

# The Transactional Lawyer

A Publication of the Commercial Law Center



## I Don't Think You Own What You Think You Own: Protecting Your Client from Unintended Risk

*Andrew S. Lillywhite*

Businesses often relinquish possession or control over an asset to another entity for some form of servicing or processing, thinking that they remain the owner of the asset and thus are not subject to the credit risk of the processor. A recent decision by the California Court of Appeals shows just how wrong these assumptions can be. *Lonely Maiden Productions, LLC v. GoldenTree Asset Management, LP*, 2011WL 5966335 (Cal. Ct. App.); cf. *In re LGI Energy Solutions, Inc.*, 2011 WL 6090133 (8th Cir. BAP 2011) (involving a slightly similar problem).

In *Lonely Maiden Productions*, Axium provided payroll processing services to film clients for their film projects. In keeping with the parties' signed written service agreements, Axium calculated wage and withholding amounts for the clients' employees and then invoiced those amounts to the clients. After clients transferred the invoiced amounts, Axium issued payroll checks to the clients' employees and paid withholdings to the appropriate entities.

Axium granted to GoldenTree and GoldenTree perfected a security interest in Axium's deposit accounts. After Axium defaulted on a loan secured by the security interest, GoldenTree foreclosed on the deposit accounts, which included funds received from clients for payroll and a security deposit provided by the clients. The clients then sued GoldenTree to

recover their funds. After losing at trial, the clients appealed.

Each written service agreement provided that it was the entire agreement of the parties and could not be modified except by a writing signed by both Axium and the applicable client. Consequently, the California Court of Appeals applied the parol evidence rule and looked only to the express terms of the written agreements, which stated that: "[n]othing contained herein shall constitute a partnership between, nor joint venture by, the parties hereto or make either party an agent of the other."

The court rejected the clients' attempts to use extrinsic evidence to contradict or supplement the agreements. Instead, it interpreted the provision to not impose express limits on Axium's use of the clients' funds, and it concluded there was no legal basis for finding implied promises to that end. Consequently, the funds the clients had provided to Axium to cover payroll were not held in trust, and GoldenTree's security interest attached to those funds. Even the funds the clients had provided as a security deposit were not held in trust because the parties did not use the terms "trust" and "trustee," did not place any limits on Axium's use of the funds, and did not agree that the security deposit ever had to be returned.

The problem for the clients in this case is not unlike that faced by businesses that have consigned goods to a merchant for sale, thinking that they remained the owner of the goods and thus were not subject to the secured creditors of the consignee. Several such businesses have suffered significant losses when the consignee defaulted on its loans and the consignee's secured creditor seized and sold the goods. See, e.g., *Rayfield Investment Co. v. Kreps*, 35 So. 3d 63 (Fla. Ct. App. 2010); *Quality Leasing Co. v. Dealer Services Corp.*, 927 N.E. 2d 431 (Ind. Ct. App. 2010); *In re Downey Creations, LLC*, 414 B.R. 463 (Bankr. D. Ind. 2009); *In re Niblett*, 441 B.R. 490 (Bankr. E.D. Va. 2009); *Excel Bank v. National Bank of Kansas City*, 290 S.W. 3d 801 (Mo. Ct. App. 2009); *Woven Treasures, Inc. v. Hudson Capital, LLC*, 46 So. 3d 905 (Ala. 2009).

The best protection for businesses that consign goods is to comply with the rules in Article 9 for obtaining priority. They should: (i) perfect their security interest in the consigned goods by filing a

Contents	
<i>I Don't Think You Own What You Think You Own: Protecting Your Client from Unintended Risk</i> .....	1
<i>Analyzing Restrictions on Assigning Ownership Rights in a Business Entity</i> .....	2
<b>Recent Cases</b> .....	6

proper financing statement; and (ii) send a § 9-324(b) PMSI notification to all parties that have filed a financing statement against the consignee's inventory. *See* U.C.C. § 9-319(b), cmt. 3, ex. 3.

For the clients of a payroll processor, the simplest solution for overcoming the risk that the security interest of the payroll processor's creditor may attach to their funds is probably to include trust language in the processing agreement. A prudent attorney would expressly provide in a written payroll processing agreement a provision such as:

**[Payroll Processor] shall hold in trust for the benefit of [Client] all funds provided to it by [Client] for: (i) distribution to [Client's] employees; (ii) payment of payroll taxes; or (iii) payment of employees' withholding taxes. [Payroll Processor] shall, until disbursement pursuant to this Agreement, keep all such funds in a segregated account and not commingle any of such funds with any other funds provided by [Client], any funds provided by any other client of [Payroll Processor], or any of [Payroll Processor's] funds.**

Note that this language implicitly differentiates between the funds the client transfers to the payroll processor for distribution or for taxes and funds the client transfer in payment of the processor's services. Additional language may be desirable for any security deposit.

An attorney for a processor's client should advise the client that, unless a provision such as this is included in the payroll processing agreement, the client will be taking a risk of the processor's solvency and might lose whatever funds it transfers to the processor.

*Andrew S. Lillywhite is a third-year student at Gonzaga University School of Law.*



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## Analyzing Restrictions on Assigning Ownership Rights in a Business Entity

*Stephen L. Sepinuck*

Your client wishes to acquire a security interest in an owner's interest in a closely-held business. However, one of the formation documents – the articles of incorporation, membership agreement, partnership agreement, operating agreement, or an agreement among the entity's owners – purports either to prohibit assignment (either outright or for security) or to require the assent of all the owners to an assignment. Can your client acquire a security interest despite that transfer restriction?

Norm Powell wrote a [wonderful article](#) about restrictions on the assignment of an interest in a Delaware LLC, published in the April 2011 edition of this newsletter. What follows is a more general discussion of how to analyze the issue.

### Step One – Classify the Interest

Whenever you are presented with a question implicating Article 9 of the UCC, the first step is usually to classify the type of property offered as collateral. That is important to the issue discussed here because classification is relevant both to the scope of Article 9 and, if Article 9 does apply, to the applicability of § 9-406 and § 9-408, Article 9's rules that override some restrictions on assignment.

Shares in a corporation are classified as "securities," *see* § 8-103(a), and also as "investment property," *see* § 9-102(a)(49). An ownership interest in an unincorporated business entity – *e.g.*, a partnership or LLC – is usually a general intangible. *See, e.g.,* *Trapp v. Hancuh*, [530 N.W.2d 879](#), 887 (Minn. Ct. App. 1995) (partnership interest); *Newcombe v. Sundara*, [654 N.E.2d 530](#) (Ill. App. Ct. 1995) (limited partnership interest). However, such an ownership interest will be a security if it is traded on a securities exchange or in a securities market. More significant, such an interest will qualify as a security if the terms of the interest expressly provide that it is a security governed by Article 8. *See* § 8-103(c); *In re McKenzie*, [2011 WL 6140516](#) (Bankr. E.D. Tenn. 2011) (interest in an LLC is a general intangible if it is not investment property); *In re Dreiling*, [2007 WL 172364](#) (Bankr. W.D. Mo. 2007) (interest in a limited

liability company was a general intangible, not a security, because the LLC interest was not traded on an exchange and the LLC agreement did not provide that membership interests were securities). Because of this so-called “opt-in” to Article 8, it is imperative to check the formation documents and any ownership certificate to determine the proper classification of the owner’s interest in the entity.

If an ownership interest in an unincorporated business is a general intangible, a further classification exercise is necessary: one must determine whether the interest at issue is a payment intangible (a subset of general intangibles). This will depend largely on what the owner is purporting to assign. If the owner is purporting to assign only the right to distributions, then the interest will be a payment intangible. *See* § 9-102(a)(61). If the owner is purporting to assign the entire interest, including voting or management rights, then the interest will not be a payment intangible.

### Step Two – Determine Whether Article 9 Applies

If the ownership interest is being assigned to secure a monetary obligation, Article 9 will apply regardless of whether the ownership interest is a security, payment intangible, or general intangible. *See* § 9-109(a)(1). If the assignment is an outright sale, Article 9 will apply only if the ownership interest is a payment intangible, *see* § 9-109(a)(3); Article 9 does not apply to sales of general intangibles that are not payment intangibles or to sales of securities.

### Step Three – Determine Governing Law

Assuming Article 9 does apply, the next step is to determine which state’s law will govern the efficacy of the transfer restriction. This is important because, as noted below, several states have non-uniform versions of § 9-406 and § 9-408, as well as laws outside Article 9 that may be relevant to the issue.

Article 9 contains rules on which state’s law governs perfection, the effect of perfection, and priority, *see* § 9-301, but it does not contain a rule on which state’s law governs attachment, *see* § 9-301 cmt. 2. That is left to the law governing the security agreement, which the parties are generally free to select. *See id.*; § 1-105. This raises the prospect that the debtor and secured party could select as the law governing their security agreement the law of a state that invalidates all restrictions on assignment, even if the business entity was formed under some other state’s law.

For example, consider a debtor who owns a member interest in a Delaware LLC. The LLC agreement expressly prohibits assignment of a member’s economic rights, control rights, or membership status without the consent of all members. Assume that this restriction is valid under Delaware law. The debtor enters into a security agreement with a lender, purporting to grant the lender a security interest in the debtor’s economic rights. The security agreement provides that it is governed by California law. Assume California invalidates contractual restrictions on assignment. If California law applies, then the security interest will attach.

Article 9 itself does not deal expressly with the issue, but comment 3 to § 9-401 discusses it. That comment indicates that the matter would be left to the applicable conflicts-of-law rules, and assumes that those rules would require application of the law governing formation of the entity. In other words, in the example above, a court applying its conflict-of-laws rules would likely select Delaware law to govern the attachment question. The minimal case law on this point supports that conclusion, albeit without much analysis. *See In re Garrison*, [2011 WL 5593025](#) (Bankr. W.D. Ark. 2011) (restrictions on transfer of corporate stock are governed by the state of incorporation). *See also* Restatement (Second) of Conflict of Laws §§ 187, 188 (suggesting the same if application of the chosen law would violate a “fundamental policy” of a state that has a materially greater interest than the chosen state and whose law would otherwise govern). Nevertheless, the matter remains subject to some uncertainty.

### Step Four – Consider the Limited Effect of §§ 9-406 and 9-408

If Article 9 applies, either because the assignment secures an obligation or because the assignment is an outright sale of a payment intangible, then you need to consider whether § 9-406 or § 9-408 invalidates the restriction on assignment.

In doing this it is imperative to be careful. First, several states have adopted nonuniform language – or enacted statutes outside Article 9 – to exempt ownership interests in one or more types of business entities from Article 9’s anti-assignment rules. *See* Colo. Rev. Stat. § 7-90-104; Del. Code Ann. tit. 6, §§ 15-104(c), 17-1101(g), 18-1101(e) (referenced in Del Code Ann. tit. 6, § 9-408(e)(4)); Ky. Rev. Stat. Ann. §§ 275.255(4), 362.1-503(7), 362.2-702(8); Tex. Bus. Orgs. Code §§ 101.106(c), 154.001(d) (referenced

in Tex. Bus. & Com. Code § 9.408(e)); Va. Code Ann. §§ 8.9a-406(k); 8.9a-408(g), 13.1-1001.1(B), 50-73.84(C). If the law of one of those states applies, then the restriction on assignment will likely be valid and will prevent attachment unless the debtor and secured party do whatever the law requires. Second, neither § 9-406 nor § 9-408 deals with securities, so if the debtor’s ownership interest is a security, nothing in Article 9 will invalidate a restriction on assignment.

If the ownership interest is a general intangible and if the law that governs includes the uniform version of § 9-406 and § 9-408, one might be tempted to conclude

that one of these provisions overrides the restriction on assignment, and thus the security interest can attach. The extent to which these provisions override restrictions on assignment – whether completely, so that the security interest can attach and be enforced, or partly, so that the security interest can attach but cannot be enforced against the entity – depends on: (i) whether the ownership interest is a payment intangible or a general intangible that does not qualify as a payment intangible; and (ii) whether the assignment secures an obligation or is an outright sale. The following chart summarizes these rules.

**Effect of § 9-406 and § 9-408 on Restrictions that Prohibits Assignment or Requires Consent**

	Payment Intangibles	General Intangibles
Assignment Secures an Obligation	Restriction rendered ineffective by § 9-406(d)(1)	Restriction rendered partly ineffective by § 9-408(a)(1), (d)
Outright Sale	Restriction rendered partly ineffective by § 9-408(a)(1), (d)	Restriction unaffected by Article 9

But wait! Reading these provisions more carefully, one must seriously question whether they have much impact at all on the issue. Both § 9-406 and § 9-408 deal with terms in an agreement between the debtor and an “account debtor” that prohibit assignment or require the account debtor’s consent to an assignment. An account debtor is someone obligated on a general intangible (including a payment intangible). § 9-102(a)(3). A business entity owes obligations to its owners and thus could be an account debtor to an owner who purports to grant a security interest in an ownership interest. However, the others who own an interest in the business entity would presumably not be account debtors, at least not with respect to the ownership interest or distribution rights on it.

So here’s the problem. In most situations, the business entity is not a party to the documents by which it is formed. If those documents form the agreement that contain the restriction on assignment, then the agreement is not one between the debtor and the account debtor, and hence neither § 9-406 nor § 9-408 will apply. Even if the entity is a party to that agreement, § 9-406 and § 9-408 will trump a requirement that the account debtor – the entity itself –

consent to the assignment, not one that requires the consent of third parties, such as the other owners.

In short, even if: (i) the ownership interest is not security, (ii) Article 9 applies to the secured transaction, (iii) the state whose law governs has the uniform version of § 9-406 and § 9-408, and (iv) no other statute purports to limit their scope, then neither § 9-406 nor § 9-408 is likely to override a prohibition on assignment or a requirement that the other owners consent to an assignment. The PEB is in the process of issuing a commentary that will reach this same conclusion. This conclusion may also explain why the recent cases on this issue do not even discuss § 9-406 or § 9-408. See *In re McKenzie*, [2011 WL 2118689](#) (Bankr. E.D. Tenn. 2011) (no security interest attached to the debtor’s LLC interest because the operating agreement required the prior written consent of the LLC’s Board of Governors and no such consent was obtained); *Meecorp Capital Markets, LLC v. PSC of Two Harbors, LLC*, [2011 WL 1119191](#) (D. Minn. 2011) (denying summary judgment on whether lender acquired a security interest in LLC interests because LLC agreements required unanimous consent of all members to the creation of a security interest and it was not clear that all the members had consented); [2011 WL 6151487](#) (D. Minn. 2011) (subsequent



decision ruling that guarantor did not grant a security interest in his LLC interest because there was no evidence that written notice was provided to all members, as required by the member control agreement; guarantor also did not grant a security interest in his general partnership interests because the member control agreements prohibit transfer of governance interests without the unanimous, written consent of all other members and the resolutions of the Boards of Governors consenting to the pledge were insufficient to satisfy this requirement); *In re Weiss*, [376 B.R. 867](#) (Bankr. N.D. Ill. 2007) (debtor could not grant security interest in his LLC and limited partnership interests because the operating agreements prohibited any transfer of the interest of a member or limited partner without the consent of the manager or general partner and no consent was provided until years later).

#### Step Five – Evaluate the Restriction under non-Code Law

Of course, the mere fact that Article 9 fails to override a restriction on assignment does not mean that the restriction is effective to prevent assignment. For this point, other law must be consulted. See *In re Rabinowitz*, [2011 WL 6749068](#) at \*8 (Bankr. D.N.J. 2011) (citing *Owen v. CNA Ins./Continental Cas. Co.*, [771 A.2d 1208](#) (2001)) (noting that law outside the UCC may have bearing on the efficacy of a contractual prohibition on assignment). Indeed, Article 9 makes this point expressly in § 9-401(a).

As Norm Powell explained in his article, a state's LLC law may well provide for restrictions on assignment. For example, New Jersey's LLC act allows a member to transfer his or her interest, in whole or in part, except as provided for in an operating agreement. See N.J. Stat. Ann. § 42:2B-44(a). Similarly, § 502(f) of the Revised Uniform Limited Liability Company Act provides that an assignment of a member's distribution rights from an LLC in violation of a restriction on assignment contained in the operating agreement "is ineffective as to a person having notice of the restriction at the time of transfer." Restrictions on the assignment sale of corporate stock are also normally valid. See, e.g., *In re Garrison*, [2011 WL 5593025](#) (Bankr. W.D. Ark. 2011) (shareholder agreement prohibiting shareholders from transferring or encumbering any stock without the express written consent of all the shareholders, even though not noted on the stock certificate, was effective to prevent the creation of a security interest once the lender had knowledge of the restriction).

However, even when a restriction on transfer is valid, the restriction may be waived or the required consent may be implied. See, e.g., *In re Westbay*, [2011 WL 2708469](#) (Bankr. C.D. Ill. 2011) (although LLC agreement required the written consent of all members to use of the debtor's membership interest as collateral, that requirement was impliedly waived because all the members knew of and benefitted from the transaction, which was in exchange for a loan of working capital to the LLC); *In re McKenzie*, [2011 WL 6140516](#) (Bankr. E.D. Tenn. 2011) (debtor could grant a security interest in wholly-owned LLCs regardless of restrictions in membership agreement because consent to the transfer is presumed).

Moreover, in the absence of a statute expressly authorizing owners to create a valid restriction on transfer, the issue will fall to the common law. Under that law, there may be reason to question the efficacy of some restrictions on transfer.

As a general matter of contract law, unless a contrary intention is manifested, a contract term restricting assignment gives the obligor a right to damages for breach but does not render an assignment ineffective. Restatement (Second) of Contracts § 322(2)(b). Thus, a term in a membership agreement prohibiting assignment or requiring the consent of the other owners is unlikely to prevent the attachment of a security interest unless the agreement also expressly states that any attempted assignment in violation of the restriction is void.

There may also be a common-law impediment to the validity of a restriction on assignment if: (i) the putative assignee lacked notice of the restriction; (ii) the restriction was not included in the documents forming the business entity and was instead part of an agreement made with some or all of the owners long after they acquired their ownership interests; or (iii) the restriction was made in connection with a donative transfer to the owner now wishing to make the assignment. The point to remember, though, is not to restrict the analysis to Article 9. The mere fact that Article 9 does not invalidate a restriction on assignment of an ownership interest in a business entity does not necessarily mean the restriction is effective. It may still be possible for the owner to grant a security interest in that ownership interest.

[Stephen L. Sepinuck](#) is a professor at Gonzaga University School of Law and co-director of the Commercial Law Center.



## Recent Cases

### SECURED TRANSACTIONS

*Union Bank Co. v. Heban,*

[2012 WL 32102](#) (Ohio Ct. App. 2012)

Although each of the security agreements the debtor authenticated contained a cross-collateralization clause purporting to make the collateral secure all of the debtor's obligations to the bank, the clauses were insufficient to overcome the fact that the promissory note for one loan – entered into after one secured transaction and before several others – expressly stated that the loan was unsecured.

*In re McKenzie,*

[2011 WL 2118689](#) (Bankr. E.D. Tenn. 2011)

[2011 WL 6140516](#) (Bankr. E.D. Tenn. 2011)

No security interest attached to the debtor's LLC interest because the operating agreement required the prior written consent of the LLC's Board of Governors, and no such consent was obtained. The court asked for more briefing on whether § 9-408 allows a security interest to attach to the proceeds of the LLC interest despite a restriction on assignment in the operating agreement.

Pursuant to subsequent decision, debtor could grant a security interest in wholly owned LLCs regardless of restrictions in membership agreement because consent to the transfer is presumed. As to remaining LLCs, secured party failed to submit evidence that the debtor's interests were freely transferrable. While § 9-408 does override restrictions on the transfer of an interest in general intangibles, such as partnership interests and some LLC interests, by failing to submit the operating agreements, the secured party failed to prove that the LLC interests were general intangibles and not securities..

*Mecorp Cap. Mkts., LLC v. PSC of Two Harbors, LLC,*

[2011 WL 1119191](#) (D. Minn. 2011)

[2011 WL 6151487](#) (D. Minn. 2011)

Summary judgment denied on whether lender acquired a security interest in LLC interests because LLC agreements required unanimous consent of all members to the creation of a security interest and it was not clear that all the members had consented.

Pursuant to subsequent decision, guarantor did not grant a security interest in his LLC interest because there was no evidence that written notice was provided to all members, as required by the member control agreement. The guarantor also did not grant a security interest in his general partnership interests because the member control agreements prohibit transfer of

governance interests without the unanimous, written consent of all other members and the resolutions of the Boards of Governors consenting to the transfer were insufficient to satisfy this requirement.

*Lebedowicz v. Meserole Factory LLC,*

[2011 WL 6380290](#) (N.Y. Sup. Ct. 2011)

Security agreement signed by members of LLC on behalf of the LLC, and not in their personal capacities, did not grant a security interest in the members' LLC interests because the LLC itself did not have rights in those membership interests..

*Lonely Maiden Prods., LLC v. Goldentree Asset Mgmt., LP,*

[2011 WL 5966335](#) (Cal. Ct. App. 2011)

Security interest granted by payroll processor attached to funds provided by processor's clients, including a security deposit provided by one client, because the processor's contracts with its clients disclaimed any agency relationship and failed to create a trust because even though the contracts required the processor to pay the clients' employees, the contracts did not require the processor to make the payments out of the funds provided.

*Zurita v. SVH-1 Partners, Ltd.,*

[2011 WL 6118573](#) (Tex. Ct. App. 2011)

Landlord acquired a security interest in equipment used by individual tenant even though the equipment was purchased by a limited liability company because the tenant wholly owned the LLC and therefore had the power to transfer rights in the equipment. Although security agreement referred to property "owned or hereafter acquired" by the tenant, that language did not limit the scope of the security interest.

*Variety Wholesalers, Inc. v. Prime Apparel, LLC,*

[2011 WL 6036084](#) (N.C. Ct. App. 2011)

Creditor with perfected security interest in clothier's accounts was not entitled to funds due from clothier's customer because the goods sold to the customer violated the trademark rights of another entity, and thus the debtor did not have any right in the account to pass to the secured creditor.

*In re Miller,*

[2012 WL 32664](#) (Bankr. C.D. Ill. 2012)

Financing statement identifying the debtor as "Bennie A. Miller" – the name the debtor had used much of his life and on his driver's license, social security card, tax returns, and the deed to his residence – was ineffective to perfect because the debtor's legal name was the name on his birth certificate, "Ben Miller," and a search under that name did not reveal the filing.

*Union Bank Co. v. Heban,*

[2012 WL 32102](#) (Ohio Ct. App. 2012)

Trial court erred in ruling that a financing statement must relate to a specific note or indebtedness; bank's filed financing statement was effective to perfect subsequent secured transactions and to give bank priority over intervening secured party.

*Kazar v. San Gabriel Plaza, Inc.,*

[2011 WL 6062019](#) (Cal. Ct. App. 2011)

Original tenant that retained a security interest in equipment sold when assigning the lease to a buyer of tenant's franchise did not have priority over the interest of the landlord even though the lease expressly provided that any lien of the landlord would be subordinate because the assignee abandoned the leased premises, causing the lease to terminate and title to all equipment to vest in the landlord.

*Mountaineer Investments LLC v. Heath,*

[2011 WL 6038450](#) (Wash. Ct. App. 2011)

Notification that motor home would be disposed of at a public sale on a specified date was not insufficient merely because the sale closed a month afterwards, given that the sale commenced on the date specified. Although no one appeared at the location to place an in-person bid, and the secured party then used telephone inquiries and written submissions to reach an agreement, the process remained a public sale.

*Texas Capital Bank v. Ameriprise Fin. Servs., Inc.,*

[2011 WL 6189494](#) (N.D. Tex. 2011)

Secured party had no cause of action against purported custodian of REIT for violation of control agreement because, even if the person who signed the control agreement on behalf of the purported custodian had actual or apparent authority to do so, the transfer agent for the REIT was actually a different, unrelated entity.

## COMMERCIAL CONTRACTING

*McDonald v. Clay,*

[2011 WL 6396526](#) (Ca. Ct. App. 2011)

Because the buyer's promissory note was itself unambiguous, the parol evidence rule prevented consideration of a contemporaneously executed purchase agreement that contained a recital stating that the purchase was "without recourse," even though writings are to be read together if they relate to the same matter and are executed by the same parties as parts of one transaction.

*Dewaay v. Dallenbach,*

[2011 WL 6656586](#) (Iowa Ct. App. 2011)

Partners who voluntarily paid required capital contribution of defaulting partner had no cause of action against the defaulting partner to recover that money because the partnership agreement did not provide for such relief.

*Webster Business Credit Corp. v. Bradley Lumber Co.,*

[2011 WL 5974582](#) (W.D. Ark. 2011)

Applying New York law, borrower could not have a claim against its secured lender for breach of the parties' loan agreement, based on a modification or waiver arising from course of dealing, because the agreement expressly provided that neither it nor any of its provisions "may be changed, modified, amended, waived, supplemented, discharged, cancelled or terminated orally or by any course of dealing."

### **Edited By:**

**Stephen L. Sepinuck**

Professor, Gonzaga University School of Law  
Co-director, Commercial Law Center

**Linda J. Rusch**

Professor, Gonzaga University School of Law  
Co-director, Commercial Law Center

**Scott J. Burnham**

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

**For questions or to submit content to *The Transactional Lawyer*, please contact Vicky Daniels at [vdaniels@lawschool.gonzaga.edu](mailto:vdaniels@lawschool.gonzaga.edu)**

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