2007 LEGAL UPDATE:

STAYING AFLOAT ON A SEA OF LEGAL CHANGES

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CASE SUMMARIES FOR LEGAL UPDATE

Ability to Collect Rentals Under Article 2A Finance Leases or Leases with “Hell or High Water” and/or Waiver of Defenses Provisions

State of Florida, Office of the Attorney General, Department of Legal Affairs v. Commerce Commercial Leasing, LLC, et al., 946 So.2d 1253 (Fla App. 1st Dist 2007)

The Florida Attorney General (the “Attorney General”) brought an action on behalf of small businesses against leasing companies (the “Defendants”) that purchased rental agreements (the “Assignments”) from NorVergence, Inc. and its subsidiary, which sold telecommunications services and leased equipment under lease agreements (the “Leases”) to various small businesses. Under the Assignments, the Defendants obtained the right to collect rental payments on the Leases while the obligation to provide services contracted for remained with NorVergence. NorVergence rarely provided the services; however, the Defendants still demanded payment from the small businesses on the Leases.

The Leases all contained provisions purporting to waive any objections the small businesses might have to making rental payments for the Matrix, even if the equipment did not work. The complaint then claims appellees knew or should have known that: the equipment was worth between $500-$1,200; there was a gross disparity between rental payments due from the small business and the value of the equipment; the rental cost varied dramatically from one rental agreement to the next without explanation; and the small businesses were required to acknowledge the equipment was in working order before it was even connected.

In his complaint (the “Complaint”), the Attorney General alleged violations of the Florida Deceptive and Unfair Trade Practices Act (FDUTPA) stemming from leasing of telecommunications equipment as part of bundled services packages. The Complaint first alleged that it is unlawful under Florida Law to enforce unfair and unconscionable agreements, pointing to the disparity between the equipment’s value and its rental cost, the four paragraphs in small print on the reverse side of the Leases comprising the hell or high water provision, the free-floating venue provision, the warranty disclaimer provision, and the assignee liability provision. The Complaint further alleged that it is unlawful under Florida Law to enforce agreements (regardless of any specific term in those agreements) procured through deceptive, unfair and unconscionable acts or practices. Finally, the Complaint alleged that the Leases were for the provision of future consumer services, and as they did not contain three-day cancellation provisions, constituted a per se violation of Florida Law.

The Circuit Court, Leon County, Russell A. Cole, Jr., J., dismissed, finding that the Defendants were exempt from FDUTPA because they were either subsidiaries of banks or engaged in banking activity, that even if they were not exempt specific contract provisions were permitted by law, and that the agreements were not contracts to provide future consumer services. The Attorney General appealed.

On appeal, the Court held, inter alia, (1) that leasing companies were not, by virtue of the fact that were subsidiaries of banks, exempt from the FDUTPA; (2) that the
Attorney General stated a claim under FDUTPA premised on “unconscionable acts or practices” and “unfair or deceptive acts or practices”; (3) that the Attorney General failed to state a claim for alleged violation of the three-day right of cancellation; but that such failure to state claim did not warrant dismissal with prejudice.

The appellate Court found that the trial court never addressed liability under FDUTPA for deceptive, unfair or unconscionable acts or practices and never mentioned whether the equipment rental cost was unconscionable or unfair. The Court found that although banks are exempt from FDUTPA because they are regulated by a state or federal agency, subsidiaries of banks and those who engage in banking activities are not so exempt.

The Court further found that the trial court applied the Uniform Commercial Code definition of consumer lease, and a much narrower version than that applied under FDUTPA. The Court noted that when considering a claim under FDUTPA, the issue is whether the alleged practice was likely to deceive a consumer acting reasonably in the same circumstances, and that unlike a claim for fraud, a party asserting a deceptive trade practice under FDUTPA need not show actual reliance on the representation or omission, and that the Attorney General had met this threshold by asserting that the various small businesses were victims of a Ponzi scheme, that they were targeted specifically because they were technically unsophisticated, that they were sold grossly overpriced goods, that the agreements failed to disclose that such agreements were being simultaneously and immediately assigned, that Defendants knew the consumers were not receiving actual telecommunications services, that Defendants required consumers to maintain insurance on equipment based on inflated prices, and that Defendants accepted delivery letters from consumers, which triggered payment responsibilities, despite having actual knowledge that the equipment had not been delivered in working order, and that these practices are likely to mislead consumers acting reasonably under the circumstances. As such, the Court found that the Attorney General clearly stated a cause of action premised on alleged “unconscionable acts or practices” and alleged “unfair or deceptive acts or practices in the conduct of trade or commerce,” regardless of the terms in any specific contract provision.

Finally, the Attorney General alleged liability on the part of NorVergence for failure to include the three-day cancellation notice in the leases as is required in contracts for the provision of future consumer services. However, that requirement only applies to leases that promise to provide future services. The leases at issue were only for equipment, and not for the provision of any services. As such, the Court found that this portion of the complaint should be dismissed, but without prejudice.


In a decision generally favorable to the plaintiff/lessor, the legal analysis contained in this decision indicates a potential for future problems arising from a common form of documenting and structuring financing transactions. After the lessee had entered into a series of leases for messaging equipment to communicate with its truck drivers, the equipment began to fail to deliver or receive messages – due primarily to a
failure of service to be provided by the equipment vendor— and the lessee stopped making lease payments. The lessor contended that the lease was an Article 2A finance lease or, alternatively, that the lease contained language which would have the same effect—i.e., to make the lessee’s payment obligations irrevocable. Since the leases contained a purchase obligation (payment of $1 at the end of term), the court correctly rejected the Article 2A finance lease characterization. However, the court accepted the lessee’s alternative characterization as a sale of goods with a security interest based upon the fact that the lessor had acquired the equipment from the vendor in conjunction with entering into the lease with the lessee. Evidently, the court viewed this arrangement as one sale followed by another, thus making the purported lease transaction subject to Article 2, Sales, of the UCC and the possible defenses afforded to buyers thereunder (e.g., revocation of acceptance or cancellation of the agreement). Fortunately for the lessor, the court held that the equipment itself was not non-conforming (as opposed to the service which was to have been provided by the vendor) and thus that the lessee could not avail itself of these Article 2 remedies. The decision also suggests that even if the equipment were non-conforming, the provisions of the lease disclaiming warranties and referring the lessee to the vendor (instead of the lessor) for all complaints regarding non-conforming equipment provided remedies to the lessee other than those available under Article 2. Had the court been content simply to characterize the purported lease as a secured loan—rather than a secured installment sale—there would have been no need to consider all of these potential buyer’s remedies emanating from Article 2. However, the use of a typical lease document—containing little or no indication that the lessor is in actuality only making a secured loan—in conjunction with the lessor’s purchase of equipment from the vendor can give rise to the characterization employed by this court.


After a lower court held that the lessee under NorVergence leases was not obligated to pay Preferred Capital as an assignee of NorVergence due to uncontested fraud on the part of NorVergence, the assignee appealed based on an argument that the leases contained a merger clause and were thus separate from NorVergence’s fraudulent service agreements. In holding that the assignee had not refuted the lessee’s evidence that the leases were part and parcel of the agreement for a total communications package, the court states that “As Norvergence’s assignee, defendant [Preferred Capital] stood in the shoes of Norvergence vis a vis the [leases]” and quotes a case stating that an “assignee stands in the position of the assignor, possessing the same rights and being subject to the same defenses.” Based on that the court concludes that the leases are “voidable at plaintiff’s option by virtue of Norvergence’s fraudulent inducement, regardless of whether plaintiff shows a breach of the [leases] by Preferred.” There was no discussion, however, of whether the lease contained a waiver of defenses, which is intended under Article 9 to have exactly the opposite effect of the general rule of law regarding an assignee’s position invoked by this court, and whether such waiver of defenses is enforceable notwithstanding fraudulent inducement by the original lessor.

Following a jury verdict in favor of the lessee, the plaintiff, an assignee of a NorVergence lease, moved for judgment as a matter of law on its lease contract claim, for a new trial and to supplement the record with regard to certain jury instructions. In denying all such motions except to supplement the record, this court has occasion to discuss the manner in which the jury had been instructed concerning the plaintiff’s arguments based on the leases’ provisions for “hell or high water” obligations to pay, Article 2A finance lease status and waiver of defenses. In particular, there is discussion of how an assignee’s right to collect based upon such provisions is affected by the lessee’s defenses based on fraud – both fraud in the inducement and fraud in factum. Although not entirely clear, the court may be using “fraud in factum” to mean one of the very few defenses available to an obligor to prevent enforcement by a good-faith, for-value assignee of a lease with a waiver of defenses provision – i.e., fraud that induced the lessee to sign the lease with neither knowledge nor reasonable opportunity to learn of its character or its essential terms. Whether or not the jury in this case was properly instructed in that regard is not clear, but the fact that the case got to a jury is significant and was due to the court’s finding that the jury waiver in the lease was not enforceable, in part, because it was relatively inconspicuous.


This court denies a summary judgment motion seeking damages for breach of a lease by the assignee of the lease, originally between an independent franchise dealer of the equipment manufacturer as lessor and the lessee. Although the lease contained a “hell or high water” provision unconditionally obligating the lessee to make all lease payments regardless of any defect in the equipment, it also included a reference to the manufacturer’s warranty. The court holds that these two provisions are potentially in conflict, that the warranty’s provisions were apparently not waived, and thus that more details need to be learned concerning the particular provisions of the warranty and conduct of the parties. The decision does not indicate whether the lease contained a waiver of defenses clause that might have enabled the assignee to collect payments notwithstanding issues relating to enforceability by the original lessor.

De Lage Landen Financial Services, Inc. v. Cricket’s Termite Control, Inc., 942 So.2d 1001 (Fla.App. 2006)

After the lessee entered into a lease of equipment designed to randomly select and dial telephone numbers and then play a pre-recorded marketing message, it was notified by the State of Florida that such use of the equipment violated a Florida non-solicitation law. Following this notice, the lessee ceased using the equipment and also ceased making payments to the assignee of the lease. When sued by the assignee, the trial court ruled in favor of the lessee on the basis that the lease was void and unenforceable because the use of the system was a violation of Florida law. In reversing the trial court, this appellate court noted that (i) there were other possible legal uses of the equipment and (ii)
the lease was an Article 2A finance lease containing a “hell or high water” clause and a variety of disclaimers concerning the adequacy and fitness of the equipment.


Notwithstanding its finding that a lease’s disclaimer of the implied warranties of merchantability and fitness for a particular purpose was not conspicuous and therefore not enforceable under Article 2A, this decision goes on to hold that the lessee’s defense to making payments owing under the lease is unsuccessful inasmuch as the lease qualifies as a “finance lease” which, according to Article 2A, (i) does not include such implied warranties and (ii) requires the lessee to make all payments irrespective of any defects in performance. While such reasoning is sound to the extent that Article 2A is applicable, the stated facts indicate that the lease may have given the lessee a one dollar purchase option. In such a case, Article 2A would not be applicable and the decision would more likely need to consider the effect of basic contract law.


Although the facts regarding the lease documentation are somewhat unclear – the court refers to lease agreements having not only the lessor and lessee, but also the equipment supplier, as parties – this court holds that various defenses asserted by a lessee unhappy with the performance of equipment being leased are not available against a lessor under an Article 2A finance lease, even where lessor is affiliated with the equipment supplier.


In a decision demonstrating the power of a waiver of defenses clause, this court affirms a judgment in favor of an assignee against a lessee that had signed a lease and related acceptance certificate, but that never received the equipment and that had agreed with the lessor to rescind the lease after the date the lease was assigned (the lessee did not become aware of the assignment until about two years after the rescission, when it was sued by the assignee). Notwithstanding its agreement with the lessee that the lease had never become a finance lease under Article 2A (which requires that the lessee accept the goods before its promise to pay becomes irrevocable) for purposes of collection by the lessor, the court holds that Article 9’s provisions regarding waivers of defenses gives the assignee the right to collect as long as the lessee is not able to assert successfully any of the limited number of specific defenses that are available against a holder in due course of a negotiable instrument. Although the court expresses sympathy for the lessee, which signed the documents believing that the lessor would hold them in escrow until the equipment was delivered and accepted, the court cites “sound policy” and references securitization as a modern form of financing in concluding that “Enforcing a waiver of defenses, save for those that would be good against a holder in due course of a negotiable instrument, promotes the transfer of accounts by allowing a purchaser to rely on the face of the documents. Thus, the lessee, like the maker of a negotiable instrument, bears the
risk of putting into the stream of commerce documents that appear regular on their face but have underlying flaws.”


This appellate court affirms summary judgment in favor of an assignee of two NorVergence leases against a lessee who argued, among other things, that the leases were fraudulent and unconscionable and also unenforceable by the assignee due to the close connection between NorVergence and the assignee. In this rather brief decision, the court indicates that Iowa has yet to adopt the close connection doctrine and that the “hell or high water” provisions effectively cut off the defenses of fraud and unconscionability.


This court grants summary judgment against a group of lessees with respect to their liability to pay all rentals owing under their leases. Notwithstanding having made payments under the leases for a time, the lessees argued that summary judgment was not appropriate since the plaintiff had not pled and proven the execution of certificates of acceptance which, according to the lease schedules, were to indicate the date on which the payment obligations commenced and therefore, according to the lessees, were a condition precedent for their obligations. The court relies on the “hell or high water” provisions in the leases setting forth the lessees’ “absolute and unconditional” obligation to make all payments in rejecting this possible obstacle to summary judgment.


Decision strongly upholds a lessor’s right to collect all rentals under Article 2A finance leases with “hell or high water” language in the face of the lessee’s evidence that the CT scanning equipment being leased was unsafe. The court goes on to say that even if the leases did not qualify as finance leases under the UCC, the lessor’s warranty disclaimers would suffice as a matter of contract law both to absolve the lessor of any liability for the equipment and to require continued payment by the lessee. The court further finds that the lessee’s allegations that the vendor and lessor had formed a joint venture (there was evidence that the vendor had granted the lessor an exclusive right to provide financing) were not substantiated to the point where the lessor might have liability for the vendor’s negligence.


After this court had been overruled by the Seventh Circuit in granting the lessee’s motion to dismiss for lack of personal jurisdiction based upon the alleged unenforceability of the NorVergence lease’s “floating forum selection” clause, the court denies the lessee’s motion to dismiss based upon the alleged preclusive effect of a default judgment entered in 2005 by a U.S. District Court in New Jersey in a suit brought against
NorVergence by the Federal Trade Commission. This court holds that because IFC was not a party to the FTC suit, because it cannot yet be determined whether IFC and NorVergence were in privity, and because IFC may qualify as a holder in due course, it is possible that IFC may be entitled to enforce the lease even if it is found to be void (a contention of the FTC in the New Jersey case).

IFC Credit Corporation v. Magnetic Technologies, Ltd., 859 N.E.2d 76 (Ill.App. 2006)

This appellate court overturns a lower court’s ruling against an assignee of a lease entered into by the lessee with NorVergence, Inc. The lower court had dismissed an action brought by the assignee to collect payments under the lease based upon the purported res judicata effect of default judgments against NorVergence in separate lawsuits brought by the Federal Trade Commission and the Illinois Attorney General, both of which judgments declared NorVergence lease agreements to be void and unenforceable. Finding that the assignee in this case was not a party to either of those lawsuits, that its interest in the lease was acquired before the commencement of the two lawsuits, and that its relationship with NorVergence as assignee did not require a conclusion that it was in privity with NorVergence, this court finds the doctrine of res judicata not to be applicable to the assignee’s claims against the lessee. The court also declines to consider the lessee’s collateral estoppel defense based on two other courts having recently found NorVergence leases assigned to this assignee to be unenforceable, because the lessee raised this argument for the first time on appeal.


This decision consolidates seven cases in which lessees of NorVergence sought summary judgment that their leases held by various assignees of NorVergence should be rescinded due primarily to fraudulent conduct on the part of NorVergence. The lessees argued that a 2004 decision by a Massachusetts court in response to a suit against NorVergence brought by the state Attorney General, holding that the leases were rescinded and unenforceable, renders the leases void and binds the finance company/assignees. Noting that the assignees had no opportunity to participate in the Attorney General’s suit, this court declines to grant summary judgment in favor of the lessees, and comments that fraud in the inducement does not render the leases void and that the leases by their terms are enforceable by good faith, for-value assignees. Although some of the assignees had requested summary judgment in their favor, the court declines, noting that while the assignees’ arguments have considerable strength, the lessees have not had an opportunity to contest the assignees’ status as good faith purchasers for value.


In affirming a lower court’s summary judgment in favor of the lessor, this court affirms a finance lessor’s ability to collect rentals notwithstanding lessee complaints about the equipment and the equipment vendor’s failure to service the equipment (as well as dismissing unsupported arguments of fraud in the inducement).

Plaintiff appealed from the Iowa district court's ruling declaring its contract with defendants-appellees null and void, arguing that the district court erred in its determination that the contract was unconscionable. The appellate court reversed and remanded for further proceedings.

Defendant was leased two beverage carts from Royal Links, Inc., that were to be stocked with various beverages, snacks, and other items for sale to golfers on the course. Royal Links' program also included profits raised from advertising it would place on the carts. Royal Links told Defendant the carts were “free” because the advertising revenue paid for the carts' lease payments. Defendant decided to purchase the carts and elected to use financing. Royal Links had arranged with various financiers to provide financing for the carts, and provided Defendant with a credit application, which it forwarded to Plaintiff, which subsequently approved Defendant for financing. Royal Links then provided Plaintiff’s lease agreement to Defendant, which contained a “hell or high water” clause whereby Defendant agreed to pay all rents and other amounts due on the lease regardless of whether the equipment is lost, destroyed, defective, or disappears.

The Royal Links program ran into trouble and stopped paying Defendant advertising profits. Defendant, in turn, stopped making lease payments to Plaintiff. At trial the parties presented three issues: (1) Defendant asserted Royal Links was an agent of Plaintiff; (2) Plaintiff asserted that the contract was a finance lease under UCC Article 2 and thus the hell or high water clause had to be enforced; and (3) Defendant asserted that the contract was unconscionable.

The district court concluded Royal Links was not an agent of C and J, leaving open whether the contract was a finance lease or a contract for sale with a security interest. The district court also found that the contract was unconscionable. C and J appeals the court's ruling concerning unconscionability. On appeal, Defendant requested that if the appellate court found that the contract is not unconscionable, that it would either: (1) find an agency relationship between Plaintiff and Royal Links; or (2) determine the equipment lease agreement is a sale with security interest, thus making the hell or high water clause unenforceable.

On the issue of unconscionability, the appellate court considered the following factors: (1) assent; (2) unfair surprise; (3) notice; (4) disparity of bargaining power; and (5) substantive unfairness, noting that the contract could be unconscionable “[i]f the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made.” Iowa Code § 554.2302 (2005). The appellate court further noted that an agreement is unfair if “it is such as no person in his or her senses and not under delusion would make on the one hand, and as no honest and fair person would accept on the other.” The court noted that basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract.

The appellate court found that the district court erred when it found that the contract was both procedurally and substantively unconscionable. First, the appellate
court, noted that hell or high water clauses are valid and enforceable in Iowa. The appellate court further noted that it was only after Royal Links collapsed that the carts became a bad investment, and that the analysis must begin at the time the contract was made. The appellate court found that there was no evidence showing that, at the time the agreement between Plaintiff and Defendant was made the price of the carts was unconscionable. The appellate court specifically considered that the Defendant was a sophisticated contractor with experience managing golf courses and experience and knowledge concerning the types of carts available and ample time to consider the agreement. The appellate court also noted that the Defendant was under no pressure to accept the agreement and testified that he understood the agreement when he signed it.

In addressing whether an agency relationship existed between Royal Links and the Plaintiff, the appellate court agreed with the district court that there was none. The appellate court noted that the Defendant should have been alerted to the actual relationship between Royal Links and the plaintiff given the Plaintiff’s documentation and the post-delivery telephone interview involved in the credit process. The appellate court also noted that there was no evidence that Royal Links had any input into the Plaintiff’s decision to provide leasing or that the Plaintiff had any influence over what Royal Links employees represented to buyers such as the Defendant.

Finally, the appellate court found that it was reasonable to conclude that the equipment lease agreement was a finance lease. The court recited that pursuant to Iowa Code § 544.13103(1):

- “Finance lease” means a lease with respect to which:
  1. the lessor does not select, manufacture, or supply the goods;
  2. the lessor acquires the goods or the right to possession and use of the goods in connection with the lease; and
  3. one of the following occurs:
     a. the lessee receives a copy of the contract by which the lessor acquired the goods or the right to possession and use of the goods before signing the lease contract;
     b. the lessee's approval of the contract by which the lessor acquired the goods or the right to possession and use of the goods is a condition to effectiveness of the lease contract;
     c. the lessee, before signing the lease contract, receives an accurate and complete statement designating the promises and warranties, and any disclaimers of warranties, limitations or modifications of remedies, or liquidated damages, including those of a third party, such as the manufacture of the goods, provided to the lessor by the person supplying the goods in connection with or as part of the contract by which the lessor acquired the goods or the right to possession and use of the goods; or
(d) if the lease is not a consumer lease, the lessor, before the lessee signs the lease contract, informs the lessee in writing (i) of the identity of the person supplying in the goods to the lessor, unless the lessee has selected that person and directed the lessor to acquire the goods or the right to possession and use of the goods from that person, (ii) that the lessee is entitled under this Article to the promise and warranties, including those of any third party, provided to the lessor by the person supplying the goods in connection with or as part of the contract by which the lessor acquired the goods or the right to possession and use of the goods, and (iii) that the lessee may communicate with the person supplying the goods to the lessor and receive an accurate and complete statement of those promises and warranties, including any disclaimers and limitations of them or of remedies.

The appellate court noted that while the district court determined that it was questionable whether the lease met the first two requirements of Section 554.13103, that the structure of the transaction indicated that the Plaintiff bought and sold the equipment to the Defendant, and that the Royal Links logo at the top of the lease agreement further confused the transaction, the contract clearly stated on its front that Royal Links is the “dealer” and Plaintiff is the “lessor.” Furthermore, the appellate court noted that the remainder of the contract referred only to Plaintiff and Defendant, and that it was therefore reasonable to conclude the first requirement of the statute was fulfilled.

The appellate court found the lease’s fulfillment of (2) to be somewhat problematic, however, as according to the lease, Defendant had title and was the owner of the carts upon delivery while Plaintiff reserved a security interest in the equipment. But, Plaintiff also attached certain restrictions concerning the use of the equipment consistent with ownership, requiring that the carts remain at the address on the lease, that Defendant use them equipment in conformity with manufacturer's instructions and warranties only for business purposes, that Defendant provide upkeep for the carts, and that the carts be available for Plaintiff’s inspection. The appellate court found no issues with the lease’s compliance with Sections (3)(c) and (d).

**True Lease versus Security Interest**


About one year after entering into a lease of a garbage truck (with a TRAC provision not particularly relevant for the determination of issues in this case), the lessor sent a letter to the lessee stating that the lessor would convey the truck to the lessee for no additional compensation at the end of the lease if the lessee made all payments pursuant to the terms of the lease. After the lessee had temporarily fallen behind in its payments, though catching up shortly after the scheduled end of the lease term, the lessor sued for
return of the truck. The trial court held in favor of the lessor, finding that the letter was unenforceable for failure of consideration and also that the lessee had defaulted under the lease. This appellate court reverses, based on its findings that (i) the lease was originally a lease governed by Article 2A, (ii) 2A-208(1) states that no consideration is required for a modification of a lease to be binding, and (iii) the effect of the modifying letter was to convert the lease into a security agreement. This conclusion apparently means that once the conversion to a security agreement occurs, a subsequent default – even under the specific terms of the modification – does not re-convert the transaction to a lease, entitling the lessor to return of the equipment per the terms of the original lease.


Although this New Jersey Supreme Court decision does not discuss the distinction between leases and security interests directly, it provides an interesting perspective on the treatment of “rent-to-own” contracts. It overturns rulings by both the trial and appellate courts which had concluded that neither the New Jersey Retail Installment Sales Act nor the state’s criminal usury statute is applicable to the contracts at issue, primarily because the customers were not bound to make all the payments which would entitle them to become the owners of the goods. In what the lone dissenting opinion refers to as “a cobbled-together judicial cure for a perceived but unsubstantiated ill,” the court highlights the intended protections for consumers who often finance their purchase of household goods through rent-to-own contracts. There is also some discussion of the history of the “time price doctrine” and the interrelationship of interest rate provisions in New Jersey’s RISA and its criminal usury statute. (An Appendix to the reversed appellate court decision lists statutes in other states, most of which – unlike New Jersey and only two other states – have statutes explicitly regulating rent-to-own contracts as a distinct transactional form.)


In deciding that a lease of a used motor vehicle was a true lease, rather than a security agreement, this bankruptcy court bases its conclusion in part upon testimony that the vehicle had not been maintained well and was “on its last legs” – indicating that its value at the end of the lease would be less than the purchase option price and concluding that the purchase option was not nominal. Such an analysis is incorrect insofar as it relies on an estimated value of the goods at lease end, which estimate is done during the course of the lease instead of at lease inception. The testimony regarding the condition of the vehicle also indicated that the vehicle had only one or two more years of remaining life. Since the remaining lease term extended for a longer period, the same faulty analysis should have resulted in a conclusion that the lease was actually a security agreement. Both estimated remaining economic life and estimated value at lease end should be determined as of the beginning of the lease.

This court examines the application of UCC Section 1-201 (37)’s definitional distinction between a lease and a secured transaction to consumer rental purchase agreements for furniture in order to determine the treatment of such agreements under a Chapter 13 bankruptcy plan – i.e., to determine whether the agreements must be assumed or rejected or treated as a secured claim. After concluding that the agreements do not satisfy the “bright-line” criteria indicating a secured transaction – thus requiring a further examination of the “facts of each case” – the court focuses on five factors, four of which are already mentioned in the statutory language of 1-201(37), in concluding that the agreements are true leases. The court rejects the debtors’ argument that because their rental payments were disproportionately large compared to the value of the property, they effectively did not have a meaningful right of termination. Instead of evaluating this argument as a possible example of economic compulsion, the court employs the statute’s indication of the neutrality of the full pay-out factor as a reason to reject the debtor’s argument.

Measures of Lessors’ Damages

Koonce d/b/a K. Krane v. Dousay, --- So.2d ---, 2007 WL 675994 (La. App. 3 Cir. 2007)

Plaintiff leased a truck and a crane (collectively, the “Equipment”) from Defendant, and the terms of the lease required that the Defendant provide adequate insurance on the Equipment, that the insurance list Plaintiff as “added insured” and that the Equipment be domiciled at the address provided on the lease agreement. Plaintiff sent Defendant a letter terminating the lease alleging that the Defendant was in default for failing to provide adequate insurance and for failing to keep the Equipment at the address provided on the lease and demanding return of the Equipment within five days of receipt of the letter pursuant to the Louisiana Lease of Movables Act.

Defendant responded to Plaintiff by denying all allegations in the letter and refusing to surrender the Equipment. Plaintiff filed suit. Defendant filed for involuntary dismissal, asserting that Plaintiff failed to carry out his responsibilities under the lease/purchase agreement. Plaintiff appealed.

On the issue of adequate insurance, the appellate court noted that the relevant language in the lease/purchase agreement was as follows:

4. LESSEE assumes all risk and liability for and agrees to indemnify, save and hold LESSOR harmless from all claims and liens of all loss and damage to the machinery and all loss, damage, claims, penalties, liability and expenses, including reasonable legal fees, howsoever arising or incurred because of the machinery or the storage, use of operation thereof. LESSEE at its own expense shall carry adequate liability insurance with respect to use, operation and possession of the machinery against bodily injury and against property damage.
5. LESSEE, at its own expense, will provide during the term of this lease, before any equipment covered by this lease is used, such insurance of the type and in an amount satisfactory to LESSOR as is necessary for and against any liability or loss for injury or death to any person or persons or for any damage to property resulting from or arising out of the use, possession or operation by LESSEE of any equipment hereby leased. LESSEE shall keep the equipment insured at its full insurable value against loss or damage to it resulting from all risk or physical damage. LESSEE shall deliver to LESSOR policies or certificates of insurance naming LESSOR as an insured.

At the hearing before the trial court, Plaintiff testified that the insurance Defendant obtained was not adequate because it merely insured the Equipment under a general automotive policy, covering the truck for use as a truck only and not for its additional intended use as a crane. Plaintiff went on to explain that to operate a crane, several types of insurance are required, specifically: (1) insurance to move the vehicle under automotive; (2) optimum general liability insurance to operate it as a crane lifting equipment; and (3) insurance in case the operator causes damage or injury by dropping the item being lifted. The Plaintiff further complained that he was not listed as an additional insured but rather as a loss payee under the insurance obtained by the Defendant.

The appellate court went noted that the language of the lease/purchase agreement was dispositive on the issue of adequate insurance coverage. The appellate court further noted that the lease agreement states that: “LESSEE at its own expense shall carry adequate liability insurance with respect to use, operation and possession of the machinery against bodily injury and against property damage.” (Emphasis added). The appellate court noted that while the lease agreement described “the machinery” as a: “94 FORD LNT8000” and a “990 NATIONAL CRANE[,]” it did not specifically state that both the truck and the crane were required to be separately insured.

The Defendant had insured the Equipment for $1 million in liability insurance and $50,000 in property damage insurance on the truck only and not on the crane, the latter of which he subsequently increased to $70,000 and included the crane under the policy. The Plaintiff had presented evidence that the Equipment had a market value of $70,000.

The appellate court agreed with the trial court and held that the insurance provided was adequate under the terms of the lease/purchase agreement. Additionally, the appellate court noted that under Louisiana case law, where lease violations are technical courts are inclined to treat them as non-serious, as voiding lease agreements is not favored by law, particularly for technical infringements. The appellate court found that the failure to list the Plaintiff as an additional insured under the insurance policy was merely a technical violation of the lease. The appellate court further noted that a contract may not be dissolved when the obligor has rendered a substantial part of the performance and the part not rendered does not substantially impair the interest of the obligee.
The Massachusetts Supreme Court discusses the interrelationship of a lease’s provisions regarding liquidated damages and automatic renewal, given the particular facts of this case. After the lessee (which had succeeded to the obligations of the original lessee following a merger and had thereafter misplaced the lease documents and discarded most of the leased equipment) failed to notify the lessor of an intention to terminate the lease following the initial thirty-six month term, the lessor declared a default and sought liquidated damages based upon the present value of rentals alleged to be owing for two successive automatic annual renewal terms plus a stated percentage of the original equipment cost. The court affirms a lower court’s holdings that (i) the lessor’s default letter demanding return of the equipment prevented it from claiming that the lease term had been automatically extended for the second successive twelve-month renewal term and (ii) the liquidated damages provision represented an amount that would be grossly disproportionate to a reasonable estimate (at the time the lease was entered into) of the actual damages to be incurred beyond the end of the initial thirty-six month term of the lease. The court also takes the occasion to agree with a majority of courts in other states and holds that, as a matter of commercial contract law in general, the party challenging the enforceability of a liquidated damages provision bears the burden of proof. In a footnote it indicates that although this holding does not explicitly apply to contracts governed by the UCC, it is not aware of any reason why the allocation of the burden of proof would be different in that context.


This case illustrates the relation between a somewhat unusual remedies provision in a lease (permitting the recovery of future rentals only in the event of a payment default – not for other defaults) and provisions of Article 2A pertaining to repudiation of a lease by one party if that party does not provide adequate assurance of performance following a request by the other party if that other party had reasonable grounds for feeling insecure (2A-401 in the uniform version, different numbering in Ohio). Here the lessee had continued to make rental payments and argued that the lessor was not entitled to future rentals as damages. The court, however, found that the lessor’s justifiable termination of the lease and bringing suit in court following the lessee’s repudiation of the lease under the law (by not providing the lessor with adequate assurance of performance after the lessor had learned of the lessee’s plans to sell its assets) entitled the lessor to disregard the peculiar default provision and sue for total breach. The court also employs a clause in the lease calling for its amendment if any provision in the lease is prohibited by law to save the lease’s accelerated damages provision by requiring state-law mandated minimization of damages at the same time.
In this appellate court reversal of a trial court’s modification of an arbitration award, the court mentions that damages consisting of the present value of future lease payments may be awarded under Article 2A-529 “if the lessor is unable after reasonable effort to dispose of [the goods] at a reasonable price or the circumstances reasonably indicate that the effort will be unavailing.” Otherwise 2A-528 would apply, which requires a credit for the present value of the market rent for such goods. The appellate court overturned what it characterized as the trial court’s substitution of its own judgment for that of the arbitrator concerning whether the lessor could have reasonably disposed of the equipment.

The main holding of this case is that provisions in a lease of an aircraft placed the responsibility for insuring against seizure of the aircraft and the risk of loss in case of such a seizure on the lessee – notwithstanding the unfortunate fact that the seizure by the U.S. Drug Enforcement Administration may not have been justified. After holding that the lessee was obligated to make all lease payments despite the seizure, the court looks to the lease provisions regarding remedies after default by the lessee and holds that the remedy of acceleration of future rentals in the lease does not require employing a discount rate: as of the date of acceleration, “the accelerated payments were not ‘future damages,’ but were present damages, governed by the terms of the Lease.”

After concluding that the lease at issue was an Article 2A finance lease, the decision examines some of the history of New Jersey law concerning various types of remedies for damages that are permitted under law, as opposed to constituting a penalty. Among other things, the court notes that while acceleration of rentals is a common remedy in leases, future payments must generally be discounted to present value.

Plaintiff leased scaffolding equipment (the “Lease”) to BHA, Inc. (“BHA”) through Commercial Finance Group (“CFG”). The Lease was then assigned by CFG to the Plaintiff. Under the Lease, BHA was required to make monthly payments over sixty (60) months and BHA bore the “entire risk of loss, theft, disappearance, destruction or damage (‘loss’) to the Equipment from any cause whatsoever.” The Lease further stated

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1 BHA asserted that the agreement was not for a lease of the equipment but rather for the purchase of the equipment pursuant to a finance agreement. However, BHA was unable to point to any documentary evidence or language in the Lease to support its allegation. The Lease specifically stated that it was an “Equipment Lease Contract” and contained a schedule of lease payments, as well as stating that the “[l]essor and lessee agree that this Lease is a ‘Finance Lease’ as that term is defined in Article 2A of the Uniform Commercial Code.”
that “no loss shall relieve or diminish Lessee’s obligation to pay all rent due or fulfill any other Lease obligation under this Lease.” Some of this scaffolding equipment was moved to Thomas S. Boyland Street (the “Boyland Site”), where BHA was operating as a subcontractor for A&N Restoration (“A&N”).

Later, BHA executed an assignment of all equipment owned by BHA located at Boyland Site to A&N in partial payment for sums owed by BHA to A&N. BHA and A&N then had a dispute, and BHA stopped working at the Boyland Site. BHA also made arrangements with United Southern Corporation (“United”), with whom the Plaintiff had entered into a collection agreement, to return all of the scaffolding in exchange for a release from the Lease. A&N would not release the scaffolding at the Boyland Site to Plaintiff. Plaintiff then moved for partial summary judgment against BHA.

The Court noted that the Lease was silent on choice of law, and the parties did not address the issue of choice of law. The Court determined that the two potential laws of Alabama and New York are in accord on the elements of a cause of action for breach of contract, with both requiring general a contract, consideration, performance by the plaintiff, breach by the defendant and damages resulting from that breach. The Court further found that BHA failed to raise an issue of triable fact as to its liability for contractual breach, whereas the Plaintiff produced the Lease, the terms of which BHA did not contest.

BHA first argued that A&N removed the scaffolding equipment from the Boyland Site without its permission. However, the Court noted, the Lease clearly provides that BHA as lessee bears the risk of loss, theft, disappearance, destruction, or damage to the scaffolding. BHA next argued that BHA and Plaintiff had an oral agreement to return the equipment in lieu of making additional payments, and that such oral agreement did not include the specifications of the written release (the “Release”). BHA argued that the Plaintiff, by failing to pick up the scaffold days after the agreement was reached, breached the agreement. The Court noted that the oral agreement was not mentioned prior to oral argument, and further noted that BHA provided no evidence in support of its assertion of an oral agreement.

The Court found that the Plaintiff clearly met its burden on the issue of the liability of BHA for breach of contract and that the only remaining issue was damages, which it determined was not ripe for summary judgment.

Renewals, Automatic Renewals, Return of Equipment


In this brief decision granting a lessor’s motion for summary judgment against the guarantor of a bankrupt lessee, the court holds that because a notice of intent to terminate the lease was not sent prior to the date set forth in the lease, the lease automatically renewed under its terms for a one year period.

Vicarious Liability and Motor Vehicle Leases

Following an accident in which the plaintiff was injured by a truck owned by one of the defendants (an individual named Bhupinder Singh), Mr. Singh attempted to rely on a Michigan statute that both (i) makes vehicle owners liable for injuries caused by either their or an agent’s negligence, and (ii) shields lessors in the business of leasing motor vehicles (pursuant to leases for periods of greater than thirty days). Since Mr. Singh had leased only this one vehicle to another of the defendants (Buffalo Group, Inc. – additional facts indicated that Mr.Singh continued to operate the leased truck himself and was a passenger in the truck at the time of the accident), the court denies his motion for summary judgment, finding that he was not sufficiently “engaged in the business of leasing motor vehicles” to be shielded by the statute.


After a bus caught fire while being driven, causing considerable damage to the bus and to passengers’ personal property, the lessee sued the lessor in tort for damages (the lessee had also sued the manufacturer, which was not a party to the lessor’s motion to dismiss decided by this case). Noting that the lease contained “plain, unequivocal, unambiguous language” in which the lessor disclaimed all warranties and stated that it would not be liable for any damage arising from the lessee’s use of the bus, the court granted the lessor’s motion to dismiss, stating that “a party unhappy with the performance of a product may not seek in tort remedies that are unavailable to it under the terms of its contract.”


Under the Connecticut vicarious liability statute in effect at the time of the accident, a lessor of a motor vehicle was stated to be liable for damage to person or property to the same extent as the operator of the vehicle. This appellate court upholds a grant of summary judgment in favor of the motor vehicle lessor – finding that the lessor was not liable under Connecticut’s statute inasmuch as the driver of the car under lease (the lessee’s unlicensed daughter) was not an authorized driver under the terms of the lease agreement, which prohibited use of the vehicle by unlicensed drivers. (The court also makes mention in a footnote of the preemptive federal statute discussed below, which statute did not apply to this case since this action was commenced before the statute’s effective date.)


In a decision likely to be the subject of much discussion (and, possibly, appellate review), this court denies a motor vehicle lessor’s motion to dismiss the plaintiff’s tort claim under New York’s vicarious liability statute, which motion was based upon preemption of such state statute by the federal statute referred to in the case below. After finding that the state statute “has nothing to do with ‘commerce’” and is a state legislative act within the state’s inherent Tenth Amendment (U.S. Constitution) authority, the court holds that the federal statute is an unconstitutional exercise of Congressional authority under the U.S. Constitution’s Commerce Clause.

Notwithstanding plaintiff’s creative arguments to the contrary, this U.S. District Court for the District of Columbia holds that the federal statute referred to in the case below was clearly intended to preempt any statute in any of the states or the District of Columbia that imposes vicarious liability for the negligence of a lessee on the lessor of a motor vehicle as long as such lessor is engaged in the business of leasing motor vehicles and there is no negligence or criminal wrongdoing on the part of such lessor. The plaintiff had attempted to argue that the federal statute needed to explicitly name the statutes to be preempted in order to be adequate to repeal the contrary provisions of state law.


One of the first motor vehicle vicarious liability cases to be decided after the enactment of a federal statute intended to preempt existing state laws on the subject (49 U.S.C. Sect. 30106). Making mention of the only two earlier decisions in the U.S. (in New York and Maine) addressing the applicability of this new federal statute, the court holds against the plaintiff inasmuch as the plaintiff was seeking to impose, under Connecticut law, precisely the type of liability that the federal statute prohibits – liability solely by virtue of ownership (in this case, ownership by a vehicle rental company).

Product Liability of Lessors


Finding that the lessor of a truck trailer was merely a financial lessor, as opposed to a commercial lessor, this court grants the lessor’s motion for summary judgment against the plaintiff alleging that the lessor should be held strictly liable for injuries caused by the defective product. In this decision, the court traces the history of Illinois common law concerning strict product liability – beginning with sellers of defective products, extending the rationale for this doctrine to lessors placing the product in the stream of commerce, and finally distinguishing financial lessors whose role is limited to providing the money as opposed to the products. Interestingly, as the decision points out, the distinction between financial and commercial lessors was first made in federal courts in Illinois and later adopted by state courts.
Vendor Issues

M & I Equipment Finance Co. v. Lewis County Dairy Corp., 2007 WL 128879

After entering into a lease agreement for equipment that had not yet been manufactured, the lessor made payments – authorized by the lessee – both to the equipment manufacturer and to the lessee (the latter as reimbursement for a payment previously made by the lessee to the manufacturer) and was to make further payments to complete the purchase of the equipment being manufactured. The terms of the lease did not require the lessor to make its payments pursuant to any particular schedule, but did give the lessor the right to terminate the lease by a particular date if the manufacturer failed to deliver. When the manufacturer refused the lessor’s request to provide some assurances that future lease payments owing would be supported by some sort of collateral, (i) the lessor ceased making payments to the manufacturer, (ii) the manufacturer ceased production of the equipment, and (iii) after learning of the foregoing, the lessee stopped making payments under the lease. Finding that the lessor’s actions did not constitute a breach of its obligations under the lease and that the lessee’s non-payment clearly breached its obligations, the court granted the lessor’s motion for summary judgment.

Wells Fargo Bank v. Levin Professional Services, Incorporated, 2006 WL 1919174
(U.S.Ct.App. 4th Cir. July 12, 2006)

Following delivery of equipment to a lessee, which equipment was to be purchased from its vendor by the lessor, the vendor was never paid by the lessor and sued to garnish lease payments from the lessee. Prior to the lessor’s default in paying the vendor, the lease had been assigned by the lessor to Wells Fargo (as an indenture trustee for noteholder beneficiaries). In this decision, the Circuit Court affirms the District Court’s grant of summary judgment in favor of Wells Fargo permitting recovery of garnished lease payments from the vendor because Wells Fargo was a bona fide purchaser for value who took possession of the lease prior to the vendor’s garnishment action.

First Nonprofit Insurance Company v. Miralink Corporation, 2006 WL 1156393

Notwithstanding the supplier’s claims that there was no contract directly between it and the lessee of equipment sold by that supplier to the lessor, and thus that the lessee had no legal right to enforce warranties with respect to the equipment, the court notes that Article 2A automatically extends the benefit of the supplier’s promises made to the buyer of the equipment (i.e., the lessor) to the lessee under a finance lease. The court thus refuses to grant the supplier’s motions to dismiss, and permits the lessee to continue in its attempt to prove the existence of a supply contract. The court also makes short shrift of the supplier’s suggestion that it is entitled to stand in the shoes of the lessor under the finance lease and get the benefit of the lease’s disclaimer of warranties and arbitration provisions.
Indemnity Clauses


The plaintiff in this case, an employee of the lessee under a railcar lease with General Electric Railcar Corporation, was injured while inspecting the railcar, and subsequently brought suit against everyone connected with the railcar on products liability and negligence theories. Among other holdings, this decision affirms the lower court’s grant of summary judgment in favor of GE that the lessee was obligated to indemnify GE for its reasonable attorneys’ fees and costs according to the plain meaning of the indemnity clause in the lease.

Forum Selection, Jurisdiction and Choice of Law


This decision affirms the ruling of a (county) Court of Common Pleas finding that a forum selection clause stipulating venue in the lessor’s county in Pennsylvania was enforceable against defendants located in Missouri, Wisconsin and Alabama. The court summarizes the case law as indicating that a forum selection clause in a commercial contract between business entities is presumptively valid unless (i) the clause itself was induced by fraud, (ii) the clause is so unfair inconvenient as to deprive a party of its opportunity to be heard, or (iii) the clause violates public policy. With regard to the first listed point, the court indicates that a claim that the entire contract was induced by fraud is not enough without proof that the forum selection clause was itself induced by fraud.


A brief decision overruling a lower court’s dismissal of a complaint by a NorVergence assignee. Noting that there was no allegation that the forum selection clause (which stipulated that venue was to be in the state where the assignee, if any, is located) was itself fraudulently induced and that the defendant was a sophisticated business entity, this appellate court holds that the clause is enforceable. The court also notes that the change in venue was only from New Jersey (NorVergence’s location) to New York.


Reversing an Ohio Court of Appeals decision, the Ohio Supreme Court rules that the “floating” forum selection clause contained in NorVergence leases signed by twelve out-of-state (i.e., outside of Ohio) commercial entities was not enforceable by the plaintiff assignee, a finance company with its principal office in Ohio. Although finding that (i) the lessees were all commercial entities (notwithstanding the lessees’ assertions that they were unsophisticated “mom and pop” small businesses that should be treated differently), (ii) there was no evidence that the lessees were defrauded into agreeing to the forum selection clause in particular, and (iii) there is a valid business reason for
including a floating forum selection clause in contracts, the court nevertheless finds the clause to be unreasonable and therefore unenforceable. It is not entirely clear whether this holding rests upon the obvious fact that the signatory would not be able to “answer the question of where he may be forced to defend or assert his contractual rights” (which the dissenting opinion notes would invalidate all floating forum selection clauses, notwithstanding the majority’s finding that such clauses have a valid business purpose) or, more particularly, that in these cases NorVergence withheld from these lessees the fact that it intended almost immediately to assign the leases to a company in Ohio. The dissenting opinion would have adopted the reasoning of the U.S. Court of Appeals for the Seventh Circuit in *IFC v. Aliano Brothers*.

Preferred Capital, Inc. v. Associates in Urology, 453 F.3d 718 (6th Cir. 2006)

In these two decisions, the Sixth Circuit reverses lower court decisions in favor of lessees claiming that the “floating” forum selection clause in NorVergence leases was not enforceable by this assignee of the leases. The lessees, located in Florida and Pennsylvania respectively, had argued that the clauses were both unjust in themselves and also a part of fraudulently induced lease transactions. Holding that the lessees’ general claims of fraud did not demonstrate that agreement to the forum selection clause was itself fraudulently induced and that such a clause is generally enforceable as between commercial entities (finding no evidence that enforcement of the clause would be unreasonable or unjust), this court finds the clauses to be valid and enforceable. However, in the *Aetna Maintenance* case, the court comments that the District Court may revisit the issue upon remand if the Ohio Supreme Court rules to the contrary in a case before it involving this same assignee (the lessee in which case is Power Engineering Group, Inc.).


After an assignee of a NorVergence lease obtained a default judgment against the lessee in a court located in assignee’s state (Ohio), it attempted to domesticate that judgment in the lessee’s state (Texas). This appellate court affirms the trial court’s order vacating that judgment, disagreeing with the assignee’s argument that the lessee’s having sent six lease payments to Ohio was sufficient to permit the Ohio court’s exercise of personal jurisdiction over the lessee. The court also comments that although the lessee devoted part of its responsive brief to argue that the lease’s “floating” forum selection clause (according to which the lessee consents to jurisdiction in the state of the assignee’s principal office) should not be enforced, this court did not need to address that issue inasmuch as the assignee had not raised the issue in its original brief.


A trial court in South Carolina had dismissed an action by a lessee of telephone equipment alleged to have been known by the lessor to be illegal, because the lease
contained a forum selection clause agreeing to the jurisdiction of courts in New York. The South Carolina Supreme Court reverses on the ground that actions involving alleged misrepresentations made by the lessor prior to entry into the lease, which misrepresentations may have induced the lessee to enter into the lease – as opposed to defaults under the lease itself – are not governed by the forum selection clause in the lease. The court also notes that South Carolina cases generally disfavor forum selection clauses.


The Defendants entered into a contract for discount telecommunications services with NorVergence, Inc (“NorVergence”). The Service Contract included an equipment rental agreement (“ERA”). Subsequently, Norvergence assigned all of its rights to, but none of its obligations under, the ERA to the Plaintiff. The Plaintiff alleged that it served invoices on the Defendants, which the Defendants did not pay. The Defendants alleged that NorVergence failed in its obligation to install a certain matrix box (the “Matrix Box”) without which the equipment it was leasing was useless. The Defendants further alleged that the Matrix Box retails for only $395.00, but that under the lease the Defendants were charged $295.00 per month for the Matrix Box.

The Defendants moved to dismiss based on forum non conveniens. The Defendants noted that they are a Colorado corporation and a Colorado resident, that they conduct business solely in the State of Colorado, have never transacted business in the State of New York and have no connection or contact with the State of New York. The Defendants further alleged that the transaction in question occurred in Colorado and that they have never directly transacted any business with the Plaintiff, which has its principal place of business in the State of New York. Based thereon, the Defendants argued that there is no basis for the exercise of long arm jurisdiction pursuant to CPLR § 302, and that, in accordance with CPLR § 327, New York is an inconvenient forum, requiring the matter to be heard in Colorado.

The Plaintiff argued that jurisdiction was properly acquired over the Defendants in New York by virtue of a forum selection clause contained in the ERA which reads:

**APPLICABLE LAW:** ... This agreement shall be governed by, construed and enforced in accordance with the laws of the State in which Rentor's principal offices are located or, if this Lease is assigned by Rentor, the State in which the assignee's principal offices are located, without regard to such State's choice of law considerations and all legal actions relating to this lease shall be venued exclusively in a state or federal court located within that State, such court to be

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2 The ERA did not require that NorVergence give the Defendants any notice of the assignment, nor did NorVergence provide the Defendants with any such notice of the assignment.
The Plaintiff further noted the following language that appeared on the personal guarantee signed by Mr. Blood, directly above his:

THE SAME STATE LAW AS THE RENTAL WILL GOVERN THIS GUARANTY. YOU AGREE TO JURISDICTION AND VENUE AS STATED IN THE PARAGRAPH TITLED APPLICABLE LAW OF THE RENTAL. (bold and capitalization in original)

The Defendants argue that this forum selection clause is invalid and unenforceable because it lacks specificity, failing to advise the parties of the actual forum(s) in which suit may be maintained, and that it was part of an agreement obtained by fraud and overreaching. The Defendants further allege that its enforcement would be unjust and unreasonable, virtually denying them their day in court.

The Court noted that forum selection clauses are prima facie valid and enforceable unless shown to be unreasonable, as they provide certainty and predictability and help to avoid litigation over personal jurisdiction. The Court further stated that for a forum selection clause to be set aside, it must: (1) be found invalid due to fraud or overreaching; (2) be determined that its enforcement would be unreasonable; or (3) found to be so inconvenient that the challenging party would be for all practical purposes deprived of his or her day in court.

After discussing how various other courts have addressed the validity of the forum selection clause at issue, the Court noted that in Sterling Nat'l Bank v. Eastern Shipping Worldwide, Inc., 35 A.D.3d 222, 826 N.Y.S.2d 235 (1st Dept. 2006), the Appellate Division, First Department unanimously reversed the dismissal of the plaintiff's complaint on forum non conveniens grounds and upheld the forum selection clause, noting:

The forum selection clause itself clearly provides that if the lease has been assigned, as was the case herein, then the venue of any legal action shall be in the state where the principal headquarters of the assignee is located, in this matter, New York.

Following the Sterling Court, the Court found that the forum selection clause at issue was clear and specific enough to survive scrutiny unless the Defendants could show fraud or overreaching or manifest unfairness. The Court noted that the fraud must be as to the forum selection clause itself, and not the contract generally. Furthermore, the Court noted that the Defendants had time to read the contract prior to signing it. On the final element of manifest unfairness, the Court found that requiring that the Defendants
travel to New York to defend does not render the provisions of the forum selection clause so onerous as to deprive the Defendants of their day in court, and that the Defendants agreed to this term when they signed the contract and knew that it would be a possibility.

Assignments of Leases


Vision Financial financed a lessee’s purported purchase of a furnace through a sale-leaseback transaction and then assigned the lease to FirstMerit. Although both the original lessor and assignee had performed due diligence – including a tour of the lessee’s facility with a view of equipment said to be the furnace, and a review of a manufacturer’s invoice and copies of checks from the lessee to pay the manufacturer – it subsequently came to light that the lessee was defrauding both financing sources and had never purchased the furnace described in the lease. FirstMerit sued Vision Financial for rescission of the lease assignment based on the doctrine of mutual mistake. After citing provisions in the assignment agreement in which Vision Financial clearly disclaims representations about the equipment and states that it has no knowledge of any facts impairing the validity and value of the lease, this court holds that the assignment clearly allocated the risk of mistake regarding the existence of the furnace to the assignee.


Following a purported assignment of payment streams under equipment leases to a bank, the assignor filed for bankruptcy and its trustee sought to recover the rights to such payment streams from the bank by arguing both that the assignment of these payment rights was not an assignment of payment intangibles and thus could not have been automatically perfected according to the provisions of Article 9 – even if the assignment qualified as a true sale – and also that the assignment was a loan (i.e., not a true sale), requiring a different means of perfection even if the assignment could be characterized as an assignment of payment intangibles. Overruling an earlier decision of the bankruptcy court, this bankruptcy appellate panel finds that the transaction did involve an assignment of payment intangibles – “stripped” away from the underlying equipment leases which are classified under Article 9 as chattel paper – which assignment would have been automatically perfected under Article 9 if it qualified as a sale. But the panel also agrees with the lower court that the substance of the transaction was in fact a loan secured by the payment streams, in which case perfection could not be automatic. The panel remands to the lower court to determine whether the bank may have perfected its interest in the payment streams by taking possession of the leases through an agent (there was apparently no UCC filing done listing either the leases or the payment streams as collateral). The panel also raises the issue, without deciding it, of whether Article 9 clearly gives priority to a purchaser of leases which perfects its purchase by taking possession of the chattel paper subsequent to a sale of the lease payment streams to a prior buyer that has automatically perfected its purchase of such “stripped” payment intangibles.
**Authority of Lessee’s Employee to Enter into Lease**

**Weinreis v. Hill, 719 N.W.2d 354 (N.D. 2006)**

The North Dakota Supreme Court affirms a trial court’s finding that a leasing company acted negligently and not in good faith when it purchased an aircraft in a sale-lease back transaction and paid the proceeds to the individual who represented himself to be the president of the corporate lessee, rather than to the lessee itself, notwithstanding a variety of reasons to question such individual’s authority. The decision also upholds the trial court’s judgment requiring the leasing company to reconvey the aircraft to the corporation.


Summary judgment is denied this lessor concerning the issue of whether the party who signed a lease – the defendant’s controller – had either actual or apparent authority to act for the lessee. Statements by the lessee’s president were found inconclusive as to the controller’s actual authority and the fact that two lease payments were made did not constitute evidence of apparent authority since the invoices were apparently sent to the controller for payment.

**Lessors’ Rights in Bankruptcy Proceedings**

**In re Federal-Mogul Global Inc., No. 05-2423 (U.S. Ct. App. 3rd Cir. March 15, 2007(Not precedential)**

The Third Circuit holds that the equipment lessor was entitled to payment of a full month’s rent with respect to leases rejected by the bankrupt lessee in the middle of such month, reversing holdings by both the Bankruptcy and District courts that the lessee was entitled to pro-rate the rental amount for that month. Since the leases all required the payment of a full month’s rental in advance at the beginning of each month and nothing in the bankruptcy code itself or in the prior proceedings authorized an amendment of the terms of the lease, this appellate court finds no grounds for permitting pro-ration of the payments.