower that is a corporation or LLC, the entity represents and warrants – both when the agreement is signed and at closing – that it is in good standing and has the power to conduct business. But what if, between those dates, the entity is administratively dissolved, perhaps for failing to pay a

yearly fee to the state or failing to file a required annual report?

Pursuant to both the Model Business Corporations Act and the Uniform Limited Liability Company Act, if the entity is reinstated, reinstatement relates back to the date of dissolution, so that the entity is retroactively authorized to conduct business during the period it had been dissolved.⁵ As a result, any litigation it began in state court during that period should not be affected. However, there is some authority that, at least for some purposes, the entity would not have standing during that period to commence some actions in federal court, and that reinstatement does not cure the standing problem. As a result, the case must be dismissed. While the entity may, after reinstatement, re-file the complaint, the applicable limitations period might have expired in the interim.⁶

Similarly, a seller or borrower might represent and warrant when the agreement is signed and at closing that its assets are fully insured. But what if the insurance coverage lapsed during the interim and the assets suffered a casualty?

The solution to these problems is relatively simple. The seller or borrower could covenant to maintain its corporate status and to maintain insurance on its assets during the pre-closing period. The ABA’s Model Asset Purchase Agreement follows this approach.⁷ Alternatively, the seller or borrower could warrant (but not represent) that it will be in good standing and have insurance throughout the pre-closing period.⁸

The key points for transactional lawyers are: (i) to be aware of the dates on which representations and warranties are operative; (ii) to determine if some or all of the representations and warranties should be operative at other times; and (iii) if so, to include in the agreement additional terms to add that protection.

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Notes:

1. [2017 WL 4286777](#) (N.D. Ohio 2017).
2. The court did, however, conclude that CBG was equitably estopped from terminating the Asset Purchase Agreement. *Id.* at *5-6.
3. *Id.* at *3.
4. *Id.*

5. See Model Bus. Corps. Act § 14.22(c); Uniform LLC Act § 709(d)(1).

6. See Galen Med. Assocs., Inc. v. United States, [74 Fed. Cl. 377](#), 381-83 (Fed. Cl. 2006) (standing to pursue a bid contest); Paradise Creations, Inc. v. UV Sales, Inc., [315 F.3d 1304](#), 1308 (Fed. Cir. 2003) (standing to bring patent infringement claim).

7. See ABA Model Asset Purchase Agreement § 5.2(b), (g), (i) (2001).

8. Most authorities hold that a *representation* must be a statement of past or present fact; it cannot be about a future fact. See [RESTATEMENT \(SECOND\) OF CONTRACTS § 159](#) cmt. c. A *warranty*, in contrast, can be a promise about the past, present, or future. Thus, for example, “this app works on both iPhones and Android phones” could be a representation, warranty, or both, whereas “this app will, for the next six months, work on both iPhones and Android phones” can be a warranty but cannot be a representation.

Despite this and other distinctions between representations and warranties, it is common for transactional lawyers to combine all statements and promises of fact together. That is, they frequently draft transactional documents so that a party both represents and warrants every critical fact. For a debate on this approach, see Kenneth A. Adams, *The Phrase Represents and Warrants Is Pointless and Confusing*, [BUS. LAW TODAY 1](#) (Oct. 2015), and Stephen L. Sepinuck, *The Virtue of “Represents and Warrants”: Another View*, [Bus. Law Today 1](#) (Nov. 2015).



Recent Cases

SECURED TRANSACTIONS

The Mostert Group, LLC v. Mostert,
[2017 WL 4700343](#) (Ky. Ct. App. 2017)

Although the term “software” might, in other contexts, include source code, the term did not do so in the security agreement that a newly formed limited liability company executed in favor of one of its members because the parties had differentiated “software” from “source code” in a contemporaneously executed agreement under which the individual contributed “software programs and source codes” to the company.

In re Lexington Hospitality Group, LLC,
[2017 WL 5035081](#) (Bankr. E.D. Ky. 2017)

A lender’s mortgage on the debtor’s hotel did not extend to the rents, which are personal property. The lender’s perfected security interest in accounts did not extend to the cash paid by hotel guests because cash is money, for which possession is the only method to perfect unless it is proceeds of other collateral, and guests’ payment up front in cash did not create an account. The lender’s security interest in credit card receivables generated by hotel guests was not perfected because such receivables are payment intangibles, not accounts, and while the security agreement covered both accounts and general intangibles, the lender’s financing statement covered only accounts. Although the financing statement referenced the security agreement, a reference to a document does not describe what is in the document.

Blue Ridge Bank v. City of Fairmont,
[2017 WL 555986](#) (W. Va. 2017)

A city that leased equipment under a finance lease with a hell-or-high-water clause had a defense to payment against the bank that received an assignment of the lease from the lessor. Because, after the lessor failed to pay the supplier for the equipment, the city paid the supplier directly, the city had a defense arising from the lease transaction, and thus it did not matter whether that defense accrued before or after the assignment to the bank. Although both the hell-or-high-water clause and § 2A-407 cut off most of a finance lessee’s defenses to payment, that rule applies only after the finance lessee accepts the goods. In this case, the city accepted the goods not under the lease, but under its own purchase contract with the supplier.

BANKRUPTCY

In re MPM Silicones, LLC,
[2017 WL 4772248](#) (2d Cir. 2017)

In setting the interest rate to be applied to a dissenting class of secured claims in a crammed-down Chapter 11 plan, courts must use a market rate if an efficient market exists and, only if no efficient market exists should the court employ the formula approach in *Till*, which starts with the prime rate and makes adjustments for the time-value of money, inflation, and the risk of non-payment.

A class of senior-lien noteholders, whose indenture provided for a make-whole premium if the debtor redeemed the notes prior to a specified date, were not entitled to compensation for the make-whole premium because the debtor did not redeem the notes; the indebtedness was instead accelerated by the debtor’s bankruptcy filing.

In re Keisler,

[2017 WL 4685000](#) (Bankr. D.S.C. 2017)

Because the debtors, as guarantors of a secured obligation, had the statutory right to redeem the collateral, the debtor's Chapter 13 plan could provide for payment of the redemption amount over the life of the plan.

LENDING & CONTRACTING

White Winston Select Assets Funds, LLC v. Intercloud System, Inc., [2017 WL 4390104](#) (D.N.J. 2017)

A prospective borrower that signed a term sheet for a \$5 million loan from a private investment company before obtaining alternative funding from another lender was liable for the \$500,000 breakup fee provided for in the term sheet. The investment company was excused from satisfying the conditions to close because the prospective borrower had made those conditions impossible to fulfill. The breakup fee was not a penalty because it was not grossly disproportionate to the \$600,000 maximum return that the investment company might have obtained from making the loan.

Shanghai Commercial Bank v. Kung Da Chang, [404 P.3d 62](#) (Wash. 2017)

A bank that had a Hong Kong judgment against a borrower could enforce the judgment against the borrower's community property in Washington because the loan agreement chose Hong Kong law – which does not recognize community property – to govern enforcement, application of Hong Kong law does not offend Washington policy, and Hong Kong Law would have otherwise applied in the absence of a chosen law because Hong Kong had the most significant relationship to the transaction.

Vitatech International, Inc. v. Sporn,

[2017 WL 4876175](#) (Cal. Ct. App. 2017)

An agreement to settle a contract dispute that required the defendant to pay \$75,000 and which provided that, if payment was not made by a specified date, the plaintiff could file a stipulated judgment for the \$166,000 amount claimed plus prejudgment interest and attorney's fees, created an unenforceable penalty because the defendant never admitted to liability on the underlying claim and the increase in liability for not timely paying the settlement amount was disproportionate to the harm caused.

Rapid Capital Finance, LLC v. Natures Market Corp., [2017 WL 4764559](#) (N.Y. Sup. Ct. 2017)

A transaction structured as a sale of future receivables with a face amount of \$38,100, in exchange for \$30,000, with the seller obligated to turn over future receivables through daily debits of \$152 was a true sale, not a secured borrowing, because the agreement contained a reconciliation provision that allowed for changes in the daily debits based on the amount of receivables generated. As a result, the transaction could not be usurious.

In re MPM Silicones, LLC,

[2017 WL 4772248](#) (2d Cir. 2017)

An intercreditor agreement that excepted from its debt subordination clause “any Indebtedness . . . that by its terms is subordinate or junior in any respect to any other Indebtedness” was ambiguous as to whether it referred to lien subordination or debt subordination, in part because each meaning rendered other language in the agreement superfluous. Extrinsic evidence indicates that the language did not except notes with a springing lien that was subject to lien subordination because the parties understood that those notes were not subordinated and a contrary ruling would have led to an absurd result that the notes were senior when issued but then subordinated when their springing lien sprung.



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