

Delaware Court of Chancery Holds That Granting a Security Interest Can Constitute a ‘Transfer,’ With Significant Implications for Financing Transactions

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In a recent *decision*, the Delaware Court of Chancery held on summary judgment that a borrower’s grant of a security interest in substantially all of its assets, including its rights under a license agreement, constituted an “assignment” or “transfer” of such rights that triggered the license agreement counterparty’s contractual right of first negotiation (ROFN) and right of first refusal (ROFR). The decision has implications beyond the pharmaceutical licensing context in which it arose, and should prompt careful review of transfer restriction provisions in any agreement where a party may later seek to pledge its contractual rights as collateral.

Background

Two businesses were parties to a license agreement under which the licensee held the exclusive right to develop and commercialize certain pharmaceutical products. Section 15.5(c) of the license agreement restricted the licensor from making a “payment assignment,” defined to include any decision to “sell, assign, contribute, convey, grant or otherwise transfer to any Third Party” all or any of the licensor’s rights to receive payment under the agreement, without first providing the licensee with written notice and complying with a 30-day right of first negotiation and a subsequent right of first refusal to match the terms of any third-party transaction.

In 2024, the licensor entered into a credit agreement with third-party lenders, granting them a first-priority perfected lien on, and security interest in, substantially all of its assets, including all license agreements. The licensor failed to notify the licensee or comply with the ROFN/ROFR procedures before executing the credit agreement. The licensee sued, alleging the licensor breached Section 15.5(c).

Holding

The court granted summary judgment to the licensee on liability. The court’s analysis rested on two complementary grounds.

First, the court held that the grant of a security interest fell within the contractual definition of payment assignment because the license agreement’s transfer restriction was not limited to outright sales or assignments. The catchall language (or otherwise transfer) was broad enough to encompass the creation of a lien. The court relied on the ordinary meaning of “transfer,” which includes parting with an interest in an asset, such as the creation of a lien or other encumbrance. The court reasoned that by pledging all license agreements as collateral, the licensor necessarily transferred an interest in the payment rights arising from those contracts.

Second, and critically, the court found structural confirmation in the license agreement itself. Section 15.5(c) specifically carved out a prior collateral assignment to a lender from the definition of payment assignment. Applying the canon of *expressio unius est exclusio alterius*,^[1] the court reasoned that the parties' decision to exclude one specific collateral assignment implied that other collateral assignments were included within the general rule. If security interests were categorically outside the scope of the transfer restriction, the prior lender carve-out would be surplusage.

The Court Rejected Four Defenses

The licensor raised four legal defenses, each of which the court rejected:

- **Security interest versus assignment.** The licensor argued that the credit agreement created a security interest, not an assignment, and that the two are legally distinct. The court acknowledged that commercial law generally distinguishes between the two but held that the parties' bespoke contractual definitions controlled over common-law defaults. The broad definition of payment assignment, particularly the "otherwise transfer" catchall, captured the grant of a security interest.
- **Delaware UCC preemption.** The licensor argued that the ROFN and ROFR were unenforceable under Section 9-406(d) of the Delaware UCC, which invalidates contract terms that "prohibit, restrict, or require the consent of the account debtor" to an assignment. The court disagreed, drawing a distinction between legal prohibitions and practical impairments. The ROFN and ROFR did not prohibit the licensor from assigning its rights or require the licensee's consent; they established procedural requirements that the licensor had to satisfy before completing the transaction. The court warned that adopting the licensor's reading would sweep in all ROFN and ROFR provisions in commercial contracts, a result inconsistent with the UCC's text and purpose.
- **Excluded property.** The credit agreement contained a saving clause that carved out from the collateral pool any contract where granting a security interest was "prohibited." The licensor argued that if the license agreement restricted the pledge, then the saving clause excluded it from the collateral, meaning no breach occurred. The court rejected this circular argument, finding that the license agreement did not prohibit the grant of a security interest; it required the licensor to follow procedural steps before doing so.
- **Null and void provision.** The licensor argued that Section 15.5(d) of the license agreement, which rendered any assignment in violation of Section 15.5 "null, void and of no legal effect," meant the pledge was functionally nonexistent, and therefore could not support a breach claim. The court held that a provision designed to protect the non-breaching party could not be used as a shield by the breaching party.

Takeaways for Financing Transactions

This decision has direct implications for borrowers, lenders, and counterparties to agreements containing transfer restrictions:

- **Security interests can trigger transfer restrictions.** Parties should not assume that a pledge of collateral falls outside the scope of contractual restrictions on "transfers" or "assignments." Where the transfer restriction includes catchall language such as "or otherwise transfer," or where the contract carves out specific security interests (implying others are covered), a collateral pledge may trigger notice obligations, ROFNs, ROFRs, or consent requirements.
- **Borrowers must diligence their existing contracts before granting security interests.** Before entering into a credit facility with a blanket collateral pledge, borrowers should review their material contracts for transfer restrictions that may be triggered by the grant of a security interest. Failure to comply with notice or procedural requirements can give rise to breach of contract liability, as the licensor discovered, even if the borrower does not default on the underlying loan.
- **Lenders should assess transfer restriction risk in collateral.** Lenders relying on blanket security interests should evaluate whether the borrower's key contracts contain transfer restrictions that could impair the lender's

ability to enforce against the collateral or could expose the borrower to breach claims that diminish the value of the collateral.

- **“Excluded property” saving clauses may not save you.** Standard saving clauses that carve out contracts where a security interest is “prohibited” may not function as expected. As this decision illustrates, a court may find that the underlying contract does not “prohibit” the security interest (it merely imposes procedural conditions), meaning the saving clause is never triggered and the contract remains in the collateral pool.
- **The Delaware UCC does not preempt ROFN/ROFR provisions.** Borrowers and lenders should not rely on UCC Section 9-406(d) to override contractual ROFN or ROFR provisions. The court drew a clear line between legal prohibitions (which the UCC invalidates) and procedural requirements (which it does not) and cautioned against reading the statute to sweep in all such provisions.
- **Specific carve-outs create interpretive risk.** The prior lender carve-out was central to the court’s reasoning. Parties who negotiate specific exclusions for particular security interests should understand that those exclusions may be read, under *expressio unius*, as confirmation that all other security interests are covered by the restriction.

[1] Meaning, “one thing is the exclusion of the other.”

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