WHAT'S NEW IN THE LAW OF LEASING

Robert W. Ihne, Esq.
[with thanks to Ed Gross, Christine Luong, Rebecca Rigney and Deb Abram of Vedder Price for gathering cases]
Updated for the ELFA through May 1, 2018
(* denotes items added or updated since last update as of December 1, 2017)

Finance Companies' Rights to Collect – Including Ability to Collect Rentals Under Article 2A Finance Leases or Leases with "Hell or High Water" and/or Waiver of Defenses Provisions

Blue Ridge Bank, Inc. v. City of Fairmont, 807 S.E.2d 794, 2017 WL 5559861 (Sup.Ct. of App. W.Va. November 14, 2017) *

After the lessee (a city in West Virginia) entered into a lease purchase agreement ("lpa") with a lessor, it discovered that the lessor had converted funds designated to pay for the lessee's equipment subject to the lpa, causing the lessee to pay for much of this equipment itself. The money that the lessor was to have used to pay for the equipment came from the lessor's assignment of the lpa to a bank (the "assignee"). After the lessee paid for much of the equipment out of pocket, it attempted to negotiate with the assignee to reduce the amount of its monthly payment under the lpa to recoup the amount it was forced to pay for the equipment itself. When the assignee did not consent, the lessee filed a declaratory judgment action, which the trial court decided in favor of the lessee. On appeal by the assignee, this court affirms the trial court's judgment in favor of the lessee. Although the court includes some confusing comments labeling the lpa an Article 2A finance lease yet also stating that the lpa gave the lessor a security interest in the equipment, the decision rests on the legal position of the assignee as having being subject to claims and defenses of the lessee, whether accruing before or after notification of the assignment. Since the lessee had not accepted all of the goods under the lpa, the court holds that such fact constituted an exception to the "hell or high water" obligation of the lessee argued by the assignee. The court goes on to hold that since the lessee had not entered into an enforceable agreement not to assert against the assignee claims that it might have against the lessor, the lessee can assert against the assignee defenses arising from the lessor's misuse of funds.

H.E.D. Inc. v. Konica Minolta Business Solutions U.S.A. Inc., 2017 WL 4340205 (U.S.Dist.Ct. N.D.Ind. September 29, 2017)

After printing equipment leased from the lessor proved to be inadequate for the needs of the lessee, the lessee brought suit against the lessor for breach of warranty and breach of contract. The court rules in favor of the lessor with regard to three provisions set forth in conspicuous print in the lease: (i) the disclaimer of warranties; (ii) the agreement that the lease is a finance lease under Article 2A; and (iii) the waiver of the rights to consequential, indirect or incidental damages. The court also notes that the lease contained a waiver of rights under Article 2A. However, the court puts off ruling on other lessee complaints inasmuch as the court states that it cannot determine who exactly are parties to the lease – in particular with respect to the lessor. The lease states that the lessor is Konica Minolta Premier Finance, a program of Konica Minolta Business Solutions U,S.A., Inc. – and the court asks whether both KMPF and KMBS are lessors. Although the defendant indicated that they were the same entity (in all likelihood the only legal entity is KMBS, with KMPF being merely a division of the former), the court asks for more resolution of this question.

<u>Xerox Corp. v. JoJo Monster Graphics, LLC, 2017 WL 3895907 (U.S.Dist.Ct. W.D.N.Y. September 6, 2017)</u>

In a case with somewhat puzzling facts and/or puzzling plaintiff arguments, a "hell or high water" clause and an agreement that the lease was an Article 2A finance lease is enforced – notwithstanding that the lessor was a vendor of the equipment which had made a "Total Satisfaction Guarantee" in the two leases stating that the lessor would replace any equipment with which the lessee was not totally satisfied. Despite the lessee's allegations that the equipment did not function properly and that the lessor did not properly service the equipment, the court holds that the lessee had agreed to make all payments unconditionally, that such provisions in a lease between commercial entities are typically enforceable and not contracts of adhesion, and that the lessee had not alleged that it had requested the lessor to replace the equipment per its exclusive remedy under the "Total Satisfaction Guarantee."

<u>ShopKo Stores Operating Co., LLC v. Balboa Capital Corp., 2017 WL 3579879 (U.S.Dist.Ct. C.D.Cal. July 13, 2017)</u> *

This case concerns the lessor's motion for summary judgment with respect to a number of claims made by the lessee arising from the lessor's having charged interim rent for a period of one day less than a quarter for equipment lease schedules which had a base term of a number of quarterly periods. The master lease provided that the rent payable shall be "shown on" the schedule – which the lessee argued should have meant the indicated number of quarters shown on the schedule – but also provided that the lessor could elect to have interim rent equal to 1/90 of the average quarterly rent payable on any day, in the lessor's discretion, occurring in the quarter following the commencement date. The lessor elected the 89th day of the quarter, which resulted in an initial interim rent payment being very close to the quarterly rent – an amount that the lessee claimed it mistook for the initial full quarterly rent payment. The court denies the lessor's motion for summary judgment on all the lessee's claims except for one that the court finds duplicative of the main breach of contract claim. Not helpful to the lessor's case was evidence introduced by the lessee of forty-nine other complaints from customers alleging that they were misled by the lessor's interim rent charging practices.
Also not helpful was lessor's internal communication in response to a lessor employee suggestion that the interim rent charge could be more than the regular quarterly payment: the lessor decided that charging only 89/90 of the quarterly rent would not "rock the boat" and stated that "Hogs get fat and pigs get slaughtered."

<u>Lease Finance Group, LLC v. Qazi, 59 N.Y.S.3d 281, 56 Misc.3d 944, 2017 WL 2855090 (NYC Civil Ct. June 28, 2017)</u>

This decision illustrates some of the limits of "hell or high water" lease provisions and holder in due course status for assignees in the context of a leasing company's attempt to enforce a guaranty against the person who also signed the lease (on behalf of what entity or person is not clear) – a person whose first language was not English and who alleges that he was told that the lease was merely an agreement to be responsible for damages to the equipment. The court notes that this leasing company has been sued by the New York state attorney general for ensnaring unsophisticated business owners into signing leases with "hell or high water" clauses and other "onerous" terms. Such business owners are initially approached by a separate company offering credit card processing services who then have the business owner sign papers for both such services and also a lease that will be assigned to LFG. The court denies the lessor's motion for summary judgment, noting that there are remaining issues as to whether the lessor took the lease without notice of fraudulent inducement and as to whether the lessee even knew what it was signing (the court here includes a reference to the NorVergence line of cases). This is a reminder that fraud by a lessor can be a defense to enforcement of "hell or high water" clauses and that an assignee's knowledge of fraud as well as the existence of possible fraud-in-factum can be defenses to enforcement by the assignee.

Construction Resources Group, LLC v. Element Financial Corp., 2017 WL 2266894, 2017 WL 2305717 (U.S.Dist.Ct. W.D.Ok. May 23, 24 2017)

These two decisions, written on consecutive days, illustrate the way that an Article 2A finance lease is supposed to operate for the benefit of the lessor and also to preserve certain remedies for the lessee. In the first case, the lessor moved for summary judgment after the lessee had ceased making payments on a lease of a wheel loader which the lessee complained was severely defective. After carefully analyzing the statutory criteria for a finance lease, the court decides that this lease did not fully satisfy the Article 2A definition. However, since the lease also contained a provision stating that the parties agreed that the lease was a finance lease as defined in Article 2A, and since the lease was not, according to the court and notwithstanding arguments by the lessee, an unconscionable contract (even if a contract of adhesion), the court agrees to treat the lease as a finance lease. Thus, the court grants the lessor's motion for summary judgment based upon the lessee's unconditional-obligation-to-pay requirement that is characteristic of finance leases. In the second case, the lessee was attempting to recover damages for breach of a warranty from the equipment manufacturer applicable to the wheel loader. In this case the court denies the manufacturer's motions for summary judgment with respect to its express warranty, the implied warranty of merchantability, and the lessee's claims for incidental and consequential damages – scheduling a trial on these claims. Thus, while the lessee was held to its unconditional obligation to the lessor insofar as it agreed that its lease constituted a finance lease, it retained remedies against parties supplying the equipment as long as it can prove that warranties, either express or implied, had been violated.

Kinetic Leasing, Inc. v. Nelson, 2017 WL 2985536 (U.S.Dist.Ct. D.N.D. Apr.14, 2017)

This dispute revolves around a lease of equipment which the lessor purchased from one company (which apparently was considered by the lessor to be a dealer) to lease the equipment on a finance lease to another company. The lessee was responsible for structuring the transaction in this manner; however, it claimed that not all of the equipment was delivered with titles such that the lessee could register and use it. In addition, it appeared that some of the equipment to be leased was still subject to a security interest previously granted by the seller to its lender. When the lessee stopped making all payments under the lease, this lawsuit ensued. Although the court states that contentions of fraud, misrepresentation and enforceability of the lease required further proceedings and could not be resolved on the parties' summary judgement motions, the court does rule that the lease was a finance lease as defined in Article 2A (and as discussed in White, Summers & Hillman). Of interest also is the lessor's argument that it is industry practice not to independently investigate whether a dealer can pass clear title to the equipment it sells. Lastly, the court rejects the lessee's argument that the lease is invalid due to Minnesota (the lessee's state) law requiring motor vehicle lessors to be licensed. The court rules that this law was not intended to apply to lessors under finance leases.

Xerox Corp. v. RP Digital Services, Inc., 232 F.Supp.3d 321, 2017 WL 512621 (U.S.Dist Ct. W.D.N.Y. Feb. 8, 2017)

The lessee had entered into both a purchase agreement and finance lease agreement with Xerox, the manufacturer and vendor of both pieces of equipment, but ceased making payments on both after claiming that the equipment under the lease did not work properly and that Xerox had made false and fraudulent statements about that equipment. The court grants Xerox summary judgment as to both the purchase agreement and lease, as to the latter holding that the lease's "hell or high water" clause was enforceable and sufficient to defeat the lessee's claims of fraudulent inducement and negligent misrepresentation. This vendor was fortunate, perhaps, that the court did not focus on the origins of "hell or high water" as supporting finance companies, who supply only money, not equipment, and cannot generally be expected to have any responsibilities with respect to the equipment being financed.

ShopKo Stores Operating Co., LLC v. Balboa Capital Corp., 2016 WL 9308530 (U.S.Dist.Ct. C.D.Cal. October 19, 2016)

This lessee is suing Balboa for fraud with respect to collecting more rent payments than was apparent to the lessee. The claim is that the lease docs did not adequately disclose an extra "pro-rata" or "interim" rent payment charged by Balboa at the beginning of the lease term which the lessee believed to be the initial ordinary periodic payment due. The court conducted a hearing concerning this claim and the lessee's requests to discover the experience of, and any complaints from, Balboa's other customers. Notwithstanding Balboa's objections to such a "fishing expedition," the court orders Balboa to produce documents that evidence customer complaints.

GreatAmerica Financial Services Corp. v. Meisels, 2016 WL 5480718 (Ct.App. Iowa September 28, 2016)(final publication decision pending)

This affirmation of a lower court decision may be encouraging for those who finance equipment vendors. At issue is the enforcement of a lease between an office equipment vendor and its customer, which lease was subsequently assigned to a finance company. The lessee had also entered into a service agreement with the vendor, and after the lessee alleged that the vendor had not performed under that service agreement, it ceased making lease payments to the assignee and asserted that the vendor should return any lease payments already made. The lessee argued that the lease and service agreement constituted a "unified" agreement and also that the equipment had not been accepted under the lease. The court concludes that acceptance had occurred in view of a signed certificate of acceptance and the lessee having made fifteen payments before attempting to cancel the lease. The court also rejects the argument that the lease was part of a "unified" agreement and holds that the lease contained a "hell or high water" clause which was enforceable by the assignee. Finally, the court finds that the assignee was a holder in due course, entitled to enforce the lease's waiver of defenses clause. In this regard, the court rejects the lessee's claim that there was "fraud in factum" such that the lessee could justify not paying the assignee (as a holder in due course) because the lessee had no reasonable opportunity to obtain knowledge of the contents of the lease.

<u>CDK Global, LLC v. Tulley Automotive Group, Inc., 2016 WL 1718100 (U.S.Dist.Ct. N.J. April 29, 2016)(not for publication)</u>

Although this case is in a preliminary stage of its proceedings and does not directly raise hell or high water or waiver of defenses issues, it provides a cautionary tale for those who might consider financing leases originated by a vendor who is also providing services in connection with the leased equipment. After a car dealership had ceased making payments under a lease of equipment designed to facilitate its day-to-day operations, the vendor sued to accelerate the lease payments and obtain return of the equipment. The dealer counterclaimed, alleging that the leased system did not work properly, resulting in numerous problems, and that the dealer had been fraudulently induced to enter into the lease and related master services agreement. Although the vendor argued that an integration clause in the services agreement barred the dealer from alleging misrepresentations by the vendor, this court holds that the alleged misrepresentations concerned matters that were extrinsic to the services agreement and thus were not barred. Among other bad news for the vendor was the court's refusal to dismiss the dealer's counterclaim under the New Jersey Consumer Fraud Act, which covers goods and services sold to the general public (i.e., not limited to goods and services for personal, family or household use).

<u>*In re* Brican America LLC Equipment Lease Litigation, 2015 WL 235409 (U.S.Dist.Ct. S.D.Fla. January 16, 2015)</u>
<u>*In re* Brican America LLC Equipment Lease Litigation, 2014 WL 12772199, Case No. 10-md-02183-PAS (U.S. Dist.Ct. S.D.Fla. July 18, 2014)</u>
<u>*In re* Brican America LLC Equipment Lease Litigation, 2014 WL 250246 (U.S.Dist.Ct. S.D.Fla. January 22, 2014)</u>
<u>*In re* Brican America LLC Equipment Lease Litigation, 2013 WL 3967920 (U.S.Dist.Ct. S.D.Fla. August 1, 2013)</u>
[Other proceedings in this case may be found at <u>2013 WL 12092311 (U.S. Dist.Ct. S.D.Fla. November 15, 2013</u> and <u>2015 WL 11681185 (U.S.Dist Ct. April 23, 2015)</u>]
[The District Court's findings were generally affirmed in <u>Blank v. NCMIC Finance Corp., 2016 WL 6871879 (U.S.Ct.App. 11th Cir. November 22, 2016)(not selected for publication in West's Federal Reporter)</u>]

These cases illustrate some of the potential difficulties in a triangular relationship involving a vendor, its customers and a financing source. In this multidistrict litigation, a number of dentists and optometrists alleged that they had been victimized after entering into marketing agreements with a vendor (Brican) promising payments by Brican for advertising in the plaintiff's offices to be displayed on flat screen televisions and related equipment which were to be financed by leases between the plaintiffs and either (i) a lessor/finance company (NCMIC) or (ii) Brican itself (which leases were subsequently assigned to NCMIC). The marketing agreements between Brican and the plaintiffs had different versions of a cancellation provision, applicable in the event that Brican failed to honor its commitments, which provision stated either (a) that the leases could be cancelled by the plaintiffs, or (b) that Brican either would, or could be requested by the plaintiffs to, buy the leases from the plaintiffs. According to the court, the central questions involved the wording of the cancellation provisions, the relation of such provisions to the leases, the relationship of the vendor to the finance company (including whether the finance company was aware of the cancellation provisions), and whether the transactions were structured as leases (i) directly between the finance company and the plaintiffs or (ii) between the vendor and plaintiffs and then subsequently assigned to the finance company. In the January 22, 2014 decision, the court finds that the vendor's alleged misrepresentations could not be imputed to the finance company and therefore that the "hell or high water" leases directly between the plaintiffs and the finance company should be enforced notwithstanding the cancellation provisions of the marketing agreements. However, in the July 18, 2014 decision, the court finds in favor of the plaintiffs and against the finance company with respect to the leases assigned to the finance company holding that the finance company could not enforce the waivers of defenses in such leases inasmuch as the finance company's knowledge of possible fraud by the vendor and failure to investigate further while purchasing more transactions disqualified it as a good faith assignee with holder-in-due course status. In a puzzling footnote in this same decision, the court first states that these assigned financing agreements are secured transactions rather than true leases, and "therefore" the plaintiffs are "account debtors" with respect to waiver of defenses law. Any implication that lessees on a true lease would not be an account debtor is incorrect inasmuch as "account debtor" is defined to include someone obligated on chattel paper – which includes true leases as well as security agreements. In the January 16, 2015 decision, the court clarifies its previous decision, holding that the reliance element of each plaintiff's fraudulent inducement claim against Brican will need to be established through further proceedings.

<u>The CIT Group/Equipment Financing, Inc. v. Brown County, Ohio, 25 N.E.3d 473, 2014 WL 7014658 (Ohio App. Dec. 15, 2014)</u>

After a county hospital defaulted under its lease of hospital equipment, the lessor sued the county. Although the lease had been signed by the president of the hospital and authorized by the hospital's board of trustees, this appellate court affirms a lower court's ruling that had granted summary judgment in favor of the county. The court holds that no agency relationship had been established between the county and the hospital's board of trustees inasmuch as the statute creating the hospital does not expressly grant the board the authority to bind the county and subject its general fund to payment of hospital contracts, and that even if some implicit agency relationship were demonstrated, the proper procedures to bind the county had not been satisfied.

Siemens Financial Services, Inc. v. Stonebridge Equipment Leasing, LLC, 2014 WL 2557413 (R.I. Sup. Ct. June 6, 2014)

Although this decision does not make clear whether the Siemens Financial lease to a "spectacularly unsuccessful" medical imaging operation contained a "hell or high water" provision, the court does find that providing the lessee with a demographic profile regarding the potential demand for health-care services (with appropriate disclaimers) does not constitute a fraudulent representation excusing the lessee from making its lease payments. Thus the Rhode Island Supreme Court affirms the summary judgment granted in favor of the lessor by a Rhode Island Superior Court.

Leasing Services LLC v. Machinist AFL-Ciolodge 6S, 2014 WL 1688070 (Wis.App. April 30, 2014)

After a trial court agreed with the lessee that a lease's "hell or high water" clause was unconscionable and should not be enforced, this appellate court reverses. After citing a Wisconsin decision stating that for a contract to be found unconscionable, it must exhibit both procedural and substantive unconscionability, this court holds that because the lessee was free to comparison shop and not bound to deal with the lessor on the lease, there was no procedural unconscionability, and thus the lease should be enforced.

Nissan World, LLC v. Market Scan Information Systems, Inc., 2014 WL 1716451 (U.S.Dist.Ct. D.N.J. April 30, 2014)

The lessees in this case entered into lease agreements with Wells Fargo Financial Leasing containing large balloon payments due at the end of the lease term. The lease agreements provided for "hell or high water" obligations, contained an integration clause, and stated that the lessor was not an agent of the equipment supplier. The lessees refused to make such balloon payments and provided evidence that the supplier had promised to make such payments on behalf of the lessees if the lessees entered into leases of equal or greater value after the initial leases expired. Wells Fargo sought both to have the court order (i) the lessees to make their balloon payments under the leases and (ii) the supplier to pay Wells Fargo damages for failing to deal with the lessees and make balloon payments on their behalf (the failure of which Wells Fargo argued was a breach of a warranty under its dealer agreement with the supplier). While the court agrees that the supplier did breach a warranty made to Wells Fargo by failing to negotiate with the lessees regarding new leases and make the balloon payments, it also holds that it cannot grant Wells Fargo summary judgment against the lessees insofar as a trier of fact still needed to determine whether Wells Fargo had knowledge of (or possibly even helped develop) the agreements between the lessees and the supplier – which, according to the court, could lead to a conclusion that the "hell or high water" provisions had been modified.

Key Equipment Finance, Inc. v. Performance Imaging, LLC, 2014 WL 2257175 (Conn.Super. April 22, 2014)(unpublished opinion, check court rules before citing)

After a lessee ceased making payments on two lease agreements, claiming that the equipment did not function, this court decides in favor of the lessor, holding that the leases are finance leases under Article 2A and therefore implied warranties of merchantability and fitness for a particular purpose do not apply. The court goes on to say that even if the agreements were not classified as finance leases, those warranties were properly disclaimed.

General Electric Capital Corp. v. FPL Service Corp., 995 F.Supp.2d 935 (N.D. Iowa 2014)
General Electric Capital Corp. v. FPL Service Corp., 2013 WL 6238484 (U.S.Dist.Ct. N.D. Iowa Dec. 3, 2013)

This pair of cases exemplifies an unusual literal application (though not acknowledged by the court) of a lease's "hell or high water" provisions. After the unfortunate lessee's business – including two industrial copiers financed by the lessor – was destroyed by flooding from Hurricane Sandy, the lessee attempted to justify its failure to continue making payments using two defenses found in the Restatement (Second) of Contracts: supervening impracticability and frustration of purpose. The court makes short shrift of these defenses inasmuch as (i) the Restatement qualifies both defenses if there is language in the contract to the contrary, and (ii) the lease contained provisions amounting to a "hell or high water" clause, which under applicable Iowa law is enforceable whether or not the lease is a true lease. With regard to arguments by the lessee that the lessor had not properly disposed of the equipment, the lessor attempted to argue that the provisions of Article 9 concerning proper notice and disposition did not apply since the lease contained language stating that the parties agreed that the transaction was a finance lease under Article 2A. The court makes equally short shrift of this argument by noting that the $1 purchase option in the lease creates a secured transaction subject to Article 9. In the more recent of the two decisions, the court finds that the lessor did in fact dispose of the copiers in a commercially reasonable manner as required by Article 9. [In a somewhat disconcerting footnote to the "hell or high water" provision discussion in the earlier case, the judge states that if it were up to him alone, he would not enforce such a provision against an otherwise valid act-of-God defense unless it was clear that the parties had specifically bargained for the "hell or high water" provision as opposed to its being a non-negotiated, standard provision of the contract.]

General Electric Capital Corp. v. MSI Modular Systems Installations, 2014 WL 12696769 (U.S.Dist.Ct. C.D.Cal. January 30, 2014)

In this dispute, the lessor brought suit against the lessee for not making full payments with respect to two leases of commercial trucks. The lessee claimed that the lessor was aware of the lessee's need for trucks with the most recent model of engines that complied with California emissions rules (and that anything less would be of limited use to the lessee), but instead had trucks delivered with earlier model, non-compliant engines. The lessor argued that there was no explicit provision in the leases regarding the engines and that the lessor had disclaimed all warranties. Finding that there may be an ambiguity in the contract, the court denies the lessor's motions to dismiss the lessee's counterclaims for breach of contract and intentional and negligent misrepresentation.

Xerox Corporation v. Graphic Management Services Inc., 2013 WL 3777148 (U.S.Dist.Ct. W.D.N.Y. July 17, 2013)

This case could prove useful to anyone (either the original lessor or an assignee of that lessor) attempting to collect under a lease in which the lessor is also the vendor of the equipment. Among a number of issues raised by the parties, the central issue was whether the lessor/vendor was entitled to summary judgment against a lessee of equipment sold by the vendor when the lessee claimed both that the equipment did not function properly and that the lessor/vendor had fraudulently induced the lessee to enter into the leases. This court grants the lessor's summary judgment motion and enforces both the lease's "hell or high water" clause as well as the parties' agreement in the lease to treat the transaction as an Article 2A finance lease even if the transaction did not qualify under the Article 2A definition of "finance lease" (this lease would not have qualified inasmuch as this lessor was also the supplier of the equipment).

Pacific Financial Leasing, LLC v. Fernandes, 2013 WL 3184620 (Mass.App. Ct. June 25, 2013)(slip copy, not to appear in a printed volume)

After being approached by a vendor of wide screen televisions, the lessee (which operated a bar and restaurant) entered into a lease for televisions with a lessor referred to the lessee by the vendor. After the lessee defaulted on the lease, the lessor brought suit and obtained a summary judgment against the lessee. On this appeal, the lessee alleged that there were issues of material fact regarding misrepresentations made by the vendor concerning income to be obtained by the lessee from advertising sales that should have precluded summary judgment. This court affirms the lower court's holding, noting that the lease provides that it is a non-cancelable Article 2A finance lease and that there was no evidence presented by the lessee to suggest that the vendor and lessor were related in a way which might provide a basis for concluding that the lessor should be held responsible for the vendor's alleged misrepresentations.

The CIT Group/Equipment Financing, Inc. v. Shapiro, 2013 WL 1285269 (U.S.Dist.Ct. S.D.N.Y. March 29, 2013)

After a lessee's interests under a lease had been assigned to another lessee that subsequently stopped making payments and filed for bankruptcy, the lessor sued the original lessee and the personal guarantors on the original transaction. The defendants' arguments that they were not liable to the lessor because the lessor had failed to provide them notice of the bankrupt lessee's default are rejected by the court on the ground that the assignment agreement between the original lessee and the bankrupt lessee stated that the original lease agreement remained in full force and effect. The terms of that original lease agreement, according to the court, provided that the lessor had no duty to provide notice before bringing suit. What the court and the defendants may not have considered is that the original lessee became a surety by remaining liable on the lease after the assignment – i.e., it became a guarantor of the bankrupt lessee's obligations. Unless it waived defenses based upon suretyship, it should have been entitled to raise such defenses such as failure of the lessor to provide notice of the successor lessee's default.

Telerent Leasing Corp. v. Progressive Medical Imaging PLC, 2013 WL 228087 (U.S. Dist.Ct. E.D.Mich. Jan. 22, 2013)

When the lessee under an Article 2A finance lease defaulted, the plaintiff (an assignee of the first assignee of the original lessor's rights) brought suit against the lessee and seven individuals who had signed personal guarantees of the lessee's obligations – each guaranty limited to twenty percent "of the amount funded by the Lessor in the aggregate…" This case centers on the correct interpretation to be given those quoted words found in the guarantees. Although the court rejects the guarantors' argument that the words should be interpreted to mean the current amount due under the lease, it also rejects the plaintiff's seemingly reasonable interpretation that "the amount funded by the Lessor" means the amount actually funded by the original lessor. Instead, the court reasons that the plaintiff's recovery should be limited by the law of assignment ("under which 'the assignee succeeds to no greater rights than those possessed by the assignor'") to the amount assigned to the plaintiff by the initial assignee after about three years' worth of lease payments had been made. No doubt the plaintiff believed it had a higher number to rely upon from the guarantors – the same number that would have defined the guarantors' liability had there been no assignment at all by the original lessor – when it decided to purchase the lease from the initial assignee.

TBF Financial, LLC v. Petrenko, 2012 WL 5292826 (Wash.App.Div.1 Oct. 29, 2012)

The same court that decided the Financial Pacific Leasing v. Sharp case below reverses a trial court summary judgment in favor of an assignee of the original lessor on grounds that might cause some concern. After a lessee entered into a lease of a copy machine with the manufacturer of the copier (or an affiliate of the manufacturer) that contained a provision prohibiting modifications unless in writing, the lessee allegedly received non-conforming equipment and then spoke over the phone with a manufacturer's representative and agreed to an oral modification of the lease terms in consideration for not rejecting the equipment. In reversing the trial court's summary judgment in favor of the assignee and remanding for trial, this appellate court refers to the no-modification-except-in-writing clause and states that "Despite this clause, it is well settled in Washington that parties to a contract may modify or abrogate contract terms in any manner they choose, regardless of provisions that prohibit modifications or abrogation except in a particular manner. Indeed, Washington courts have consistently held no-oral-modification clauses unenforceable." Whether or not the assignee might have some recourse against its assignor (the equipment manufacturer or its affiliate), such statements by this appellate court may give financing companies pause.

Financial Pacific Leasing, LLC v. Law Offices of David A. Sharp, P.A., 2012 WL 4857214 (Wash.App.Div.1 Oct. 15, 2012)(unpublished opinion)

This case raises interesting questions about the meaning of "acceptance" – both under Article 2A and in the context of the terms of a lease agreement. In this case the lease provided that the assignee of the lease could verify by phone that the equipment had been examined by the lessee, was in good operating order and was accepted for all purposes under the lease. Although the equipment vendor never actually delivered the equipment which was to be subject to the lease, when the lessee was called by the assignee, the lessee saw a truck delivering a large box and told the assignee that the equipment was "just being delivered." The lease also stated that a phone confirmation of acceptance by the lessee would authorize the assignee to pay the vendor – which the assignee did following the phone call. After finding that the parties to the lease agreed that the lease was intended to qualify as an Article 2A statutory finance lease (as stated in the lease) and also commenting that Article 2A's definition of "finance lease" provides that the lessee's obligations become irrevocable upon the lessee's acceptance of the equipment, the court concludes – perhaps questionably – that the lessee was not entitled to rely on its argument that the lease did not qualify as a finance lease because it never actually accepted the equipment. The court reasons that the lease contained waivers of lessee rights under 2A – 508 through 522, which includes 2A-515, Acceptance of Goods (providing, among other things, that acceptance occurs after a reasonable opportunity to inspect the goods). This court, however, goes on to reverse a trial court's summary judgment against the lessee and remands for trial on the issue of whether the lessee's stating that the equipment was just being delivered constituted acceptance under the terms of the lease. This decision makes clear that the manner in which a lease indicates when a lessee will be deemed to have accepted the equipment is critical to commencing the lessee's unconditional obligations to pay. This can be crucial whether or not the court properly decided that a lessee's waivers of certain provisions of Article 2A means that the lessee cannot defend itself from finance lease claims by stating that it had not actually accepted the equipment.

In re Equipment Acquisition Resources, Inc. (Brandt v. The CIT Group/Equipment Financing, Inc.), 2012 WL 4754957 (Bankr.N.D. Ill. Sept. 28, 2012)

This case is one of eleven cases decided on the same date coming out of the bankruptcy of Equipment Acquisition Resources. In each of these cases, William A. Brandt, Jr., the Plan Administrator for EAR, brought suit against a different finance company to recover lease payments made by EAR to the finance company as fraudulent transfers. It was alleged that an individual had caused EAR to enter into leases of equipment acquired by the finance companies at grossly inflated prices from another company that had just purchased the equipment from EAR. The Administrator claimed that all of these circular transfers amounted to a Ponzi scheme in which funds from financing companies entering into leases later in time were used to pay EAR's earlier inflated lease obligations – to the eventual detriment of EAR and its other creditors. The court concludes that the Administrator's claims will be dismissed in one month unless the Administrator is able to provide more specific evidence of actual fraudulent intent on the part of the finance company.

Simington v. Lease Finance Group, LLC, 2012 WL 651130 (U.S.Dist.Ct. S.D.N.Y. Feb. 28, 2012)

A pair of small businesses brought a class action suit against a group of defendants in the business of processing electronic payments (for credit and debit cards) which involved the leasing of electronic point-of-sale equipment by plaintiffs. At this early stage in the suit, the court grants some of the defendants' motions to dismiss certain of the plaintiffs' claims but denies other defendant motions with regard to other plaintiff claims. While not at the stage where the court might have discussed lessor/defendant arguments based on "hell or high water" leases, the case illustrates examples of purported outrageous conduct by the defendants such as, for example, hiding most of the provisions on relatively expensive leases for inexpensive equipment which plaintiffs were talked into signing in return for unfulfilled promises of huge savings on the costs of the payment processing services.

GE Capital Information Technology Solutions, Inc. v, Campbell Ads LLC, 2011 WL 5835909 (U.S.Dist.Ct. N.D.Ind. Nov. 21, 2011)

After the lessee ceased making payments owing on a lease for a copier machine, the lessor brought suit and the lessee (i) counterclaimed that the lessor had breached the lease agreement by failing to provide a proper working copy machine and also (ii) affirmatively defended by arguing that the lessor had breached warranties regarding the equipment. In this brief decision, the court rules in favor of the lessor by pointing out that in the lease, the lessor had disclaimed warranties and the lessee had waived rights and remedies under Article 2A. The court did grant a lessee motion to file a third party complaint against the manufacturer of the copier.

De Lage Landen Financial Services, Inc. v. Rasa Floors, LP, 792 F.Supp.2d 812 (E.D.Pa. 2011)

A lessor entered into lease agreements with two lessees in connection with a program operated by certain vendors (Capital 4 and 3Com) who offered customers telephone and internet services requiring networking and telephone equipment, the financing of which took the form of the subject lease agreements. After the service provider failed, the lessees ceased making lease payments and the lessor filed suit. This court grants summary judgment in favor of the lessor – both on it claims against the lessees and on the counterclaims asserted by the lessees. The lease agreements made clear that although the rental payments might include the cost of services being provided (which the lessor would forward to the service provider) in addition to the amount for equipment rental, the lessor was not responsible for providing the services or maintaining the equipment. The court notes that after the failure of the service provider, the lessor decreased the amount of the rental payments to eliminate the portion for the services. The decision strongly supports the enforceability of lease provisions placing a "hell or high water" obligation on lessees to make all payments (both under Article 2A and under contract law), and finds no evidence that the lessor was in any agency relationship with the vendors such that alleged fraudulent conduct on their part could be attributed to the lessor.

Tri-States Utility, Inc. v. Infinity Metering Company, Inc., 2011 WL 2634291 (U.S.Dist.Ct. W.D.Mo. July 5, 2011)

After the lessee entered into a lease agreement for water metering equipment, the original lessor assigned the lease to a bank/assignee which then acquired the equipment selected by the lessee. After the lessee discovered that the meters were defective, it stopped making payments under the lease and brought suit against the bank contending that the bank had breached its duty under the lease when it acquired defective equipment. Citing language in the lease disclaiming warranties by the lessor and indicating that the lessor's role was only to provide financing for the lessee's use of the equipment and also citing Article 2A's finance lease provisions, the court granted the bank's summary judgment counterclaim motion that the lessee was liable under the lease notwithstanding the condition of the equipment.

GreatAmerica Leasing Corp. v. Wahoo Productions of Florida, Inc., 2011 WL 1559935 (U.S.Dist.Ct. N.D.Iowa April 21, 2011)

Notwithstanding the fact that not all of the equipment subject to a lease had been delivered and accepted, this court finds that the lessor was entitled to collect all of the scheduled lease payments. The court initially states that it need not resolve the issue as to whether a relatively brief lease provision regarding non-cancelability constituted a hell or high water obligation because the parties agreed that the lease is an Article 2A finance lease. This conclusion seems a bit strange since, as the court itself recites, acceptance of the goods is a prerequisite for satisfying the statutory meaning of "finance lease." In any event, the court's conclusion of full liability rests primarily on a lease addendum, signed by the lessee to induce the lessor's payment to the supplier of the goods, in which the lessee promises to make all payments under the lease even if some or all of the goods are not delivered and/or installed.

De Lage Landen Financial Services, Inc. v. Perkins Rowe Associates, Inc., 2011 WL 1466157 (U.S.Dist.Ct. M.D.La. April 18, 2011)

After the lessee defaulted on its lease and was sued by the assignee of the lease, the lessee brought various claims against the original lessor, including with regard to improper installation of the equipment and failure to notify the lessee that it had assigned the lease to the assignee. The court grants the original lessor's motion for summary judgment, holding that the lease's provisions setting forth the lessee's absolute and unconditional obligations to pay rent precluded most of the lessee's claims and also finding that the lessor had no obligation to notify the lessee of an assignment.

K.E.L. Title Insurance Agency, Inc. v. CIT Technology Financing Services, Inc., 2011 WL 1326230 (Fla.App. April 8, 2011)

This appellate court affirms summary judgment in favor of the lessor on a lease which stated that (i) the lessee was responsible for any service or maintenance with respect to the equipment and (ii) the equipment supplier/servicer was not an agent of the lessor. The lessee had attempted to argue that the lessor had breached an obligation to service the equipment.

Allen & Company, LLC v. Sanford USD Medical Center, 2011 WL 941195 (U.S.Dist.Ct. N.D.Ill. March 15, 2011)

Notwithstanding the lessee's claim that it never received and accepted the equipment which was the subject of a lease, the court grants the summary judgment motion of the original lessor's assignee. The court rejects the lessee's arguments that the assignee was not entitled to enforce the lease's hell or high water clause because the assignee allegedly was aware of a license agreement between the lessee and the equipment vendor and therefore was not a holder in due course. For one thing, holder in due course status is relevant to enforcement of waivers of defenses – not hell or high water provisions. Secondly, the lease was a lease of equipment, not of services, and there was no evidence that the assignee had knowledge of any lessee defenses with respect to that lease. In addition, the lessee had made monthly payments under the lease for over three years and thus was estopped from asserting defenses against an assignee that had relied on the lessee having signed the lease and an acceptance certificate.

C & J Vantage Leasing Co. v. Wolfe, 2011 WL 7434633 (Iowa Sup.Ct. March 4, 2011)

In another of a line of cases involving financing of golf course beverage carts, the Iowa Supreme Court reverses lower court grants of summary judgment in favor the assignee of the lease used for the financing. When Royal Links, the company that was paying the lessee for advertising on the cart (in the same amounts owed by the lessee under the lease), stopped making those payments, the lessee ceased making payments under its lease. After determining that the $1 option lease was a security agreement under the law, the court holds that the hell or high water provision in the agreement is nevertheless enforceable – rejecting any notion that such provisions are only enforceable in the context of a true lease. The court then notes that the lease did not have a waiver of defenses provision, but then considers whether an assignee must be a holder in due course to enforce a hell or high water payment obligation. Though perhaps not as clearly stated as it could have been, the court's position is that such is not necessary (these two types of provisions, recognized as distinct by the court, are quite different with respect to the requirements on the parties seeking to enforce them – if there is no waiver of defenses provision, the question of holder in due course status simply does not arise). Since the assignee in this case could only stand in the shoes of the original lessor, when the court concludes (i) that there are material issues of fact regarding whether Royal Links was acting as an agent for the original lessor when Royal Links allegedly misled the lessee and (ii) that an integration clause in the lease does not preclude the introduction of evidence of such misrepresentations by Royal Links, the court finds that it must deny the assignee summary judgment. It should be noted that the outcome would likely have been different had the lease contained a waiver of defenses.

Artists & Framers, Inc. v. Lease Finance Group, LLC, 2011 WL 345883 (U.S.Dist. Ct. D.Md. Feb.2, 2011)(slip copy)

This decision denies a lessor's motion to dismiss a lessee's suit claiming that the lessee had no obligation to make payments under what was stated to be a non-cancellable lease. The court is clearly sympathetic to the lessee's claims that an alleged agent for the lessor grossly misled the lessee regarding the nature – in particular, the possibility of cancellation – of a possibly illegible lease of equipment for processing credit cards. The lessee's allegations, if ultimately proven to be true, provide an example of how lessors ought not to induce customers to sign leases.

GreatAmerica Leasing Corp. v. Davis-Lynch, Inc., 2011 WL 167248 (U.S.Dist.Ct. N.D.Iowa Jan. 19, 2011)(slip copy)

Pursuant to a Private Label Vendor Agreement, the plaintiff purchased leases on a non-notification basis from a vendor of office equipment. After the defendant/lessee stopped making lease payments to the plaintiff (who billed the lessee in the name of the vendor), claiming that the equipment vendor had engaged in fraudulent activity, the plaintiff filed a motion for summary judgment. In granting the motion, the court has occasion to discuss the nature of both the hell or high water and waiver of defenses provisions in the lease. Although it distinguishes between the two types of provisions and correctly indicates that a waiver of defenses can only be enforced by an assignee qualifying as a holder in due course, the court makes some other statements that are potentially confusing. For example, the court states that the effect of a hell or high water clause is generally to make the assignee of a lease a "quasi holder in due course" and also notes that a defense of fraud in the factum is a defense against a contract that includes a hell or high water provision. What those statements fail to recognize is that although even a lesser kind of fraud – fraud in the inducement – may be a defense to enforcement of a hell or high water clause by the original lessor, such a defense should not be available against enforcement of a waiver of defenses by an assignee qualifying as a holder in due course. In other words, a hell or high water clause in the absence of a waiver of defenses will not itself place an assignee in the position of a holder in due course who can be defeated only by the most egregious type of fraud. Although not discussed in this decision, it can be noted that the fact that the lessee did not have any notice of the assignment until it defaulted had no effect on the assignee's ability to enforce the waiver of defenses.

<u>Gaia Leasing LLC v. Wendelta, Inc., 2010 WL 5421324 (U.S. Dist Ct. D.Minn. Dec. 23, 2010)</u>

This case should motivate the assignees of equipment lessors to be sure they obtain and understand all of the documents related to the lease transaction being assigned. Although the lease in this case was not an Article 2A finance lease (the lessor had supplied the goods), it did contain a waiver of defenses (which the court confusingly refers to as a "hell-or-high water" clause). Nevertheless, the transaction also included a document called the Condition Precedent – the satisfaction of which was to be the trigger for the lessee's obligations to the lessor. Since the lessor was not able to satisfy the terms of the Condition Precedent, the lessee was never obligated to begin making payments under the lease to the assignee, against whom the court grants summary judgment.

<u>Direct Capital Corp. v. Babatunde Osunbayo, 104546/98, NYLJ 1202472562632, at *1 (Civ., RI, September 21, 2010)</u>

The court grants a lessor's motion for summary judgment against a lessee in default, finding that the lease satisfied the requirements for an Article 2A finance lease and that the lessee had accepted the equipment. Notwithstanding the lessee's defense that the equipment vendor had failed to disclose certain information about the equipment, the court holds that the lessor had only arranged for the financing and was not responsible in any way for the equipment.

<u>C & J Vantage Leasing Co. v. Outlook Farm Golf Club, LLC, 784 N.W.2d 753 (Iowa 2010)</u>

This is an appeal to Iowa's highest court of a decision involving facts common to a number of other cases – leases of beverage carts to golf courses with respect to which an advertising company had represented that advertising on the carts would pay for the costs of leasing. When the advertising company stopped paying, the lessee stopped paying the lessor or assignee of the lessor, and suit was brought against the lessee. The Iowa Supreme Court reverses the lower court's summary judgment against the lessee -- finding that there were genuine issues of material fact regarding whether the advertising company, which may have fraudulently induced the lessee to enter into the lease, had acted as agent for the lessor. The problem with this decision is its apparent confusion of a defense of fraudulent misrepresentation concerning facts regarding the lease transaction (sometimes referred to simply as fraud in the inducement) – which could be a valid defense to paying the lessor under the hell or high water clause contained in the lease – with the type of fraud that afforded the lessee neither the knowledge nor reasonable opportunity to learn of the essential character of the transaction (sometimes referred to as fraud in factum) – which is one of the few defenses to enforcement by a lessor's assignee of a waiver of defenses contained in the lease. The court does not appear to understand the significant distinction between the legal rights of the lessor, on the one hand, and its assignee, on the other: "…defenses to contract formation, such as fraud in the inducement, may be asserted even where a party has agreed to a hell-or-high water clause or a waiver-of-defenses provision." Other elements of the decision concerning some common practices in vendor-related business (e.g., placing the vendor's logo on the lease, having the vendor arrange for the signing of the lease) and concerning the distinction between leases and secured transactions could also stand further and better thought.

<u>Edison Generator Exchange, Inc. v. Quality Business Communications, Inc., 2010 WL 2696637 (N.J.Super.App.Div. July 1, 2010)(unpublished opinion – check rules before citing)</u>

This decision affirms a summary judgment granted by the trial court against a lessee alleging, among other things, that the equipment was not "correct" and did not perform properly. Since the lease was correctly found to be a finance lease as defined in Article 2A and because the lessee had signed a delivery and acceptance certificate, the court holds that the lessee could not successfully raise these defenses to making all its payments.

<u>Jet Acceptance Corp. v. Quest Mexicana, S.A. DE C.V., 2010 WL 2651641 (N.Y.Sup. June 23, 2010)(Unreported disposition - will not appear in a printed volume)</u>

This case involves four identical leases for commercial aircraft. Although only one of the aircraft was accepted by the lessee as evidenced by its signing an acceptance certificate, the court grants the lessor's motion summary judgment as to the lessee's liability for all four leases – based primarily on the hell or high water clauses contained in the leases. While the details for finding liability on the other three leases are not made totally clear, a factor probably influencing this decision was the fact that the lessor had invested nearly eight million dollars readying the four aircraft for delivery to the lessee – a fact probably contemplated in the lease agreements.

<u>Leaf Financial Corp. v. ACS Services, Inc., 2010 WL 1740884 (Del.Super. April 30, 2010)(unpublished opinion, check court rules before citing)</u>

The court grants a lessor's motion for summary judgment against a lessee for breach of a lease. The court finds that the statutory requirements for creating a finance lease exist in this case; but also goes on to cite an Article 2A Official Comment stating that even if all aspects of the statutory definition are not met, the parties may create such a lease by agreement. The court rejects the lessee's argument that the lessor had established a partnership with the vendor. The court also noted that the lessee could not rely on certain defenses under Article 2A because the lease form had the lessee waive any rights and remedies it might have under 2A-508 through 2A-522. One potentially interesting point not mentioned in this decision (possibly not really an issue under the less-than-perfectly-clear facts of this case or, even if an issue, not raised by the lessee or the court) was whether the transaction qualified as a lease under Article 2A at all. While the decision sometimes refers to goods, the "System" that was the subject of the contract appears to be comprised primarily of software. If this system were to have been all software (or perhaps even primarily software), the contract would not qualify as a lease of goods governed by Article 2A.

Faust Printing, Inc. v. Man Capital Corp., 2009 WL 5210847 (U.S.Dist.Ct. N.D.Ill. December 23, 2009)

After the lessee executed a lease with a financing company affiliate of a manufacturer of printing presses (there apparently was some confusion on the part of the lessee as to which company was to sign the lease as lessor) and received a printing press that allegedly did not function as expected, the lessee brought a fraud action against both the manufacturer and its finance company claiming that it had been fraudulently induced to sign the lease with representations that the lessee would have recourse against the manufacturer in the event of problems with the press. This court denies a summary judgment motion by the defendants, which motion argued that the hell or high water clause in the lease precluded a fraudulent inducement claim. Without any explanation, the court mentions a previous summary judgment opinion holding that the hell or high water clause was preceded by "ambiguous" language. In the "Net Lease" language quoted in the opinion, the only such language seems to be "Except as otherwise specifically provided herein or in any Schedule hereto," but the court fails to point to any provision elsewhere which might modify the lessee's absolute and unconditional obligations.

Lyon Financial Services, Inc. v. Oxford Maxillofacial Surgery, Inc., 2009 WL 2170999 (U.S.Dist.Ct. D.Minn. July 17, 2009)

Although an equipment vendor's representative (alleged by the lessee to have made various misrepresentations regarding the equipment) assisted the lessee in obtaining financing, the lessee did not demonstrate an agency relationship between the rep and the lessor. The court finds here that summary judgment against the lessee on the issue of liability with regard to the finance lease at issue is appropriate. (See discussion below under Measures of Lessors' Damages with regard to the lessor's request for damages.)

De Lage Landen Financial Services, Inc. v. Viewpoint Computer Animation, Inc., 2009 WL 678635 (U.S.Dist.Ct. E.D.Pa. March 11, 2009) and 2009 WL 902365 (U.S.Dist.Ct. E.D.Pa. April 1, 2009)

These two cases (the later of which does not involve the lessor/plaintiff directly) illustrate issues that can arise when a lessor becomes part of a program involving not only the leasing of equipment, but also the provision of services by third parties. Notwithstanding a rental agreement that clearly disclaimed responsibility on the part of the lessor for the performance of services related to the equipment being leased, the court refuses to decide many of the legal issues facing the lessor without further factual investigation regarding the lessor's role in the program and the possible connection of other program documents (to which the lessor was not a party) to the rental agreement.

The customer had signed the rental agreement as part of a program devised by the service provider (with help from the equipment manufacturer) to enable the customer to achieve promised substantial savings on its telephone and internet costs. When the service provider became insolvent and stopped providing those services, the customer stopped making payments on the rental agreement, claiming that it had a right to do so under its agreement with the service provider and claiming that the lessor was part of a conspiracy to commit fraud on it and other similarly situated customers. Indicating, among other things, that it could not determine yet what law to apply (the rental agreement was to be governed by Pennsylvania law while the customer's agreement with the service provider was to be governed by Texas law), the court states, "…this Court cannot conclude at this stage without discovery whether the [a]greements should be construed together and therefore which law should apply."

<u>The People ex rel. The Board of Trustees of Chicago State University v. Siemens Building Technologies, Inc., 900 N.E.2d 414 (Ill.App. 2008)</u>

While this case focuses more on the interpretation of a particular state statute – the Illinois Public University Energy Conservation Act – than on leasing law generally, it may be of interest to those contemplating financing for public entities. In connection with its attempt to obtain energy savings using equipment installed by Siemens Building Technologies, the state university entered into a master lease agreement with Siemens Financial Services (though the agreement is called a "lease," the parties and court consider the substance of the transaction to be a security agreement). One of the issues decided here is whether the aforementioned Act prevents the use of "hell or high water" financing provisions under which the university must pay a lessor/financer for energy conservation measures even if the measures do not produce a savings to the university. In affirming a lower court decision that the Act does not prevent such a financing provision, this court states, "If we presume for purposes of this question that third-party financing was contemplated by the legislature, then the commercial reality of this type of lease makes it clear that the risk as between the lessee and lessor for defective equipment is to be placed on the lessee who has recourse against the supplier."

<u>OFC Capital v. AT Publishing, Inc., 2008 WL 4962942 (U.S.Ct.App. 9th Cir. Nov. 20, 2008) (not for publication in Federal Reporter; not precedent except as provided by Ninth Circuit rules)</u>

After a District Court in Alaska had ruled in favor of the lessor, holding among other things that a finance lessor has no obligation to provide conforming equipment and that the lessee had no right to revoke acceptance, the Ninth Circuit affirms. In particular, the decision indicates that since the lessee realized the equipment was nonconforming before acceptance, it could not rely on 2A-517, which requires that the lessee did not discover the nonconformity as a condition of valid revocation in the case of a finance lease (in addition to the condition – not referenced by the court – that the lessee's acceptance had been reasonably induced by the lessor).

In re Rafter Seven Ranches L.P. (Rafter Ranches L.P. v. C.H. Brown Company), 2008 WL 4787106 (U.S.Ct.App. 10th Cir. Nov. 4, 2008)

A divided Tenth Circuit panel affirms the decisions of a bankruptcy court and bankruptcy appellate panel that a lessee of irrigation sprinkler systems was liable for unpaid rentals on its leases despite the facts that the systems supplied by a company chosen by the lessee did not conform to specifications of the equipment in the leases and, in the case of some of the equipment, was never used after the lessee inspected it and determined it to be "junk." The primary basis for finding liability with respect to the unused equipment was that the lessee failed to notify the lessor of its rejection of the equipment in a reasonable period of time as required by Article 2A – letting the equipment sit in the fields for six weeks before notifying the lessor. The dissent argues, to the contrary, that a reasonable opportunity to inspect should include an opportunity to test, which in the case of the "junk" would have been futile. The majority had also noted that the lessee authorized the lessor to pay the supplier before the equipment was delivered and agreed that it would look only to the supplier in the event the equipment was defective. Whether such promises would obligate the lessee to make all lease payments owing under the leases – under contract law if not under Article 2A finance lease provisions requiring a reasonable opportunity to inspect – even if prompt notice of nonconformity was given, is not made clear.

Frontier Leasing Corp. v. Bowlers Country Club, Inc., 2008 WL 4725183 (Iowa App. October 29, 2008)(final publication decision pending)

In a case with a factual background similar to, and decided by the same court as, the *C and J Leasing Corp. v. Hendren Golf Management* case decided in January of 2007, this appellate court affirms a lower court's grant of summary judgment for the lessor based upon the "hell and high water" provision in the lease notwithstanding a vendor's financial inability to pay for advertising on golf carts in amounts sufficient for the lessee to make the payments owing on the lease. The court notes that since "hell and high water" provisions are enforceable in Iowa and since the lessee had every opportunity to read the lease, there was no genuine issue of material fact to support a claim that the lease was unconscionable.

Fieldtech Avionics & Instruments, Inc. v. Component Control.Com, Inc., 262 S.W.3d 813 (Tex.App. 2008)

On the surface, the part of this case deciding the dispute between the lessor and lessee (lessee claims against a vendor were also being decided) seems to be a straightforward application of Article 2A statutory finance lease rules; however, it does not appear that the transaction qualifies for such treatment. The lessor is said to have acquired software from a vendor and then to have leased it to the lessee. Apart from questions regarding ownership of and possessory rights to the software (i.e., did the lessor itself have any right to transfer possession and use of the software to the lessee – as opposed to merely advancing to the vendor the proceeds of a loan to the lessee as payment for the lessee's right to use the software), Article 2A defines "lease" as a transfer of the right to possession and use of *goods* and "goods" is defined to include movable things and fixtures, but not information. Although, therefore, Article 2A would not appear to apply to this transaction, both the lessor and lessee agreed that the lease between them was a statutory finance lease – which probably explains the court's application of Article 2A law. Since the lease otherwise met the statutory requirements for being a statutory finance lease, the lessee's unhappiness with the performance of the software would generally not affect its unconditional obligation to make all rental payments. The lessee argued, however, that it had revoked acceptance of the software and that, according to an Official Comment to 2A-407, a lessee's irrevocable obligation to pay under a finance lease remains subject to the lessee's revocation of acceptance if the lessee has accepted without discovery of the nonconformity and the lessee's acceptance was reasonably induced by the lessor's assurances [see 2A-517(1)(b), numbered slightly differently in Texas]. Since the lease, however, also contained a general waiver of the lessee's rights under a number of sections of Article 2A, including 2A-517, the court affirms a lower court's finding of summary judgment in favor of the lessor. An interesting question that did not need to be decided, given the lessee's waivers, is the likelihood of a lessor under a finance lease giving its lessee assurances regarding the goods being leased if that lessor genuinely played no role in the selection, manufacture or supply of the goods.

<u>IFC Credit Corp. v. Burton Industries, Inc., 536 F.3d 610 (7th Cir. 2008)</u>

A NorVergence lessee had signed both NorVergence's standard Equipment Rental Agreement as well as another NorVergence-generated document entitled "Hardware Application." Notwithstanding the lease's provisions for "hell or high water" payment obligations, a waiver of defenses in favor of assignees, and – of special relevance to this decision – a merger clause stating that the lease terms were the complete and exclusive statement of the agreement and that terms not contained in the lease would not be legally enforced, the Seventh Circuit found that the Hardware Application's provision that the lease was not binding until the equipment was installed was applicable (as a contemporaneous written document whose admission into evidence did not violate Illinois's parol evidence rule) to the facts of this case. Although the equipment was delivered and the lessee signed a delivery and acceptance receipt, since the equipment was never installed, the lease was held never to have existed, leaving the assignee with no legal right to collect. Whether or not the facts of this case are common to other NorVergence lease situations, this ruling should give pause to any assignee of any well-drafted lease which has not somehow assured itself that the lessee had not signed some other document simultaneously that could call into question the existence of the lease.

<u>National City Commerce Capital Corp. v. Blackledge Country Club, Inc., 2008 WL 2797010 (Conn.Super. June 25, 2008)(unpublished opinion)</u>

This brief denial of a lessor's motion for summary judgment illustrates the potential difficulty of enforcing even a "hell or high water" lease when there exists a service agreement to be fulfilled by other parties that is necessary for the proper functioning of the equipment. Although the facts are not entirely clear, the lessor may have taken this lease of GPS equipment to be used at the defendant's golf course by assignment from a company who had relations with other companies responsible for installing and servicing the equipment. The court denied the lessor's summary judgment motion before a factual examination of the defendant's claims concerning the purported agency relationship between the plaintiff and parties that were alleged to have improperly serviced the equipment and/or alleged to have improperly induced the defendant to sign the lease.

CN Funding, LLC v. The Ensig Group, Ltd., 2008 WL 2340660 (N.Y.App.Div. June 10, 2008)

This brief decision partially overturns a questionable trial court decision holding that a lease was not enforceable due to lack of consideration since the equipment had not been delivered by a vendor that had filed for bankruptcy. The appellate court notes that although the lease did not qualify as an Article 2A finance lease, the parties had agreed to treat it as such and the lessee agreed to pay the lessor notwithstanding any failure by the vendor to deliver the equipment. This decision, however, declines to award summary judgment to the lessor since the record presented an issue of fact as to whether the lessor was aware of the vendor's bankruptcy before signing the lease, in which case the lessee may have a defense to payment.

Xerox Corporation v. Digital Express Graphic, LLC, 2008 WL 2278492 (Tenn.Ct.App. May 22, 2008)(slip copy)

Although the lease in this case does not qualify as an Article 2A finance lease and although the lessor had entered into a maintenance agreement with the lessee in connection with the lease, the decision illustrates the importance of employing lease provisions whose enforceability is supported by Article 2A. This decision upholds the lessor's right to restrict the lessee to an exclusive remedy – replacement of the equipment by the lessor in the event the lessor was unable to maintain the equipment – and to enforce its remedy of acceleration of the remaining balance in the event the lessee defaulted in its scheduled payments. The decision also finds that the terms of the lease adequately disclaimed implied warranties of merchantability (in this instance the equipment was not sold by the lessor in the ordinary course of its business and had been selected by the lessee) and fitness for a particular purpose.

Popular Leasing USA, Inc. v. Mortgage Sense, Inc., 2008 WL 1952380 (Cal.App. May 6, 2008) (not reported in Cal.Reptr.3d)

Although this decision may not be able to be cited as precedent (California rules of court must be consulted), it strongly affirms a NorVergence assignee's ability to rely on a waiver of defenses clause – even in the face of lessees' claims (accepted by the trial court, whose decision is reversed here) that the equipment was never installed and thus the lease allegedly never commenced. The court cites in particular its own 2006 decision in *Wells Fargo Bank Minnesota N.A. v. B.C.B.U.* that explained the commercial importance of enforcing such waiver of defense clauses. The decision also highlights the difference between (i) the type of fraud that may have induced the lessees to sign leases and certificates of acceptance even before the equipment had been installed and (ii) the only type of fraud available as a defense against a holder in due course (in which the signer had neither knowledge nor opportunity to learn of the character and essential terms of the instrument it was signing).

Pludeman v. Northern Leasing Systems, Inc., 2008 WL 1944567 (N.Y.Ct.App. May 6, 2008) (subject to revision before publication in the New York Reports)

In this split decision by New York's highest court, the majority finds that a number of small business owners have sufficiently pleaded, under New York law, a cause of action for fraud against individuals comprising the lessor's top management. While this decision does not directly address the liability of the lessees to make payments under their allegedly fraudulently procured leases, it interestingly highlights practices of the salespeople employed by the lessor's equipment vendor that could conceivably come back to haunt the lessor and even its individual managers: concealing subsequent pages of the lease containing important provisions while having the lessee sign the front page; rushing the lessees into signing; and not providing the lessees with a copy of the lease (unless they called a 1-800 phone number). The dissenting judge points out that the first page of the lease indicates that it is "Page 1 of 4;" that most people entering into relatively small transactions (e.g., a car rental) do not bother to read the entire agreement; that the majority's real reasons for objecting to the inside pages of the lease were apparently not that they were concealed, but that the provisions there were arguably unduly harsh; and that the salespeople who presented the leases to the lessees for signature were not employees of the lessor.

In re NorVergence, Inc. (Diversified Aerospace Services, LLC v. IFC Credit Corp.), 2008 WL1901114 (Bankr.D.N.J. April 25, 2008)

A number of lessees under NorVergence leases brought an action in the NorVergence bankruptcy proceedings against IFC Credit, which had been assigned the leases by NorVergence, to have the leases found void and unenforceable. In this decision, the bankruptcy court finds that it does not have jurisdiction to hear the lessees' claims due to the fact that NorVergence's bankruptcy estate is administratively insolvent. If the lessees were successful in this proceeding, IFC would have an indemnification claim against NorVergence based upon its agreement with NorVergence. Since, however, the bankruptcy estate is administratively insolvent, the outcome of the lessees' claims could have no effect on the administration of the estate and thus jurisdiction in the bankruptcy proceedings does not exist.

IFC Credit Corporation v. Specialty Optical Systems, Inc., 252 S.W.3d 761 (Tex.App. 2008)

Although vacating a trial court's order of sanctions (including ordering that letters regarding the assignee's agreements with NorVergence be sent to all other NorVergence lessees against which the assignee had made claims) against this NorVergence assignee, this appellate court affirms the trial court's holdings that (i) the lessee had been fraudulently induced by NorVergence into signing its lease (when NorVergence falsely promised to see that a contract with a competing telecommunications provider would be cancelled before countersigning the lease) – making the lease unenforceable (presumably by NorVergence in particular, though the decision does not make this clear) – and (ii) IFC was not entitled to holder in due course status with regard to enforcing the lease's waiver of defenses provision because it was aware that, among other things, NorVergence was promising lessees savings in connection with its leases with no intent to deliver.

Federal Trade Commission v. IFC Credit Corp., 2008 WL_1001154 (U.S.Dist.Ct. N.D.Ill. April 9, 2008)

In this opinion by a Magistrate Judge, the court grants a NorVergence assignee's motion to dismiss one count of the FTC's complaint – seeking to deny enforceability of the floating forum selection clause found in the leases acquired by such assignee (such holding being consistent with the Seventh Circuit's decision in *Aliano Bros.* as noted in the Forum Selection section below) – but denies IFC's motions on two other counts. At this very early stage in the lawsuit, the court appears to be quite deferential to the FTC's arguments against IFC. Although IFC argued that the lessees – small businesses and religious and other not-for-profit organizations – were not "consumers" under the Federal Trade Commission Act, the court (indicating that this issue was one of first impression under the FTCA) was inclined to defer to the agency's interpretation of the statute, which interpretation included such lessees as "consumers." The court also lists a good number of instances of alleged complicity by IFC in NorVergence's fraudulent scheme sufficient to warrant a trial. Although difficult to tell for certain, some of the statements made by the court may betray a lack of understanding of financing industry practice. For example, the court refers to IFC's purchase of leases "at a discount" – perhaps implying that IFC knew it was purchasing questionable paper – when what IFC paid may have merely equaled the present value of an aggregate payment steam, computed using an ordinary and reasonable discount rate of interest. In addition, the facts that (i) the lessees appear to have been obligated by the waiver of defense clauses in the leases to continue paying IFC even if the lessees had defenses to paying NorVergence and (ii) IFC could argue that the leases were stand-alone equipment leases rather than a part of an integrated package of services, were both characterized as parts of a "scheme." In any event, to the extent that an assignee can be proven to have been aware of or part of a deceptive and fraudulent scheme, the UCC would not permit such an assignee to take advantage of a waiver of defenses clause – whether or not the lessees are justifiably characterized as consumers.

Dolphin Capital Corp. v. Schroeder, 2008 WL 630602 (Mo.App. March 11, 2008)

In what may be the latest tactic employed by NorVergence lessees to avoid having to pay assignees of NorVergence leases (see also *OFC Capital v. Schmidtlein* in the Forum Selection section below), the seven lessees in this consolidated appeal had obtained dismissals of the cases by the assignee in the lower court – which dismissal is affirmed by this court of appeals – after convincing the court that NorVergence was an indispensable party to the action. Since NorVergence had been prevented by its bankruptcy from joining in pending litigation by its customers, this Missouri court needed to decide whether proceeding in the "necessary" party's absence would unduly prejudice the lessees. The court finds that the lessees' burden of proving fraud in the factum and fraud in the inducement without NorVergence is too great to permit the suit to proceed. One influence on the court appears to be "the disturbing inferences arising from the actions of Dolphin and NorVergence" – including the fact that Dolphin continued to purchase leases from NorVergence after learning of numerous immediate complaints by other NorVergence lessees against whom Dolphin had already instituted collection actions. Aside from mentioning such suspicions concerning Dolphin, the court does not discuss the distinction between fraud in the factum and fraud in the inducement, and the potential effect of such a distinction on the assignee's right to collect.

Wells Fargo Financial Leasing, Inc. v. Mountain Rentals of Gatlinburg, Inc., 2008 WL 199855 (Tenn.Ct.App. Jan. 24, 2008)(not reported in S.W.3d; see Tennessee court of appeals rules regarding citation)

In affirming a lower court summary judgment in favor of a lessor's assignee, the Court of Appeals cites a number of cases (including a number on this What's New in the Law list) that either enforce the "hell or high water" nature of a lessee's obligations under an Article 2A finance lease or enforce a lease's waiver of defenses provisions – notwithstanding the lessee's unhappiness with the equipment and with the original lessor's maintenance of such equipment. In holding that this type of finance lease is not unconscionable or inequitable, the court instructively cites a couple UCC treatises while stating, "Normally, a lender who enables a buyer to acquire the goods is not subject to a refusal by the buyer to repay the loan if the goods are not what the buyer expected. Similarly, a finance lessee cannot refuse to pay a lessor an agreed payment….The parties entered into a financial transaction in which the lessor is lending money and dealing largely in paper, not goods….The statutory scheme of finance leases benefits both parties. The lessor gains certainty and security for its extension of credit. The lessee forgoes it warranty claims against the lessor but becomes a statutory third party beneficiary of the supply contract between the manufacturer or other supplier and the lessor."

Republic Bank v. AMTEC Precision Products, 2007 WL 2220521 (U.S.Dist Ct. D.Utah July 27, 2007)

Although not a decision predicated upon principles of leasing law or waiver of defenses, this case illustrates the absolute obligation of a debtor/lessee under a progress payment agreement intended to lead to a leasing arrangement. The debtor/lessee had signed both a master progress payment agreement and a master lease agreement pursuant to terms under which the former obligations would be transformed into the latter only upon the execution and delivery of a "final" acceptance and delivery certificate. After a number of progress payments had been made to vendors, with respect to which the debtor/lessee executed "partial" acceptance and delivery certificates, the original lessor/lender (apparently servicing the transaction on behalf of its assignee) demanded repayment in full due to an alleged default under the documents related to the debtor/lessee's deteriorating financial condition. The debtor/lessee attempted to argue that the last executed partial acceptance and delivery certificate should have been treated as a final certificate and therefore that its future obligations should consist only of ordinary periodic payment obligations under the lease. This court holds, however, that the documentation does not support such a conclusion and that progress payment obligations and related charges could be accelerated.

Key Equipment Finance, Inc. v. South Shore Imaging, Inc., 835 N.Y.S.2d 268 (App.Div. 2007)

This court overturns a lower court's holding that a lease of imaging equipment was unenforceable because its print was less than eight points in depth – in violation of a

New York statute. The appellate court notes that the statute applies by its terms only to printed contracts involving either (i) consumer transactions for personal, family or household purposes or (ii) residential leases, whereas this equipment was medical equipment being used by a corporate lessee for business purposes.

C and J Leasing Corp. v. Hendren Golf Management, Inc., 2007 WL 257955 (Iowa App. January 31, 2007)

This appellate court reverses a lower court determination (about one year earlier) that a lease of two golf course beverage carts was unconscionable. Finding that the lessee was not unsophisticated and that the type of “hell or high water” clause found in the lease is valid and enforceable in Iowa, this court finds no evidence of either procedural or substantive unconscionability. After agreeing with the lower court (and disagreeing with the plaintiff) that there was no evidence of an agency relationship between the lessor and the vendor (which became financially unable to continue paying the lessee money for advertising that had been sufficient for the lessee to make its payments under the lease), this court also holds (contrary to the lower court, but consistent with commentary in Article 2A) that whether or not the lease actually qualified (as stated in the lease) as a “finance lease,” the parties could achieve the same result by agreement.

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

A Florida appellate court reverses the lower court's dismissal of a claim by the state attorney general under the Florida Deceptive and Unfair Trade Practices Act against seven assignees of NorVergence leases. While not reaching an issue raised by the attorney general -- that such common lease provisions as "hell or high water" payment obligations, waivers of defenses, disclaimers of warranties and floating forum selection clauses are themselves violations of that Act -- this court finds enough other potential issues to reinstate the claim. The decision holds that the trial court focused too narrowly on the legality of the aforementioned lease provisions while ignoring other allegations concerning the overvaluing of the equipment, disparities in rental costs for the same equipment, and burying the rental agreements within a stack of documents referred to as an “application.” The decision also faults the trial court for using the UCC definition of “consumer lease” (i.e., a lease of goods to be used primarily for personal, family or household purposes) rather than the broader definition of “consumer” in the FDUTPA.

Key Equipment Finance, Inc. v. Pioneer Transportation, Ltd., 2007 WL 118007 (U.S.Dist.Ct. W.D.Wisc. January 17, 2007)

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.

<u>Custom Data Solutions, Inc. v. Preferred Capital, Inc., 2006 WL 3734660 (Mich.App. December 19, 2006)(unpublished)</u>

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 plantiff'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.

<u>IFC Credit Corp. v. United Business & Industrial Federal Credit Union, 2006 WL 3692403 (U.S.Dist.Ct. N.D.Ill. Dec. 11, 2006)</u>

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. Such finding was, however, reversed by the U.S. Court of Appeals for the Seventh Circuit (2008 WL 126552 – see the summary in the Waivers of Trial by Jury section below), which appellate decision remanded the case to the District Court and included some pointed remarks about the difference between fraud in the factum and fraud in the inducement.

<u>Snap-on Credit, LLC v. M&B Auto, 2006 WL 3873336 (N.Y.CityCt. December 4, 2006)(unpublished)</u>

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.

<u>De Lage Landen Financial Services, Inc. v. Cricket's Termite Control, Inc., 942 So.2d 1001 (Fla.App. 2006)</u>

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.

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.

United States Achievement Academy, LLC v. Pitney Bowes, Inc., 2006 WL 2990140 (U.S.Dist.Ct. E.D.Ky. Oct. 18, 2006)

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.

Direct Capital Corporation v. New ABI Inc., 822 N.Y.S.2d 684 (N.Y.Sup.Ct 2006)

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.

Wells Fargo Bank Minnesota, National Association v. B.C.B.U., 49 Cal.Rptr.3d 324 (Cal.App. 2006)

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."

Liberty Bank, F.S.B. v. Diamond Paint and Supply, Inc., 2006 WL 2691719 (Iowa App. Sept. 21. 2006)

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.

Lyon Financial Services, Inc. v. Clear Sky MRI and Diagnostic Centers, Inc., 2006 WL 2338407 (U.S.Dist.Ct. E.D.Pa. August 10, 2006)

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.

Citicorp Leasing, Inc. v. Kusher Family Limited Partnership, 2006 WL 1982757 (U.S.Dist.Ct. S.D.N.Y. July 14, 2006)

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.

IFC Credit Corporaton v. Aliano Brothers General Contractors, Inc., 2006 WL 1843387 (U.S.Dist.Ct. N.D.Ill. June 28, 2006)

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).

William Palumbo Insurance Agency, Inc. v. Irwin Business Finance Corporation and IFC Credit Corporation, 2006 WL 1718280 (Mass.Super. May 15, 2006)

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.

Anderson v. Leasecomm Corporation, 2006 WL 1314128 (Tex.App. May 15, 2006)

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).

IFC Credit Corporation v. Century Realty Funds, Inc., 2006 WL 435695 (U.S.Dist.Ct. M.D.Fla. February 21, 2006)

In a case brought by an assignee of a NorVergence lease, which case had been transferred from a District Court in Illinois (where it had been initially brought by the assignee) to Florida (the defendant's principal place of business), this court denies the plaintiff's motions to dismiss defendant's counterclaims and to strike defendant's affirmative defenses by stating that all the defendant needed to do was plead a claim for fraud and/or fraudulent misrepresentation under the applicable law. It is not clear whether the court's conclusions rely on the defendant's claims of assignee participation in the fraud or whether allegations of *ab initio* illegality of the contract as fraudulently induced only by the original lessor would have been sufficient.

Advancmed, LLC v. Pitney Bowes Credit Corporation, 2006 WL 36901 (U.S.Dist.Ct. E.D.Ky January 4, 2006)

The court holds that an Article 2A finance lease entered into by the financing subsidiary of a vendor as lessor was enforceable against the lessee notwithstanding the lessee's unhappiness with the equipment and services to be provided by the vendor. The decision emphasizes the legal difference between the vendor and the lessor and indicates how the lease clearly distinguishes the rights and obligations of the lessor from those of the party that supplied the equipment.

De Lage Landen Financial Services, Inc. v. M.B. Management Co., Inc., 2005 WL 3376813 (Pa.Super. Dec. 13, 2005)

When a lessee attempted to escape its payment obligations under a lease of a copier that did not function properly, this court overturns a lower court's decision in favor of the lessee, noting that the lessee could not avoid the provisions of the lease (which the lessee admittedly had not read thoroughly) which indicated that the lease was a finance lease under Article 2A. This court cites an Official Comment to the definition of "finance lease" which states that the parties may achieve the same result by agreement even if not all aspects of the definition are satisfied.

Wells Fargo Bank Minnesota, National Association v. CD Video, Inc., 802 N.Y.S.2d 423 (App.Div. 2005)

This decision affirms a lower court's grant of summary judgment in favor of an assignee of an equipment lease containing a waiver of defenses, stating that a good-faith, for-value assignee was not required to prove the original lessor's performance as a condition of enforcing the lessee's obligations.

Wells Fargo Bank, N.A. v. BrooksAmerica Mortgage Corporation, 419 F.3d 107 (2nd Cir. 2005)

In a case in which the lessee entered into a sale-leaseback of computer equipment but was never paid by the lessor, the U.S. District Court for the Southern District of New York granted a motion for summary judgment by the lessor's assignee for past due payments and a declaration that the lessee remains obligated for remaining payments due under the lease (2004 WL 2072358). The district court decision strongly supported the enforcement of waiver of defense and "hell or high water" provisions – whether or not the lease qualifies as a true lease governed by Article 2A. The Second Circuit affirms; however, its reasoning highlights the sophistication of the lessee without indicating the significance of that characterization.

Lyon Financial Services, Inc. v. Woodlake Imaging, LLC, 2005 WL 331695 (U.S.Dist.Ct. E.D.Pa. Feb. 9, 2005)

In deciding a motion by an assignee of a lessor to dismiss certain counterclaims and defenses of the lessee, while the court finds that it cannot determine the outcome without an evidentiary record, it does have occasion to comment upon Article 2A's finance lease "hell or high water" provisions and Article 9's waiver of defense provisions. The court strongly endorses a number of examples of enforcement of "hell or high water" provisions including one that notes how important such provisions are for the leasing industry. However, the court also seems more hesitant to enforce such provisions than the District Court in the *BrooksAmerica* case discussed above if the purported lease turns out instead to create a security interest. The court also makes note of the criteria given in Article 9 for an assignee to enforce a waiver of defense provision. It is important to remember that while often having the same effect, these two different types of provisions emanate from different parts of the UCC and may need to be distinguished.

Sony Financial Services, LLC v. Multi Video Group, Ltd., 2005 WL 91310 (U.S.Dist.Ct. S.D.N.Y. Jan. 18, 2005), report and recommendation adopted by 2005 WL 309753 (U.S.Dist.Ct. S.D.N.Y. Feb. 9, 2005)

A lessor's summary judgment motion is granted notwithstanding the lessee's claims that equipment and services to be provided by an affiliate of the lessor were not as promised. The court cited language in the lease clearly distinguishing between the lessor and the equipment vendor, and cited cases enforcing Article 2A finance leases in which the lessor was an affiliate of the equipment vendor.

Eureka Broadband Corporation v. Wentworth Leasing Corporation, 400 F.3d 62 (1st Cir. 2005)

After entering into an Article 2A finance lease, the lessee discovered that the lessor had never paid either of the two equipment vendors when the vendors began demanding money from the lessee. After returning the equipment to the vendors (along with the payment of some money), the lessee sued the lessor for rental payments made to the lessor. The lessor counterclaimed that the "hell or high water" provision in the lease and the finance lease provisions of Article 2A entitled it to continued payments under the lease. This decision affirms the lower court's awarding of damages to the lessee and holds that fraud on the part of a lessor constitutes an exception to 2A-407, entitling a lessee to cancel the lease.

Fillmore v. Leasecomm Corporation, 2004 WL 3091642 (Mass.Super. Nov. 15, 2004)

In determining that a purported lease was not unconscionable, the court characterizes the agreement as a standard Article 2A finance lease arrangement (notwithstanding that the subject matter of the agreement was a license for accessing an internet payment gateway enabling merchants to process credit card transactions rather than a transfer of a right to possess goods). The court notes that the lessor was acting as a financing source only and was not responsible for failures on the part of the service provider.

Copelco Capital, Inc. v. Johnson, 2004 WL 1559652 (Cal.App. 2 Dist. July 13, 2004) (not officially published)

Summary judgment in favor of an assignee of a lease of a copier is upheld based upon the "hell or high water" and waiver of defenses provisions found in the lease, notwithstanding the failure of the original lessor to service the copier as required by the lease. The court commented that the assignee had not sought to collect payment of amounts due on the maintenance agreement, though it was not made clear whether or how the lease distinguished between payments for maintenance and those strictly for the use of the equipment.

Rhythm & Hues, Inc. v. The Terminal Marketing Company, Inc., 2004 WL 941908 (U.S. Dist.Ct. S.D.N.Y. May 4, 2004); report and recommendation of U.S. Magistrate Judge adopted, 2006 WL 800959 (U.S.Dist.Ct. S.D.N.Y. March 28, 2006)

Without any evidence of bad faith on the part of the assignee, Wells Fargo Bank Minnesota, a summary judgment motion by such assignee on the enforceability of a waiver of defenses clause in a lease is granted. At the same time, the court denies a summary judgment motion by the lessee with respect to a different lease based in part on an argument that the lessee's obligations had not commenced because the lease indicated no commencement date (the lessee having not challenged the commencement of other leases also indicating no commencement date).

Jaz, Inc. v. Foley, 85 P.3d 1099 (Hawai'I Intrmed.Ct. App. 2004)

Notwithstanding its having signed an acceptance certificate in connection with a "hell or high water" master lease, a lessee that never received the equipment is found not to have become obligated to make all rental payments and not to bear the risk of loss either under the terms of the lease or under Article 2A finance lease provisions. Analyzing this transaction under leasing law (despite referring to the lessee as having purchased or acquired the equipment under its lease with the lessor), the court emphasizes that a lessee must have a reasonable time to inspect the equipment before being said to have accepted it. The court points out that the lessor could have had the lessee agree to be responsible for reimbursing the lessor in the event that the lessor was required to pay the vendor before shipment and the equipment was not delivered. The decision raises issues for lessors who rely on acceptance certificates without somehow verifying delivery and the passage of a reasonable time to inspect.

Harte-Hanks Direct Marketing/Baltimore, Inc. v. Varilease Technology Finance Group, Inc., 299 F.Supp.2d 505 (D. Md. 2004)

In the course of discussing a lessee's obligation under a lease of printing equipment that also provided for servicing of the equipment by the lessor, the court holds that the enforceability of a "hell or high water" obligation to make lease payments is not affected by the lessor's failure to provide the services. The decision does, however, permit the lessee to attempt to prove fraud in the inducement to enter into the lease, in which case the lease would be voidable at the option of the lessee.

Wells Fargo Bank Minnesota, N.A. v. Nassau Broadcasting Partners, L.P., 2003 WL 22339299, 52 UCC Rep.Serv.2d 249 (S.D.N.Y. Oct. 10, 2003)

Lessee held to have unconditional obligation to make lease payments under "hell or high water" provision in lease notwithstanding lessor's failure to make all payments owing to lessee under sale/leaseback arrangement – based upon finding that lessee had agreed that its rent payment obligations commenced after disbursement of "any" (as opposed to "all") funds by lessor. In the context of discussing the validity of assignments of the lease by the original lessor, dicta in the decision erroneously refer to a "hell and high water" provision as "simply one variant of a waiver of defense and is subject to U.C.C. Sec. 9-403."

Unistar Leasing v. Lipkin, 2004 WL 2650825 (N.Y.App.Div. Nov. 19, 2004)
Unistar Leasing v. Betco, Inc., 2004 WL 2650771 (N.Y.App.Div. Nov. 19, 2004
Preferred Capital, Inc. v. Sturgil, 2004 WL 1882865 (OhioApp. 9 Dist. Aug. 25, 2004)
Information Leasing Corporation v. King, 800 N.E.2d 73, 155 Ohio App.3d 201 (Ohio App. 2003)
Information Leasing Corporation v. Borda, 2003 WL 22103377 (OhioApp. 1 Dist. Sept. 12, 2003)
Information Leasing Corporation v. Chambers, 789 N.E.2d 1155, 152 Ohio App.3d 715 (OhioApp. 2003)
Information Leasing Corporation v. GDR Investments, Inc., 787 N.E.2d 652, 152 Ohio App.3d 260 (OhioApp. 2003)

Series of cases upholding the "hell or high water" obligations of lessees (and their guarantors) signing Article 2A finance leases. The lessees had ATM machines installed on their business premises by Credit Card Center, a vendor of ATM services who offered lease financing to lessees approved by the lessor. After the vendor filed bankruptcy, it ceased servicing the ATM machines and the lessees ceased making payments under the leases. These decisions held that the lessees remained liable under apparently well-drafted leases – good unconditional payment language, thorough Article 2A finance lease provisions, disclaimers of warranties regarding the equipment, statements that the lessor was not responsible for the vendor's acts -- notwithstanding lessee claims that the vendor's false promises were to be attributed to the lessor. However, certain of these decisions also held that both common law and Article 2A require a lessor to minimize damages – something the lessor had failed to do in some instances when it did not pick up the machines after being notified that they were available.

True Lease versus Security Interest: In General

In re Lasting Impressions Landscape Contractors, Inc., Case No. 15-24433-TJC chapter 11 (Bankr. D.Md. September 14, 2017) *

The debtor in bankruptcy leased seven trucks from Ford Motor Credit to be used in its business. After the debtor filed for bankruptcy, Ford brought motions for relief from the automatic stay, which motions were opposed by the debtor which claimed that the leases were actually secured transactions. After examining the lease provisions regarding the parties' obligations at the end of the lease, some of which the court finds rather unclear, the court concludes that at lease expiration either (i) the lessee may retain the vehicles by paying an "assumed residual" equal to ten percent of the original cost, or (ii) the vehicles will be sold and either (a) any excess received over the assumed residual (to be paid to the lessor) will be passed on to the lessee or (b) any deficiency will be paid by the lessee to the lessor. Thus, in any case, the lessor will receive the assumed residual and has neither an up-side potential nor down-side risk. Analyzing these facts, the opinion runs through the statutory criteria and various concepts found in cases and commentary. Two older Maryland cases are mentioned, but found not helpful in light of the 1987 amendments to Article 1-203. The court finds the Brankle Brokerage & Leasing case decided in 2008 (394 B.R. 906) – a case concerning a TRAC lease – most persuasive in concluding that, with no up-side potential or down-side risk, the lessor has created a security interest, rather than a true lease.

<u>VFS Leasing Co. v. Hudson, 2017 WL 5071338 (U.S.Dist.Ct. W.D.Texas. August 7, 2017)</u> *

In the course of defending against a summary judgment motion by the lessor of equipment, the lessee argued that the lease was actually a secured transaction and that the lessor had not disposed of the equipment in a commercially reasonable manner, as required by Article 9. Employing UCC 1-203's criteria for distinguishing a true lease from a secured transaction, the court finds that the lessee provided no evidence regarding the economic life of the equipment and that the lease did not require the lessee to renew the lease or provide an option to renew for no or nominal additional consideration. Pointing out that the lease contained a purchase option for close to $90,000, the court also finds that such an amount does not satisfy the criteria regarding a purchase option of no or nominal additional consideration. The lessee apparently did not raise the possibility that even such a large amount of money could constitute a bargain purchase option that might "economically compel" the lessee to exercise that option. Lastly, the court cites a Fifth Circuit case indicating that a statement in the lease that the parties intended to treat the lease as an Article 2A finance lease should be considered in determining true lease status – at least in the absence of (i) evidence regarding the equipment's economic life and (ii) a nominal purchase option. The UCC and related Official Comments indicate, however, that the stated intent of the parties should not be regarded as significant in determining whether a lease is to be characterized as true or not.

<u>In re: Jack, 579 B.R. 627, 2017 WL 3225977 (Bnkr.Ct. M.D.Fla. July 31, 2017)</u>

The debtors in bankruptcy had entered into a lease for furniture and a tool bench that qualified as a rental-purchase agreement under Florida law. Since Florida's statutes also state that a rental-purchase agreement is not to be construed as a security agreement, this court holds that the agreement is a true lease that must be assumed or rejected under Section 365 of the Bankruptcy Act – as argued by the lessor. Florida law defines a rental-purchase agreement as an agreement for the use of personal property by a natural person for personal or household use for a period of four months or less, that is automatically renewed, and that permits the lessee to acquire ownership of the property. Evidently the automatic renewal is not mandatory and the lessee always has the option of ending the lease and returning the property after any given short term. Otherwise, the agreement would become a longer-term agreement that might, under the usual law distinguishing true leases from security agreements (i.e., apart from a state law, as in this case, specifically stating that certain agreements are to be construed as true leases and not security agreements), be classified as a security agreement.

<u>Stanley v. Pawnee Leasing Corp., 2017 WL 2686294 (Ct.App.Indiana June 22, 2017)(unpublished disposition not to be regarded as precedent)</u>

After defaulting under a lease, and receiving no notice of the sale of the leased equipment by the lessor, the lessees appealed a judgment against them in the trial court, contending that the lease instead created a security interest governed by Article 9, which contains notice requirements that had not been followed by the lessor. After noting that the lessees had cited outdated caselaw which indicated that the mutual intent of the parties was controlling on this issue, the court rules against the lessees' contention, stating that the lessees had made no attempt to apply the current statutory provisions to establish that the lease created a security interest.

<u>Xerox Corporation v. Piranha Business Cards, LLC, 2016 WL 5415849 (U.S.Dist.Ct. S.D.Mississippi September 28, 2016)</u>

Analyzing whether the contracts in dispute were true leases or security agreements, the court applies New York law to determine, first, whether the contracts satisfy the statutory "bright line" tests that would create a security interest – in particular, whether the fair market value purchase option was "nominal." The court asks counsel to brief whether a fair market value option indicates that the option was not nominal or whether such an option could still be considered nominal if that amount would be less than the lessee's predictable cost of performing at the end of the lease. Since both conclusions can be derived from the statutory wording, this court has indeed pointed out an ambiguity in the statute regarding what is nominal. The court goes on to ask the parties to address whether, even if none of the bright line tests (including the purchase option being nominal) are applicable, the law requires a further contextual analysis to determine whether the lease creates a security interest (citing the recently decided *In re Ajax Integrated* case summarized below). The answer should be that there might always be other "facts of the case" that could create a security interest – facts that, for instance, in some manner "economically compel" the lessee to exercise the option. Finally, the court notes that if the conclusion is that the transaction is a security agreement, the lessor's argument that the lessee waived certain rights in the lease would be untenable inasmuch as Article 9 states that certain rights (e.g., to notice of disposition and to a commercially reasonable disposition of the equipment) may not be waived by the debtor.

<u>*In re*: Ajax Integrated, LLC (Fangio v. Vehifax Corporation), 554 B.R. 568, 2016 WL 4186598 (Bankr. N.D.N.Y. August 4, 2016)</u>

This decision contains both a good analysis of what, under the facts of this case, turns a purported lease of equipment by the lessee in bankruptcy into a security agreement, and a puzzling suggestion regarding the ability of a buyer in the ordinary course of business to escape the security interest of the assignee of its seller. The equipment lease at issue, which was financed by the lessor via an apparently full recourse loan from an assignee, contained a ten percent purchase option. Moving through the requirements in the relevant New York statute, the court focuses on whether the purchase option constituted “nominal additional consideration” so as to transform the lease into a security agreement. While there was some evidence that the expected value of the equipment at the end of the lease was a good deal more than the purchase option, the court holds that there remained a genuine issue of material fact as to that possible conclusion. However, the court finds sufficient evidence that the lessee’s reasonable predictable cost of performing at lease end (for refurbishing and returning the equipment) was high as compared with the purchase option so as to render the option “nominal” under the statutory language. The court further states that if a reviewing court were to find that analysis questionable, a “contextual analysis” of the “economic realities” of the transaction would indicate the same result – inasmuch as the lessor had obligated itself to pay the assignee the same amount as the ten percent purchase option (expecting, evidently, that the lessee would exercise that option).

What is puzzling is that the court also grants the trustee in bankruptcy leave to argue that the lessee/debtor in bankruptcy was a “buyer in the ordinary course of business” so as to have purchased the equipment (inasmuch as the “lease” was actually a secured installment sale) free of the security interest held by the assignee. While Article 1-201(a)(9)’s definition of “buyer in ordinary course of business” does include the possibility that the purchase may be for cash or on secured credit (such as this lease/secured installment sale agreement) and while Article 9-320(a) states that a buyer in ordinary course of business takes free of a security interest *created by the buyer’s seller*, even if the buyer knows of the security interest, the lessee/buyer here actually *created the security interest itself* that is being held by the seller’s assignee by virtue of taking assignment of the transaction. While the debtor/lessee/buyer may be entitled to take the equipment free of security interests granted by the lessor/seller to the lessor/seller’s secured creditors generally, there should be no argument that it can set aside the security interest in the equipment held by the assignee of the transaction (which the assignee had perfected by a filing against the debtor/lessee/buyer). Even if the lessor/seller had granted the assignee a security interest in the lease and equipment in order to secure its (full recourse) payment obligations to the assignee, such a security interest in the equipment would be meaningless inasmuch as the equipment was no longer owned by the lessor at the time of the assignment. However, the assignee has a perfected security interest in the equipment *created by the debtor* by virtue of being the holder of the transaction – which should not be avoidable under any theory involving a buyer in ordinary course.

<u>BCL-Equipment Leasing LLC v. Tom Spensley Trucking, Inc., 2016 WL 3461603 (U.S.Dist.Ct. W.D.Wisc. June 21, 2016)</u>

While not to the point of deciding whether a purported lease is a true lease or a secured transaction, this opinion illustrates some important differences in enforcement rights and obligations that depend upon the ultimate characterization. This case is a replevin action arising out of an alleged breach of a purported lease. The defendant-obligors’ counterclaims against the enforcement actions taken by the purported lessor assert (correctly) that if the transaction is a secured transaction, they had rights such as a right to redeem the collateral and the right not to have the peace breached when the plaintiff attempted self-help to obtain the collateral.

<u>*In re:* LaRita Jean Harris, 2016 WL 7732998 (Bankr.W.D.Mo. April 18, 2016)</u>

A creditor in this bankruptcy proceeding attempted to argue that a rent-to-own furniture agreement was a secured transaction, rather than a lease. Noting that a Missouri statute dictated that a rental-purchase agreement was not generally to be construed as a security interest, the court bases its decision on Article 1-203's provision that if the customer has the right to terminate the agreement (without penalty) before the scheduled end of term, it cannot be considered as having created a security interest. The court so rules despite the creditor's argument that the financial realities of the transaction make the agreement non-terminable because the debtor would not be able to recover the equity in her investment in the furniture if she did terminate.

<u>*In re* Hunt, 540 B.R.438 (Bankr.D.Idaho 2015)</u>

Debtors in bankruptcy obtained financing from a friend to purchase a small plumbing business, including various property related thereto. When the debtors attempted to argue that the property was not property of the bankruptcy estate, but instead was being leased under a (true) finance lease under Idaho law, the court concluded that the agreement between the debtors and their friend was instead a disguised security interest – since the agreement indicated that the debtors would own the property at the end of the transaction (when they had completed all payments to their friend) for no additional consideration.

<u>In the matter of Wells (Wells v. American Financial, Inc.), 2015 WL 3862969 (Bankr.N.D.Ala. June 22, 2015)</u>

The debtor in this bankruptcy claimed that its 91 month automobile lease with the defendant finance company was not a true lease. The court agrees with the finance company, finding that the purchase option in the lease of $3,445.05, representing about 20% of the original purchase price of $16,300, was not nominal, citing a Sixth Circuit decision holding that a 10% purchase option was not nominal. In the course of so concluding, the court states, "The Plaintiff, while arguing the payment option is nominal, asserts that the buyout amount represents 38.8% of the value of the vehicle at buyout. Whether the payment represents 20% or 38.8% of the vehicle's original value, the Court finds that the payment is not nominal using either calculation." It is difficult to be sure, but the court may be misunderstanding the plaintiff's point. If the plaintiff was claiming that the amount represented 38.8% of the vehicle's value *at the end of the lease* – as opposed to 38.8% of the vehicle's *original value* – there may have been a good reason to conclude that the lease was not a true lease inasmuch as that might have represented a bargain purchase option (if such a bargain was determinable as of the inception of the lease).

<u>GEO Finance, LLC v. University Square 2751, LLC, 2015 WL 1637310 (U.S.Dist.Ct. E.D.Mich April 13, 2015)</u>

Amid a rather complex set of facts was the central question of whether the agreement to finance a geothermal water supply system was a true lease or a security interest. The court correctly notes that the fact that the equipment was fixtures does not itself answer the question since the UCC permits fixtures to be the subject of a true lease as well as of a security interest. While analyzing the status of the transaction under UCC

1-203, the court focuses especially on whether the agreement's purchase option was "nominal" (which would thereby convert the lease to a security interest) according to that Section's statement that "Additional consideration is nominal if it is less than the lessee's reasonably predictable cost of performing under the lease agreement if the option is not exercised." The court reasons that the large purchase option amounts were likely substantially higher than lessee's cost of performing during the original term of the lease, and therefore had not been proven to be "nominal." The court misses the point of this Code provision, however, since the Code's (perhaps not very clearly stated) point is to compare the purchase option amount with the lessee's cost of performing its end-of-lease obligations. If such end-of-lease obligations are more expensive, then the lessee has a clear incentive to exercise the purchase option and become the owner of the equipment rather than expend a good deal of money to, for example, return the equipment (even if that option is for a substantial amount of money – not the usual understanding of the word "nominal"). The court concludes that the agreement was a true lease with the lessor retaining a meaningful residual interest in the equipment. The court fails to inquire, perhaps because the parties did not raise the issues, either (i) whether the lessee may have been "economically compelled" to exercise the purchase option (for example, because the leased equipment was difficult or impossible to identify, disassemble and return) or (ii) whether the lessor may have been responsible for removing and returning the equipment for a prohibitively expensive amount. In either of such cases, there would be a strong argument that the lease was in fact a security interest.

In re Xchange Technology Group LLC, 2014 WL 7451973 (Bankr.D.Del. Dec. 30, 2014)

In the course of determining a lessor's rights under a lease of computer equipment to a lessee that had filed bankruptcy, this court engages in some very outmoded analysis to determine whether the lease, governed by Minnesota law, was a true lease or a secured financing. Holding that the lease was not a true lease, the court cites a 1990 Minnesota decision which quotes at length from a 1988 edition of the White and Summers UCC treatise. In addition to noting that the lease at issue contains a "relatively nominal" ten percent purchase option, the court also points to factors such as (i) lease provisions requiring the lessee to pay for taxes, insurance and maintenance on the equipment; (ii) the fact that the lessor is a financier; and (iii) the fact that the lessee had selected the equipment from a third-party vendor rather than from the lessor, as evidence that the arrangement was a (secured) financing rather than a lease. It appears as if this court ignores a good deal of the statutory provisions in effect since 1987 that make facts such as the aforementioned lessee's lease responsibilities irrelevant in determining whether a transaction constitutes a true lease. Although the court may have arrived at the same conclusion by employing the factors set forth in UCC 1-203 and more recent case law, it is difficult to tell.

In re Stanford, 2014 WL 4163186 (Bankr.D.S.D. August 20, 2014)

In a case in which the court concludes that it did not matter whether certain agreements were true leases or security agreements for purposes of resolving the primary issue regarding termination of the automatic stay, the court makes an odd statement about South Dakota law – that whether the *per se* security-interest-creating conditions listed in Article 1-203(b) are the only conditions for creating a security interest or merely a bright line test allowing for other circumstances that might also create a security interest is unresolved under South Dakota law. The fact that there are no South Dakota cases explicitly deciding this issue should not be a barrier to any court's concluding what many other cases and commentators have indicated -- that there can be "facts of the case" other than those enumerated in 1-203(b) which lead to a conclusion that a lease creates a security interest (e.g., a purchase option that is not nominal in any sense but which is such a bargain that the lessee would be foolish not to exercise it).

In re Gutierrez (Gutierrez v. Popular Auto, Inc.), 2014 WL 3888277 (Bankr.D.Puerto Rico Aug. 8, 2014)

The debtor/plaintiff in this bankruptcy proceeding had entered into a motor vehicle lease for seventy-two months with an option to purchase the vehicle for $0.00 plus a charge of $150.00. After the plaintiff argued that this lease was in fact a security interest, the vehicle lessor pointed to a provision in the lease stating that the lessee agreed that the lease was a financial lease contract under Puerto Rico's Act to Regulate Personal Property Lease Contracts. Although the lessee attempted to argue that the later enacted Puerto Rico Commercial Transactions Act (which adopted our UCC's previous definition of "security interest" in 1-201(37) that converted a lease with a nominal purchase option into a security interest) repealed conflicting provisions of the Act to Regulate Personal Property Lease Contracts, the court agreed with the lessor that the lease provision amounted to a waiver of the lessee's rights under the Commercial Transactions Act – and therefore concluded that the lease must be treated as a true lease. Whether or not this is an accurate statement of Puerto Rican law today, it is clearly a different outcome than would be the case under the UCC in effect in all fifty of the United States, under which the economics of an agreement calling itself a lease determines its legal status as opposed to what the parties may state in such agreement.

In re Purdy (Sushine Heifers, LLC v. Citizens First Bank), 763 F.3d 513 (6th Cir. 2014)

This case involves a dispute between a lessor of dairy cows (to a dairy farmer) and a bank holding a perfected purchase money security interest in the farmer's livestock. This decision reverses a District Court decision in favor of the bank. The court first finds that the relevant "good" to be evaluated with respect to its remaining economic life is the herd of cattle, not the individual cows. This leads to the conclusion that because the economic life of the herd is far greater than the lease term, the bright line test that was used by the lower court to conclude that the agreement created a security interest was not in fact satisfied. Because this court also concludes that the bank did not carry its burden of proving that the lease created a security interest for some other reason, the court concludes that the leases should be regarded as true leases.

Delphi Automotive Systems, LLC v. Capital Community Economic/Industrial Development Corporation, Inc., 2014 WL 2893398 (Ky. Sup. Ct. June 19, 2014)(not a final opinion and not to be cited as authority in Kentucky courts)

In a dispute between a secured creditor and a purported lessor of equipment that had taken no steps to perfect its interest as a precautionary measure, the Kentucky Supreme Court affirms the holding of two lower courts that the lease in fact created a security interest. This portion of the decision (there was also an analysis of whether the transaction was subject to Article 9 at all) was simple inasmuch as the lease agreement did not allow the lessee to terminate for the full term of the lease and the lessee was bound to become the owner of the equipment for no additional consideration at the end of the lease.

In re Wade, 501 B.R. 870 (Bankr.D.Kan. 2013)

This Chapter 13 bankruptcy case involved leases of a television and furniture by an individual. In order to analyze the rights of the lessor, the court decides that these leases were true leases, rather than secured transactions, in one brief paragraph. The court reasoned that since the leases could be terminated by the lessee at any time, they did not satisfy the circumstances for creating a security listed in UCC 1-203(b), which require that the lease not be subject to termination by the lessee along with one of a number of other possible circumstances (e.g., the lessee has a nominal purchase option). What the court fails to note – and did not investigate – is that even if a transaction does not fall into one of the per se security interest criteria found in 1-203(b), it is still possible that "the facts of the case" mentioned in 1-203(a) could create a security interest for some other reason (e.g., very onerous return conditions might economically compel the lessee to purchase the goods).

Canal Air, LLC v. McCardell, 2013 WL 4482965 (U.S.Dist.Ct. E.D.Mich. August 21, 2013)

This decision illustrates how a lack of analysis of the criteria for determining whether a purported lease creates a security interest can have a substantial impact on determining the rights of the parties. After the parties had entered into a sale/leaseback transaction for an aircraft and the lessee defaulted, the lessor sought summary judgment as to the lessee's liability and amount of damages. The lessee alleged that Article 9 applied to the transaction and that the lessor had violated its obligations to provide notice of sale and a commercially reasonable disposition of the aircraft. Without any analysis employing the criteria found in Article 1, Section 203, of the UCC concerning the distinction between true leases and secured transactions, this court concludes that New York's Article 2-A (the court oddly refers to this Article as both Article 2 and Article 2-A) applied and that the lessee had waived its rights to notice and a commercially reasonable disposition (rights that cannot be waived under Article 9). The court's determination rests primarily on the parties' intent as evidenced by language in the lease stating that the parties intended the lease to constitute both a true lease and a finance lease under Article 2A. Thus the court awards summary judgment to the lessor without considering either the statutory criteria or other concepts employed for years by courts and commentators to adjudicate true lease/security interest questions.

In re Rodriguez, 2013 WL 1385665 (Bankr.S.D.Tex. April 3, 2013)

In this case, the lessor of two trucks to a lessee which subsequently filed bankruptcy attempted to argue that its lease was a true lease. Holding that the lessee's end of lease purchase option of $6,600 was nominal insofar as that amount was less than fifty percent of the estimated fair market value, the court finds that the lease instead created a security interest as claimed by the bankrupt lessee. The court also notes that the lessee had made a significant down payment to the truck vendor before the lessor and lessee entered into the lease to finance the remaining portion. For some reason, the court also attaches significance to the use of the word “funding” by the lessor with respect to the transaction as if that word were indicative of a loan rather than a lease.

In re Waltman, 2012 WL 5828717 (Bankr.S.D.Ala. Nov. 16, 2012)

This case illustrates how certain types of state laws can be decisive in determining whether a lease creates a security interest. The lessee/debtor in bankruptcy had entered into rental purchase agreements with a lessor of portable storage buildings. The agreements provided that the property was owned by the lessor and for a lease term of one month, which the lessee could extend on a month to month basis by making monthly payments in advance of the next monthly period. They also provided that the lessee would acquire ownership of the goods after making thirty six monthly payments and otherwise complying with the leases. Agreeing with the lessor that these agreements should not be construed as security agreements (as contended by the lessee), the court looks to a Tennessee statute governing rental purchase agreements which states that rental purchase agreements are not to be construed as security interests as defined in Tennessee’s UCC. The court points to decisions in other states with similar statutes coming to similar conclusions, and concludes that the agreements should be treated as executory contracts or unexpired leases under the Bankruptcy Code.

In the Matter of Cherry, 2012 WL 3252231 (Bankr.N.D.Ala. August 7, 2012)

The lessor under an automobile lease attempted to receive true lease treatment in the lessee’s bankruptcy by arguing that the lease gave the lessee the right to terminate early. This court holds that because the lease provisions concerning early termination, although ambiguous, included language that the lessee would be required to pay a “substantial charge” which “may be up to several thousand dollars,” the lessee could not effectively terminate her obligations under the lease. That finding, plus an end of term purchase option of $650 which the court termed “nominal,” leads the court to conclude that the lease created a security interest.

In re Miller Brothers Lumber Company, Inc., 2012 WL 1601316 (Bankr.M.D.N.C. May 8, 2012)

The threshold issue in this case of lease versus security interest was easily resolved inasmuch as the lease contained a $1 purchase option. Illustrating that this determination has important consequences, the court goes on to consider the fact that the “lessor” – as a secured creditor rather than the owner of the equipment – had permitted a financing statement to lapse after the “lessee” had filed for bankruptcy. Under revised Article 9, a bankruptcy filing no longer tolls the amount of time before lapse as it had under former Article 9. Because the “lessor” did not continue the filing during the bankruptcy, it became unperfected with the consequence that its security interest could be avoided under the Bankruptcy Code.

Brenner Financial, Inc. v. Cinemacar Leasing, 2012 WL 1448048 (N.J.Super.A.D. April 27, 2012)(unpublished opinion, check court rules before citing)

This is another case illustrating the different legal rights of various parties when a purported lease in fact creates a security interest. This case involved the lease of a motor vehicle containing a nominal purchase option of $106.05 – readily determined to be a lease creating a security interest. After the consummation of a sale/leaseback transaction, the lessor/secured party obtained a certificate of title in New Jersey with itself named as owner and its financing source listed as lienholder. Shortly thereafter the lessee fraudulently obtained a certificate of title in Michigan listing itself as owner with two other parties listed as first and second lienholders. After determining that although the lessor/secured party was not named as a lienholder on the NJ title, it had nevertheless perfected its security interest (under the majority rule throughout the United States holding that listing oneself as owner substantially complies with perfection requirements), this appellate court reverses the holding of the trial court and finds that this lessor/secured party's interest had priority over the lienholders listed on the other title. However, since the rights of the various parties are governed by Article 9 (not Article 2A), the court remands to the trial court to apply the rules of Article 9 relating to enforcement of a security interest to determine whether the repossession activity by the lessor/secured party was done according to these rules designed to preserve the rights of all parties involved.

VFS Leasing Co. v. J & L Trucking, Inc., 2011 WL 3439525 (U.S.Dist.Ct. N.D.Ohio August 5, 2011)

Following a default by the lessee, the lessor repossessed and sold the four trucks being leased. In evaluating the lessee's claim that the lessor was not entitled to a deficiency judgment because the lessor had not complied with Article 9's requirement of commercial reasonability with regard to the sale, the court had to decide whether Article 9 applied at all – i.e., whether the lease created a security interest. Finding that the purchase option of 8.84% of the equipment's original cost was close to the parties' stated stipulated loss value at the end of the lease, the court concludes that the purchase option did not constitute nominal additional consideration and that the lease was a true lease.

In re KY USA Energy, Inc., 449 B.R. 745 (Bankr.W.D.Ky. May 31, 2011)

Whether a lease of trucks created a security interest was a relatively simple issue for this court inasmuch as the lease contained a $1 purchase option. Although the lessor apparently admitted that the lease constituted a security interest, it also attempted to argue that the lease was an executory contract for bankruptcy purposes. The basis for this argument was that there were no certificates of title bearing the lessee's name. The court denies the lessor's claim by pointing out that under Kentucky law a conditional lessee of a motor vehicle is considered the owner and permitted to register the vehicle even if its name is not on the title.

In re Warne, 2011 WL 1303425 (Bankr.D.Kan. April 4, 2011)

This court holds that a lease of a truck was a true lease, in large part because the fixed price purchase option had been stipulated by the parties to represent the estimated fair market value of the truck at the end of the lease term and thus did not constitute nominal additional consideration. The lessee attempted to argue that its payment of a security deposit at the outset of the lease equaling exactly the amount of the purchase option turned this transaction into a security agreement, since the lessee could purchase the truck for no additional consideration at the end of the lease if the lessor simply retained the deposit. As the court observes, that argument ignores the function of a security deposit and also does not lead to the conclusion that the lessee will buy the truck at the end of the lease. The lessee could instead decide that its most sensible option would be to return the truck and receive the return of its security deposit (assuming, of course, that there was no lessee default).

In the matter of Del-Maur Farms, Inc., 2011 WL 2847709 (Bankr.D.Neb. July 14, 2011)(slip copy)

In evaluating whether a lessee's end of lease options cause a lease to create a security interest, this court mentions a variety of previous cases comparing the purchase option price to the original price and to the total rental payments. Although the court concludes its discussion by stating that a purchase option price equal to ten percent of the original purchase price or nine percent of the total rental payments is "nominal additional consideration" under the statute, the court appears in fact to rely primarily on an analysis of whether the exercise of the option would be the only sensible alternative for the lessee. Since a failure to exercise the option under the terms of this lease would require the lessee to renew for an additional one year period and make payments aggregating more than the option price along with the choice of either returning the equipment or paying fair market value to purchase the equipment, the court holds that the lease creates a security interest.

In re Turner, 2011 WL 2490600 (Bankr.W.D.Mo. June 22, 2011)

This very brief and simple case serves to demonstrate that if a lessee (in this case of an automobile) has the right to terminate the lease and return the goods at any time without penalty or further payment (the only requirement being to return the automobile in its original condition, reasonable wear and tear excepted), the lease cannot be said to create a security interest. A necessary condition listed in the statute for creating a security interest is that the lessee's obligation be for the full term of the lease and not be subject to termination by the lessee.

Gibralter Financial Corp. v. Prestige Equipment Corp., 2011 WL 2493771 (Ind. June 21, 2011)

This decision by the Supreme Court of Indiana contains an excellent general discussion of the law distinguishing true leases from security interests. The court reverses decisions by lower courts that had granted summary judgment in favor of a lessor against a secured creditor claiming that a purported lease in fact created a security interest. Since the lessor had not filed a financing statement, if the lease was deemed to be a secured transaction, repossession and sale of the equipment by the lessor following the lessee's default would have been subject to the secured creditor's security interest. Although the Supreme Court agrees with the lower courts that the secured creditor had not been able to show that the provisions of an early buy out option constituted nominal additional consideration (therefore not satisfying one of the "bright line" tests for creating a security interest), this decision also notes that the burden of winning its summary judgment motion and proving that the lease was a true lease was the lessor's burden. Even if no bright line test had been satisfied, since the lessor had not provided any evidence that other "economic realities" did not serve to create a security interest, this court refuses to affirm the lower courts' grant of summary judgment in favor of the lessor.

In re Kentuckiana Medical Center LLC (Kentuckiana Medical Center LLC v. The Leasing Group Pool II, LLC), 2011 WL 1750769 (Bankr.S.D.Ind. May 6, 2011)

In granting a motion for summary judgment in favor of a debtor in bankruptcy finding that three purported leases in fact created security interests, this court evaluates lease end options giving the lessee either (i) a fair market value purchase option of not less than ten percent of the lessor's original cost for the equipment, (ii) a one month renewal for a given amount after which title would be transferred to the lessee, or (iii) an option to return the equipment along with a guaranty that the equipment could be sold by the lessor for not less than ten percent of original cost (and paying all costs of return, storage and sale by the lessor). Although the stated facts are less than totally clear, apparently the one month renewal option would amount to the same payment to the lessor as the purchase option with title being transferred to the lessee in both cases. Turning its focus to the last option – for return – the court concludes that the costs to return under such option would likely exceed the cost of purchase – thus making purchase the only sensible choice for the lessee. The court cites *In re Grubbs* and concludes that the economic realities of the situation call for a conclusion that the leases create security interests.

In re Southeastern Materials, Inc., 2010 WL 2836360 (Bankr.M.D.N.C. July 15, 2010)

This case illustrates neatly some of the stark legal differences between true leases and leases creating a security interest. The lessee had entered into two schedules with the lessor under the same master lease – one with a $1 purchase option and one with a fair market value purchase option. After finding that the former created a security interest, the court holds that since the lessor had not perfected its security interest within the twenty day period after delivery of the equipment, its priority was junior to a bank's prior filed lien. With regard to the latter, since no party contested that it constituted a true lease, the court granted the lessor relief from the automatic stay and ordered that the lease be rejected. The differences in rights and obligations of "lessor" financiers under both the UCC and Bankruptcy Code cannot be overemphasized.

Gibralter Financial Corp. v. Prestige Equipment Corp., 925 N.E.2d 751 (Ind.App.2010) (transfer granted, opinion vacated, IN RAP 58(A)(Ind. Oct. 29, 2010))

Eight months after an equipment user bought a punch press, it entered into a sale/leaseback transaction with a lessor containing an early buyout option. After the user defaulted on the lease, the lessor sold the equipment and later was sued by a secured lender of the user for conversion. This appellate court upholds a lower court's summary judgment against the secured creditor. While finding that the EBO price was nearly 80% of the equipment's estimated value at the time that the EBO was to be exercised, the court states that this can hardly be said to be nominal additional consideration and cites the *In re* Gateway Ethanol court's mention of the opinion of White & Summers that any option price above 50% should not be considered nominal. The court also finds that the cost of exercising the EBO was more than the cost to the user of finishing the lease and returning the equipment – not satisfying one of the criteria for nominality found in the statute. In addition, the court determines that the fact that the payments to be made during the lease term provided the lessor with a full return on its investment is not dispositive in favor of the secured party – citing the full payout lease as one of the factors listed in the statute as not necessarily creating a secured interest. Finally, the court also notes that the lack of a bill of sale or purchase agreement in connection with the sale/leaseback was not an indication that the ownership of the equipment had not been transferred to the lessor.

Cobra Capital, LLC v. Pomp's Services, Inc., 2010 WL 680947 (U.S.Dist.Ct. N.D.Ill. Feb. 23, 2010)

This decision denies a defendant/lessee's motion for partial summary judgment predicated in part on the claim that its lease with the plaintiff/lessor was a "disguised sale" (i.e., a secured transaction). After briefly summarizing Illinois law by stating that a purported lease will be recharacterized as a secured transaction if it satisfies one of two tests (the "per se" test or the "economic realities" test), the court finds that there were disputed issues of fact as to whether a $1 purchase option was intended (which would satisfy one of the "per se" tests) and whether the lessor did not retain a meaningful reversionary interest in the equipment at the end of the lease (which would satisfy the economic realities test).

In re Uni Imaging Holdings, LLC, 2010 WL 148422 (Bankr.N.D.N.Y. Jan. 12, 2010)

In deciding whether the lessee in bankruptcy has met its burden of demonstrating that a purported lease was actually a secured transaction, the court initially describes the negotiation of rental amounts and a fixed-price purchase option in the context of the parties' intentions and expectations, and then examines the facts in light of the statutory requirements and caselaw (including numerous citations to the *In re* Gateway Ethanol case discussed below). Without always distinguishing clearly between two meanings taken on by the term "nominal additional consideration" (one provided in the statutory language itself – i.e., that the cost of the purchase option may be less than the cost of completing the other requirements of the lease such as removing and returning the equipment – and another discussed in various cases and commentary – i.e., a comparison of the purchase option price with the expected value of the equipment at the end of the lease to determine whether a bargain purchase price provides an economic compulsion on the part of the lessee to exercise the option), the court discusses both meanings and concludes that the lessee has not met its burden.

Park Western Financial Corporation v. Phoenix Equipment Company, Inc. (*In re* Phoenix Equipment Company, Inc.), 2009 WL 3188684 (Bankr.D.Ariz. Sept. 30, 2009) (not for publication – electronic docketing only)

In this memorandum decision, the court considers whether a number of leases of trailers (originated through sales of the equipment by the lessee to the finance company followed by leasebacks to the lessee) should be recharacterized as secured transactions. The court seems to be at least somewhat influenced by the fact that these sale-leasebacks were motivated by the lessee's general financing needs and that the transactions were tied together with cross-collateralization agreements. In its legal analysis, the court initially finds that the lessee's requested recharacterizaton cannot be based simply upon the fact that all of the leases were subject to a "nominal" ten percent purchase option – since the lessee had not presented enough valuation evidence to establish that such a purchase option should be considered nominal – thereby automatically creating a secured transaction. However, in continuing to review all the "facts of the case," the court finds that since the ten percent purchase option was applied to all leases – regardless of their varying lengths and the differences in the values of the equipment at the outset of the leases (i.e., bearing no relation to the anticipated fair market value of the equipment at the end of the leases) – the leases should be considered secured transactions inasmuch as both the lessor and lessee expected that the lessee would have no choice but to purchase the equipment in order to stay in business.

Gangloff Industries, Inc. v. Generic Financing and Leasing Corporation, 2009 WL 1674976 (Ct.App.Ind. June 16, 2009)

This appellate court decision against a lessor of a truck reverses a lower court decision. This decision first finds that the lease created a security interest based on a version of the economic realities test – indicating that the only sensible course of action would have been for the lessee to exercise its purchase option at the end of the lease. The court cites a New York bankruptcy court decision collecting cases in which purchase option prices ranging from 10% to 25% of the aggregate rental price were found to be nominal. After finding that the lease created a security interest, the court concludes that the appellant's possessory lien for repairs and other services had priority over the lessor's lien – citing Section 9-333 of the UCC.

In re Gateway Ethanol, L.L.C., 415 B.R. 486 (Bankr.D.Kan. 2009)

The purchaser of certain equipment from a debtor in bankruptcy sought to have a lease recharacterized as a security agreement inasmuch as such recharacterization would mean that the purchaser was not required to make future payments owing under the lease. In order to determine whether such purchaser met its burden of proof, the court focuses much of its discussion on the amount of the fixed-price purchase option under the lease and whether it amounts to "nominal additional consideration" under the Article 1 statutory language distinguishing between true leases and secured transactions. This provision states that a purchase option will be considered nominal if the lessee's predictable cost of completing performance under the lease (without exercising the option) would be greater than the cost of exercising the option. Since the purchaser was unable to demonstrate that the cost to remove and return the equipment approached the amount of the purchase option, it failed to prove the creation of a security interest under this per se portion of the statutory criteria. The court goes on to consider other arguments advanced by the purchaser that the lessor did not retain a meaningful residual interest – a concept referenced in various cases and commentaries – and also rejects them. For instance, the court compares the purchase option price to the anticipated value of the equipment at the end of the lease and opines that it cannot conclude that such purchase option was nominal. (In this connection, a footnote references the opinion of White & Summers in their treatise that any option price above fifty percent of the predicted fair market value at lease termination cannot be nominal.) After considering other economic factors (as intended by the drafters of the statutory criteria for making the true lease-security interest distinction), the court mentions that even if the parties' intent may have some relevance, all evidence was that the parties originally intended the transaction to be a true lease.

In re Ecco Drilling Company, Ltd., 390 B.R. 221 (Bankr.E.D.Tex 2008)

This case provides an illustration of a potentially confusing mixture of one of the elements of the statutory criteria for distinguishing true leases from security interests found in Article 1 that itself leads to the conclusion that a security interest has been created (the existence of a nominal purchase option in the lease) and a concept used to fill in the statutory gaps (assessing the "economic realities" of the transaction). The lease contained a purchase option of an amount equal to fifteen percent (15%) of the greater of (i) the value of the equipment or (ii) sixty percent (60%) of the going concern value of the lessee determined by a third party appraiser. The court cites other cases stating that the term "nominal" can be used in a relative, rather than an absolute sense, to conclude that sizable purchase options of even a million dollars can be nominal. The court's determination that the lease creates a security interest, however, focuses primarily on the economic circumstances of the lessee and of the transaction when it concludes that the lessee was highly unlikely simply to walk away from the drilling rigs that were the subject of the lease without paying the option price to purchase them. According to the court, those economic realities indicated that neither the lessor nor the lessee expected – nor would anyone else expect – anything other than the lessee's exercise of its purchase option. Whether or not a purchase option amount qualifies as nominal, to the extent that the lessee can be reasonably predicted to exhaust the economic value of the goods, the transaction should be considered to create a security interest.

Automotive Leasing Specialists, L.L.C. v. Little, 2008 WL 2369145 (U.S.Dist.Ct. W.D.La. June 10, 2008)

After the individual lessee under a motor vehicle lease agreement filed for bankruptcy protection, she argued that the lease was not a true lease, but instead created a security interest. After finding that the lease did not afford the lessee with the right to terminate its obligations (with a questionable interpretation of the phrase "all other amounts then due under this Lease" contained in the early termination provision) and that the lessee had been given an option to purchase the vehicle at the end of the lease term for $206, the court looked to Louisiana's UCC provisions distinguishing leases from security interests (the same as in the uniform version of the UCC in effect in most states) and to cases in other jurisdictions (not finding any cases in either Louisiana or the Fifth Circuit on point) to determine that this lease creates a security interest. While this holding seems rather unremarkable in view of its interpretations of the lease provisions and facts, the court notes that while it does not have to decide any other issue – such as who owns the vehicle – at this time, there is a Louisiana statute that grants the lessor under a "financed lease" creating a security interest "full legal and equitable title and ownership" until a lessee has actually exercised a purchase option under such lease. The ramifications of such a statute – contrary to what would be concluded under the laws of other states – will evidently need to wait for another time.

Coonrod & Associates Construction Co. v. Davis, 2006 WL 3773235 (Kan.App. December 22, 2006)(unpublished)

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.

In re Parker, 2006 WL 4114240 (Bankr.D.S.C. Sept. 14, 2006)

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.

Perez v. Rent-A-Center, Inc., 186 N.J. 188, 892 A.2d 1255 (N.J. 2006)

Although this New Jersey Supreme Court decision does not discuss the distinction between leases and security interests directly, it provides its own 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 – not applicable (according to the lower courts) 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.)

Freeway Auto Credit v. Bonner (In the matter of Bonner), 2006 WL 2092386 (Bankr.M.D.Ga. July 19, 2006)

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.

Jackson v. State of Alabama, 2006 WL 825239 (Ala.Crim.App. March 24, 2006)

In deciding whether a defendant was guilty of theft of property, this criminal court examines a rental agreement in light of Alabama's UCC to determine whether (a) the defendant sold property that was owned by the rental company, or (b) the property was owned by the defendant with the rental company only retaining a security interest under the rental agreement. After examining the UCC definition of "security interest" and some Alabama cases, the court concludes that because the defendant was not obligated to pay rentals for any particular period of time and could return the property without further liability, the rental agreement was a true lease and the defendant was guilty of theft.

In re Allied Printing, Inc., 2005 WL 3947958 (Bankr.S.D.Fla. March 20, 2006)

In concluding that a lease of equipment is a true lease, this court carefully works its way through the UCC's definition of "security interest," quotes the Official Comment's disavowal of the parties' intent and of certain factors previously considered indicative of ownership in the lessee (but also found in typical net (true) leases), and finds that the lessor retained a meaningful reversionary interest in the equipment. In support of its analysis, the court cites the UCC treatise written by White and Summers on the subject of the general irrelevancy of the above-referenced factors. Although the court cites the testimony of an expert witness for the lessor who indicated that costs of de-installing, shipping and refurbishing of the equipment would be substantial, such fact was not mentioned again during the court's analysis of the true lease/security interest issue as a potential economic compulsion for the lessee to buy the equipment.

WorldCom, Inc. v. General Electric Global Asset Management Services (*In re* WorldCom, Inc.), 339 B.R. 56 (Bankr.S.D.N.Y. 2006)

In denying both parties' opposing motions for summary judgment on the issue of whether a lease of commercial telecommunications transmission equipment constituted a true lease (argued by GE, the lessor) or a secured transaction (argued by WorldCom, the lessee), the court does an exhaustive analysis of the statute, cases and commentary and concludes that neither party was entitled to summary judgment. The decision highlights the necessity of evaluating the various factors relevant to making a true lease/security interest determination as of the inception of the lease, rather than at the end of the lease term.

Ford Motor Credit Company, Inc. v. Racwell Construction, Inc., 808 N.Y.S.2d 294 (App.Div. 2005)

In this brief decision with sketchy facts and sketchy legal reasoning, the court holds that a lease was actually a secured transaction based upon the nature of its remedies after a default, citing a 1980 New York case. That earlier case, however, cites factors for finding a secured transaction that would no longer be considered relevant under present-day UCC criteria.

Coleman v. DaimlerChrysler Services of North America, Inc., 623 S.E.2d 189 (Ga.Ct.App. Nov. 14, 2005)

In vacating a trial court's finding that Article 9 did not apply to a lease agreement, the court focuses on the criteria for distinguishing leases from security interests discussed in *In re QDS Components, 292 B.R. 313* (which contains a lengthy discussion of cases and commentary interpreting earlier and more recent versions of Article 1-201(37). The court remands the dispute to the trial court inasmuch as neither the parties nor the trial court addressed these criteria.

Cook Sales, Inc. v. Shores (*In re* Shores), 332 B.R. 31 (U.S.Dist.Ct. M.D.Fl. 2005)

Notwithstanding the fact that the lessee had the right to terminate the lease at any time, the Bankruptcy Court in this district held that a lease was not a true lease because the lessee had the option of purchasing the goods (a portable building) for no additional consideration after paying rent for thirty-six months, at which time the goods were expected to have a remaining useful economic life extending well into the future. The District Court reverses on the ground that a lessee's right to terminate at any time (i.e., where the lessee has no obligation to make rental payments for any period of time past the latest rental period) strongly indicates that the lease is a true lease, along with the equipment's lengthy useful life and various requirements in the lease regarding protection of the lessor's interest in the equipment.

United Airlines, Inc. v. HSBC Bank USA, N.A., 416 F.3d 609 (7th Cir. 2005), rehearing and rehearing en banc denied (Aug. 23, 2005), cert. denied, 126 S.Ct. 1465 (March 6, 2006)

The Seventh Circuit holds that a particular airport facilities lease entered into by the airline debtor is a secured loan, and not a true lease, for purposes of federal bankruptcy law. Although the subject matter of the lease was not personal property, the court's discussion of the extent to which state law concerning the distinction between true leases and security interests controls federal bankruptcy law relating to that same subject is instructive – and potentially threatening to the treatment of TRAC leases in bankruptcy. According to the court, "A state law that identified a 'lease' in a formal rather than a functional manner would conflict with the Code, because it would disrupt the federal system of separating financial from economic distress…"

In re Bailey, 326 B.R. 156 (Bankr.W.D.Ark. 2005)

In determining whether a purported lease of two trucks was a true lease, the court holds that the lessee had no other reasonable alternative than to exercise his purchase option, which the court characterizes as "nominal." Rather than finding nominality simply as a result of the option price being substantially below the expected residual value, the court appears to consider lost opportunity cost when considering whether the facts fit the statute's statement that "additional consideration is nominal if it is less than the lessee's reasonably predictable cost of performing under the lease agreement if the option is not exercised." The court also cites the *Buehne* case discussed below for the proposition that certain factors – even those that are listed in the statute as not in themselves implicating a security interest – are "signposts indicative of a sale."

In the matter of Sanford, 2005 WL 629022 (Bankr.M.D.La. Jan. 31, 2005)

The lessee had entered into an equipment rental agreement providing for no specific term, month-to-month rental payments, and a purchase option that would apply a portion of the rental payments made toward the purchase price. Because the lease was terminable at any time by the lessee, the court holds that the lease did not create a security interest, denies the lessee's claim that it had purchased the equipment and holds that the lessor had terminated the lease before the lessee filed for bankruptcy and thus had the right to recover the equipment.

In re Buehne Farms, Inc., 321 B.R. 239 (Bankr.S.D.Ill. 2005)

In deciding that a lease of cows was actually a disguised security agreement, the court focuses on the "economic realities" of the transaction (in this case, the fact that no reasonable lessee would fail to exercise the purchase option), but also includes some confusing analysis such as identifying nominality of a purchase option price with the economic realities test and, in dicta, citing other factors as pointing to the creation of a security interest such as the lessee bearing the risk of loss and costs of insurance, upkeep and taxes, which factors are listed in the statute as not in themselves implicating a security interest. Although this lease contained a residual guaranty by the lessee similar to TRAC provisions in motor vehicle leases, the decision does not discuss the economic effect of such a provision.

In re Grubbs Construction Company, 319 B.R. 698 (Bankr.M.D.Florida 2005)

In the course of finding a number of purported leases (which, if true leases, would have constituted executory contracts subject to termination prior to bankruptcy) to be secured transactions, this court manages to invoke many different concepts employed in other cases and in commentary for distinguishing between true leases and secured transactions. With respect to four of the five leases, the court appears to rely heavily on its determination that, given the particular terms of those lease schedules, the lessee had little economic choice other than to purchase the equipment under an early buyout option. With respect to the fifth lease, referred to as a TRAC lease, the court finds that the economic substance was no different than a typical installment loan with a balloon payment at the end. Evidently this TRAC lease did not involve motor vehicles (the type of equipment was not identified), which likely would have necessitated consideration of a state TRAC statute, inasmuch as the court's discussion of perfection of the lessor's security interests involved only the filing of UCC financing statements, and not notation of liens on certificates of title.

<u>CIT Technology Financing Services, Inc. v. Tricycle Enterprises, Inc., 787 N.Y.S.2d 133 (App.Div. 2004)</u>

A lease with a five-year term and a purchase option of "10% of Total Cash Price" is held to be a true lease. The court first determined that "total cash price" should be read to mean the total of all payments to be made over the five-year term of the lease (rather than the price of the equipment at the beginning of the lease). Ten percent of that aggregate amount equaled thirty percent of the anticipated remaining market value of the equipment at the end of the lease term. Because the lease stated that it was governed by Massachusetts law, the court determined that the lease was a true lease based upon a "rule of thumb" employed by Massachusetts courts that a purchase option price greater than twenty-five percent of market value at the end of the lease term should not be considered "nominal" and thus not creating a security interest under Section 1-201(37).

<u>Fifth Third Bank v. Roberts, 2004 WL 2785955 (Ohio App. 3 Dist. December 6, 2004)</u>

In finding a purported lease to be a true lease, this court focuses both upon the intent of the parties as evidenced by the wording and provisions of the lease document (notwithstanding the Official Comment to the UCC definition of "security interest" in which the focus of the definition was stated to have shifted from intent to economics) as well as the economic fact that the purchase option amount was not nominal.

<u>Lebron d/b/a Lebron Electronics v. Citicorp Vendor Finance, Inc. f/k/a Copelco Capital, Inc., 2004 WL 1615837 (Tex.Ct.App. July 20, 2004)</u>

Judgment in favor of a lessor is affirmed in which the lessee had unsuccessfully argued that equipment leases were transactions creating security interests and were usurious. The court applies what is sometimes referred to as a "bright line" version of UCC Section 1-201(37) by stating that in order for a lease to create a security interest, the transaction must not be subject to termination by the lessee and at least one of four additional factors must be satisfied. After finding none of such four factors to apply in this case, the court holds that the transactions are leases. This analysis contrasts with decisions of other courts that have looked at other facts (sometimes referred to as "economic realities") in holding that a security interest has been created even when the "bright line" test for true lease status has been passed.

<u>*In re* Fleming Companies, Inc., 308 B.R. 693 (Bankr.D.Del. 2004)</u>

Responding to a motion by a lessor for assumption or rejection of a lease, the court holds that the purported lease creates a security interest under 1-201(37), primarily because the equipment will have little or no value at the end of the lease term and also because the economic realities were such that the lessor would have no incentive to take the equipment back at the end of the lease term.

Legends Gym v. ABCO Leasing, 383 F.Supp.2d 911 (W.D.Texas 2004)

The lessee attempted to argue that it was not liable for failing to make payments under a lease because the lease was actually a usurious loan – void and unenforceable. The court holds that the transaction was a lease, rather than a secured loan, because the lessee was not obligated to buy the equipment, the rental payments were not applied to the purchase price, and the purchase option price was fair market value, which the court says, "by definition, is not nominal." The decision does not touch on other issues (which may not have been raised by the parties), such as the economic life of the equipment, that might bear on true lease status.

Sankey v. ABCO Leasing, Inc. (*In re* Sankey), 307 B.R. 674 (D. Alaska 2004)

An interesting discussion of the factors to be employed in determining whether a purported lease is true or not. After quoting from White & Summers regarding the need in some cases to look beyond the "per se" or "bright line" tests for creation of a security interest in order to determine whether a transaction provides the lessor with a meaningful reversionary interest – and is therefore a true lease – the court expresses what it believes should be the basic test: "If the lease terms provide that at the end of the lease the lessor will receive either return of the leased goods or the reasonably predicted fair market value the goods will have at the time the option is to be performed, the lessor has retained a meaningful reversionary interest."

Duke Energy Royal, LLC v. Pillowtex Corporation (*In re* Pillowtex, Inc.), 349 F.3d 711 (3rd Cir. 2003)

Application of 1-201(37) to a services agreement providing for the use of equipment by Pillowtex with rather unusual end-of-term provisions giving the lessor a number of options with regard to that equipment. In deciding that the agreement was not a true lease, but instead created a security interest, the court emphasizes a factor enunciated in an prior bankruptcy case as evidence of non-true lease status – the present value of the scheduled lease payments being greater than the cost of the leased property (i.e., a full-pay-out lease). Since the cited case, this factor has been explicitly enumerated in the latest version of 1-201(37) as a factor that does not in and of itself create a security interest – a point that goes unnoticed in this decision. The same result could have been justified instead by relying on the economic reality that the lessor would never have undertaken the expense of removing the equipment.

In re QDS Components, Inc., 292 B.R. 313 (Bankr.S.D.Ohio 2002)

While holding against a party claiming that leases were disguised security agreements, this decision includes a lengthy discussion of past and present versions of 1-201(37) and of cases and commentary interpreting them. Consistent with certain cases and commentary, the court comments that present 1-201(37) falls short in defining when a lessor retains a "meaningful reversionary interest."

Chance Industries, Inc. v. TCF Leasing, Inc. (*In re* Chance Industries, Inc.), 2002 WL 32653678 (Bankr.D.Kan. March 29, 2002)

Four lease agreements are held to secured transactions under Section 1-201(37). After finding an early termination right (at month twelve in a thirty-six month term) to be economically harsh – rendering the agreement effectively not subject to termination by the lessee for thirty six months and thus satisfying one aspect of the circumstances deemed to create a security interest – the court examined the purchase options at the thirty-sixth month and found that they could be exercised for "nominal additional consideration," which completed the description of one of the security-interest-creating circumstances in the UCC's definition of "security interest." The decision relies on a variety of factors in determining what is "nominal," including a comparison of the purchase option prices with both the original purchase price of the equipment and the total lease payments during the initial term. In addition – and perhaps most important of all – the court recites that portion of 1-201(37) stating, "Additional consideration is nominal if it is less than the lessee's reasonably predicable cost of performing under the lease agreement if the option is not exercised." Each of the four leases at issue required the lessee to renew the lease for twelve more months for an aggregate rental of more than the option price if the lessee did not exercise the option.

Dieck v. Unified School District of Antigo, Langlade, Marathon and Shawano Counties, Wisconsin, 458 N.W.2d 565 (Wis.App. 1990)

While not decided under the UCC, this case involving a real property lease raises the same issues that could be raised under a municipal lease of equipment – does the fact that a municipality has the right to terminate a lease under the lease's non-appropriation clause mean that the lease must be characterized as a true lease as opposed to the creation of indebtedness along with the grant of a security interest. In this case, a school district entered into a twenty year lease of a school building with a $10 purchase option at the end of that twenty year term. This decision holds that the district's non-appropriation right means that the lease could be terminated at any time and thus should be considered a true lease as opposed to indebtedness requiring taxpayer approval. Apart from the non-appropriation right, it seems fairly clear that the transaction would otherwise be fairly characterized as the creation of indebtedness. If the same transaction involved the lease of equipment with a $10 purchase option, apart from the non-appropriation right, the lease would definitely be characterized under the UCC as a lease creating a security interest.

True Lease versus Security Interest: TRAC Leases and TRAC Statutes

In re Lightning Bolt Leasing, LLC, Case No. m3:15-bk-05173-JAF (Bankr.M.D.Fla. May 25, 2016)

At issue in this bankruptcy proceeding is whether a lease of two trucks should be treated as a true lease or a security agreement. The lease was apparently a standard TRAC lease setting forth "TRAC values" for each truck. At the end of the lease term, if a truck was sold for more than its TRAC value, the surplus was to be paid to the lessee, and if the sale was for less than its TRAC value, the deficit was to be paid to the lessor by the lessee. Under the UCC's test for creation of a security interest, the court finds that none of the per se security-interest-creating conditions had been satisfied. Nevertheless, the court holds that the lease was actually a security agreement when considering the economics of the transaction – the TRAC provision placed all of the upside potential and downside risk on the lessee resulting in the lessor being divested of any real residual interest. When the lessor pointed out that an applicable Illinois statute provided that "a transaction does not create a sale or security agreement merely because it provides that the rental price is permitted or required to be adjusted under the agreement either upward or downward by reference to the amount realized upon the sale or other disposition of the motor vehicle or trailer" (fairly standard language in so-called TRAC statutes in most states), the court brushes that off by stating that "shifting the entire risk of ownership, as opposed to a certain adjustment [e.g., for wear and tear on the vehicle], as is the case here, is not within the protection of the statute." This reasoning, while perhaps valid with regard to the economics of the transaction alone, disregards the point of the TRAC statute – i.e., that the effect of the TRAC clause should be ignored when applying the UCC's statutory tests for creating a security interest. If the court felt that federal bankruptcy law somehow pre-empts the state TRAC statute, it did not explicitly say so.

<u>In the Matter of HB Logistics, LLC, 2011 WL 4625198 (Bankr.N.D.Ala. Sept. 29, 2011)</u>

In this bankruptcy case, four different lessors sought to have their TRAC leases (three of which seem to have contained standard TRAC provisions, with the fourth possibly containing a "split" TRAC provision under which the lessor assumes some of the risk) declared to be true leases entitled to the appropriate protection under the Bankruptcy Code. These leases were governed by the laws of four different states, and the court references TRAC statutes enacted in three of these states – Alabama, Texas and Minnesota. With respect to the fourth state, the court indicates that the lessor did not argue that Mississippi law had passed a TRAC statute similar to the other states, and the court does not itself cite such a statute (Mississippi did in fact enact such a statute in 1994 – apparently still in effect). Nevertheless, the court holds that the TRAC lease governed by Mississippi law is a true lease under the Mississippi UCC. The court appears to feel generally that TRAC leases do not give the lessees "any equity" in the equipment and should be considered true leases based on the "economic realities."

<u>*In re* Lash, 2010 WL 5141760 (Bankr.M.D.N.C. Dec. 9, 2010)(slip copy)</u>

In connection with various motions in bankruptcy proceedings of a lessee of a truck, the court decides that a lease with a standard TRAC provision created a security interest. The lease provided that it was governed by Utah law. Indicating that Utah courts have interpreted UCC 1-203 consistently with the majority of courts in other jurisdictions, this court finds it appropriate to look to cases from other jurisdictions to help decide the issue at hand. Although the lessee argued that the TRAC amount was nominal additional consideration (thus satisfying the "bright-line" test for creating a security interest), the court finds that since there was no evidence presented regarding either the present or projected value of the truck, the court would not be able to come to a conclusion regarding nominality and must instead consider the economic realities of the transaction. In doing so the court finds the reasoning of a Florida bankruptcy court decision, <u>*In re* Grubbs Construction Company</u> (also mentioned in the <u>Hitchin Post</u> case below), convincing – i.e., that the TRAC lease closely resembles a loan with a balloon payment at the end and that the lessor, which could realize neither upside nor downside from the sale of the truck at the end of the lease, had no meaningful reversionary interest in the truck. Overlooked by this decision is the existence in Utah of a TRAC statute in the state's motor vehicle code stating the motor vehicle lease agreements with terminal rental adjustment clauses do not create a security interest.

Hitchin Post Steak Co. v. General Electric Capital Corporation (*In re* HP Distribution, LLP.), 2010 WL 3699240 (Bankr.D.Kan. September 3, 2010)

The court grants the lessor's motion for summary judgment (and denies lessee's motion) requiring the lessee to assume or reject leases after deciding that the leases -- TRAC leases of truck tractors and trailers -- were true leases. After a discussion of Article 1's distinction between true leases and secured transactions and references to cases and commentary which have supplied concepts to aid in making the distinction, the court acknowledges disagreements regarding the status of TRAC leases. While mentioning the existence of a so-called TRAC-neutral statute in the state law governing the transaction, the court states that such a statute should not alone drive the analysis and apparently agrees with those who found TRAC leases to be true leases even in the absences of such TRAC statutes. The court spends some time attempting (arguably unsuccessfully) to distinguish a TRAC-like lease discussed in *In re* Grubbs Construction Company, 319 B.R. 698 (Bankr.M.D.Fla. 2005) in which that court characterized the TRAC provision as economically equivalent to a balloon payment at the end of a loan transaction. Apart from the existence of a TRAC statute requiring that the TRAC provision not be determinative of the creation of a security interest, one must wonder how a transaction in which the lessor has neither upside potential nor downside risk with respect to potential changes in value caused only by market conditions can be characterized as one in which the lessor maintains a meaningful residual interest or entrepreneurial stake in the equipment being leased.

In re Double G Trucking of The Arklatex, Inc., 432 B.R. 789 (Bankr.W.D.Ark. 2010)

In considering a lessor's motion requiring the lessee in bankruptcy to assume or reject leases of three motor vehicles containing a typical TRAC provision, the court finds that the lessee was unable to carry its burden of proving that the lease was in fact a secured transaction. After acknowledging a split of authority concerning the status of TRAC leases, the court relies most heavily on the addition to Arkansas's UCC of a TRAC statute provision stating that a security interest is not created merely because the lease contains a TRAC clause. Since the lessee had been unable otherwise to prove that the lessor did not retain a reversionary interest or that the lessee had acquired equity in the goods, the court grants the lessor's motion.

In re Brankle Brokerage & Leasing, Inc. (Brankle Brokerage & Leasing, Inc. v. Volvo Financial Services), 394 B.R. 906, 2008 WL 4470061 (Bankr.N.D.Ind. Sept. 18, 2008)

Applying the choice of law provision in the lease – calling for North Carolina law – this bankruptcy court finds a way around a statute that apparently was intended to safeguard the true lease status of TRAC leases. In North Carolina's Article 2A, "lease" is defined to include a motor vehicle operating agreement that is considered a lease under

Section 7701(h) of the Internal Revenue Code (regarding TRAC leases). However, the court states that this does not resolve the issue in itself and goes on to consider the provisions of Article 1 distinguishing a true lease from a security interest. It then applies the same kind of analysis found in many early (i.e., prior to the adoption of TRAC lease statutes in nearly all states) TRAC lease cases to find that since the lessee has all of the down-side risk and up-side potential (and thus the lessor has no meaningful residual interest), the transaction is actually a security agreement. The court does indicate that if North Carolina had enacted the same kind of TRAC statute found in a few other states – i.e., by amending Article 1's true lease/security interest distinction instead of amending the definition of "lease" in Article 2A – this decision would have gone the other way. The court does not indicate how it would rule in the face of the most common form of TRAC statute – found in a State's motor vehicle code and stating that its provisions regarding TRAC leases not creating security interests are "notwithstanding any other law to the contrary."

Zions Credit Corporation v. Rebel Rents, Inc. and Perry Valley Rentals, Inc. (*In re* Rebel Rents, Inc.), 291 B.R. 520 (Bankr.C.D.California 2003)

Lease transaction containing a TRAC provision and also a repurchase agreement from the truck dealer, each providing for an anticipated residual value to be paid to the lessor, held to constitute a true lease under 1-201(37).

Morris v. Dealers Leasing, Inc. (*In re* Beckham), 275 B.R. 598 (D.Kansas 2002); aff'd *In re* Beckham, 52 Fed. Appx. 119, 2002 WL 31732497 (10th Cir. Dec. 6, 2002)

TRAC lease held not to constitute a security agreement inasmuch as (i) the lessee was not obligated or compelled to purchase the vehicles (e.g., under a "no lessee in its right mind test" where the lessee has no rational economic alternative but to purchase the goods); (ii) a TRAC clause provides an incentive to maintain vehicles in good condition; and (iii) a Kansas TRAC amendment to Article 2A (K.S.A. Sec. 84-2a-110) providing that TRAC clauses do not themselves create security interests itself was meant to clarify existing law.

Morris v. U.S. Bancorp Leasing and Financial (*In re* Charles), 278 B.R. 216 (Bankr.D. Kansas 2002)

Fairly thorough parsing of factors expressed in 1-201(37) in holding that a TRAC lease does not create a security interest [disagreeing with *In re* Zerkle, 132 B.R. 316 (Bankr.S.D.W.Va. 1991), which held that TRAC leases create an option to purchase for no additional consideration], then further holding that Kansas' TRAC statute hobbles any argument that TRAC leases are secured transactions.

In re Damron, 275 B.R. 266 (Bankr.E.D.Tenn. 2002)

TRAC lease held not to constitute a security interest under 1-201(37). The TRAC rider stated that the estimated residual value was a reasonable current estimate of fair market value and the court found that value to be a reasonable figure designed to encourage maintenance of the vehicles. No mention was made of Tennessee's 47-2A-110, a TRAC amendment similar to that in Kansas mentioned in the two cases discussed immediately above.

Lessors’ Damages – Measures and Entitlement

<u>AGCO Finance, LLC v. Littrell, 2017 WL 7369877 (U.S.Dist.Ct. D.Minn. December 15, 2017)</u> *

The assignee of a lease of a tractor (as well as of a contract for the sale of other farm equipment) sought a default judgment on both liability and damages after the lessee had failed to make payments. Following a detailed discussion of what is required for obtaining such a judgment under federal law, the court grants the assignee’s motion. The court notes that the assignee would not be entitled to its earlier request for both the present value of the remaining lease payments and repossession of the tractor, which would result in a windfall for the assignee. After the assignee withdrew its request regarding future lease payments and instead asked for only payments for the time period prior to repossession, the court grants the default judgment.

<u>Quality Equipment Leasing, LLC v. Alabama Logistics, LLC, 2017 WL 4304626 (U.S.Dist.Ct. N.D.Alabama September 28, 2017)</u>

After the lessee defaulted on four lease agreements for trucks and trailers and a landlord of the lessee had moved some of this equipment, the lessor sued - requesting both actual and liquidated damages. The court’s discussion of liquidated damages is a bit confusing. It rejects the lessor’s claim for liquidated damages as duplicative of its claim for actual damages, but also awards the lessor as actual damages the acceleration of rentals due after the leases were terminated by the lessor without any present valuing of such damages. The court also seems to interpret the liquidated damages claim as calling for the acceleration of all payments for the entire life of the lease – a very large amount that the court understandably rejects as a penalty. As to one trailer that was not returned, the court awards the lessor the amount of its fair market value at the time of termination (plus interest at 6% per annum).

<u>*In re*: Tidewater, Inc., Case 17-11132-BLS Doc 497 (Bankr.D.Del. August 30, 2017)</u> *

This is the transcript of a hearing in bankruptcy court which includes arguments by counsel for the debtors-in-bankruptcy/lessees and a creditor/lessor regarding the enforceability of a stipulated loss value provision in lease documents. The lessees were a group of affiliated companies which had entered into sale-leaseback transactions for leases of vessels, which obligations were all guarantied by Tidewater, Inc. Notwithstanding arguments by the creditor that previous caselaw had been altered by Article 2A-504 (supporting SLV remedies) and that the SLV remedy in the leases at issue actually resulted in damages that were lower than the actual damages, the court holds that prior case law was still good law and that the SLV was an unenforceable penalty. The court postponed a decision on an interesting issue related to the guaranty – whether an absolute and unconditional guaranty can be enforced despite the unenforceability of the underlying obligation (i.e., such a guaranty waiving defenses such as an SLV provision amounting to a penalty or even the underlying obligation being fraudulently induced). Settlement of the case by the lessor precluded a decision on this point by the court.

BA Jacobs Flight Services, LLC v. Rutair Limited, 2017 WL 277913 (U.S.Dist.Ct. N.D.Ill. January 20, 2017)

This decision is published over a year after the court had declared (in opinions summarized previously) that the acceleration clause in the lease at issue constituted an unenforceable penalty. To determine the actual damages to which the lessor should be entitled, the court held an evidentiary hearing. According to the court, based on this hearing as well as pre-trial and post-trial briefs, the parties agreed on very little – the court characterizing their analysis as self-serving, speculative and biased, not supported by any expert analysis or opinion. So the court here undertakes a rather extensive analysis itself based on the facts presented to it, and arrives at its own determination of damages to be paid to the lessor, reserving until a later hearing what the precise amount of prejudgment interest and attorneys' fees should be. [The decision as to these two amounts can be found in the case of the same name at 2017 WL 2056193 (U.S.Dist.Ct. N.D.Ill. May 12, 2017).]

Xerox Corporation v. AC Square, Inc., 2016 WL 5898652 (U.S.Dist.Ct. N.D.Cal. September 1, 2016)

This seems to be a fairly straightforward case of a default judgment in which the court approves, first, the plaintiff/lessor's claim that the lessee had defaulted under a number of leases, and second, after being ordered to submit additional evidence as to damages, the calculation of damages based in large part on the provision in the leases calling for present valuing remaining rentals using a 4% discount rate. The court also grants the lessor's demand to recover the property leased under all agreements. The court does not make clear, however, whether the combination of these two remedies might result in a windfall to the lessor if the sum of the money damages and value of the property were to be more than the lessor's remaining investment.

PNC Equipment Finance, LLC v. MDM Golf, LLC, 2016 WL 3453057 (U.S.Dist.Ct. S.D.Ohio June 20, 2016)

In this brief decision, the court enters a default judgment in favor of the lessor based mainly upon the terms of the lease – the stipulated loss value set forth in the lease minus the net proceeds from the lessor's sale of the repossessed equipment plus interest at the statutory rate.

BLB Aviation South Carolina, LLC v. Jet Linx Aviation, LLC, 808 F.3d 389 (2015)

In this case, the U.S. Court of Appeals for the Eighth Circuit renders a harsh verdict against an aircraft lessor's claim for damages following a lessee breach. The case concerned whether the appropriate measure of damages for failing to maintain an aircraft properly was the cost of repair or the diminution in value. Since the cost of repair measure would entail completely re-doing the underlying maintenance, the court rejected that as economic waste that would put the lessor in a better position than it would have been without the breach. And since the lessor had not provided sufficient proof of diminution in value, the court affirms the District Court's dismissal of the lessor's claim for damages.

BA Jacobs Flight Services, LLC v. Rutair Limited, 2016 WL 8328631 (U.S.Dist.Ct. N.D.Ill. December 8, 2015)

After the court had previously granted the lessor partial summary judgment as to the defaulted aircraft lessee's liability, the lessor moved for summary judgment as to damages based upon the lease's liquidated damages provision entitling the lessor to acceleration of the rentals remaining after default. The court denies the motion stating that this acceleration clause was an unenforceable penalty (not a reasonable estimate at the time of contracting of the likely damages from breach) since it did not take account of the fact that the lessor had repossessed and sold the aircraft. As for the calculation of the lessor's actual damages, the court finds that there are enough issues in dispute so as to require a future evidentiary hearing.

SunSouth Capital, Inc. v. Harding Enterprises, LLC, 2015 WL 12895752 (U.S.Dist.Ct. M.D.Ala. November 5, 2015)

After its lessee had defaulted, had refused to turn over the equipment or reveal its location, and had continued to use the equipment, the lessor requested a temporary restraining order. The court grants the order without notice to the lessee ordering cessation of use of the equipment and turning it over to the lessor, finding that all of the conditions for the issuance of such an order had been met, including the prevention of immediate and irreparable injury to the lessor if the order is not granted. The court also set the date for an evidentiary hearing to determine whether to convert the TRO into a preliminary injunction.

BA Jacobs Flight Services, LLC v. Rutair Limited, 2015 WL 360758 (U.S.Dist.Ct. N.D.Ill. January 27, 2015)

The lessee in this case began making payments on its aircraft lease in a timely fashion, but most of these payments were substantially less than the amounts owing under the lease. After the lessor repossessed the aircraft and brought suit for partial summary judgment as to the lessee's liability, the lessee argued that the lessor did not have the right to repossess under the lease because the lease provision giving the lessor that right began with the words "If Lessee fails to may any payment of rent or other charges within 30 days after such amounts are due and payable…" This court concludes that the language was not ambiguous enough to permit the lessee to make payments in any amount – no matter how small – and avoid the possibility of repossession without demand or notice as set forth in the lease.

VFS Leasing Co. v. USASIA Casino Tours/Entertainment, Inc., 2015 WL 82716 (U.S.Dist.Ct. N.D.Cal. January 6, 2015)
FLCM ACQ VIII, LLC v. Taos Ventures, LLC, 2014 WL 7009872 (U.S.Dist.Ct. M.D.Fla. December 11, 2014)
PNC Equipment Finance, LLC v. MDM Golf, LLC, 2014 WL 5219582 (U.S.Dist.Ct. S.D.Ohio October 14, 2014)
Balboa Capital Corp. v. WCS Lending LLC, 2014 WL 4956459 (U.S.Dist.Ct. N.D.Tex. September 29, 2014)

These cases all involve lessors' motions for entry of a default judgment against their lessees. They help illustrate the standards applied by courts before granting such motions. In the California case, the court first declines to find for the lessor under a rule regarding claims for a "sum certain" inasmuch as not every element of the lessor's damage calculation was clearly demonstrated. The court does, however, make a determination of damages in favor of the lessor under a different rule based upon the lease's provisions and the clear evidence presented by the lessor (including holding that the stipulated loss values set forth in the lease did not constitute a penalty). In the Florida case, while the court is willing to find the lessee liable, it also holds that the lessor has not laid out precisely how it calculated the damages and directs the lessor to demonstrate its calculations more clearly. The court in the Ohio case held that the lessor's evidence enabled the court to determine the amount of damages by subtracting the net proceeds of the lessor's sale of the equipment from the stipulated loss value, all as set forth in the lease. Lastly, the court in the Texas case cited Texas law indicating that a lessor may not both recover all unpaid rent and repossess the equipment from the lessee unless the lessee has clearly waived its right to retain possession. The court was also concerned not to render a default judgment that would put the lessor in a better position than if the lease had been fully performed, and it calls instead for the record to be supplemented regarding the potential effect of granting these multiple remedies.

<u>Choice Asset Management, Inc. v. CIT Technology Financing Services, Inc., 2013 WL 5039340 (Tex.App. September 11, 2013)</u>

This case offers another illustration of the difference between operating under Article 2A versus Article 9 when it comes to enforcing one's interests. This appellate court affirms the summary judgment of a lower court in favor of the lessor. The lessee argued that the lessor had failed to prove that it repossessed and sold a piece of equipment to mitigate damages and that the lessor did not dispose of certain equipment in a commercially reasonable manner under certain provisions of both Article 2A and Article 9. Since there was apparently no dispute that the transaction was a true lease, this court notes that Article 2A (i) permits a lessee to waive rights it might otherwise have (such as requiring the lessor to act on its remedy of repossessing and disposing of all the equipment – the lessor chose not to do so); and (ii) does not require commercial reasonability in the context of selling equipment repossessed after a default – but only in the context of disposition in the form of leasing the equipment to a new lessee. The court also notes that the lessee's attempts to cite obligations of a secured party under Article 9 are unavailing in the context of a transaction governed by Article 2A.

<u>Mitsui Rail Capital, LLC v. American Coal Company, 2013 WL 3227291 (Ill.App. June 21, 2013)(unpublished opinion, check court rules before citing)</u>

This is an appeal from a lower court's finding that the lessee under a railcar lease was responsible for paying the costs of repair to railcars that suffered substantial corrosion damage during the course of the lease. Although the lessee attempted to argue that the lessor had failed to inspect and repair damage to the cars, this court affirms the lower court's reasoning that (i) the lessor's inspection obligations pertained only to the wheels and moving parts (not the tubs which were the subject of the corrosion) and (ii) the corrosion did not constitute "normal wear and tear" as permitted by the lease. The court also agrees with the lower court that it was not necessary to determine the precise cause of the damage inasmuch as the cars, which had a normal life expectancy of forty or fifty years, had only ten percent of useful life remaining after being in possession of the lessee for four to five years.

The CIT Group/Equipment Financing, Inc. v. Shapiro, 2013 WL 1285269 (U.S.Dist.Ct. S.D.N.Y. March 29, 2013)

After finding that the original lessee was liable to the lessor for a default by a successor lessee to whom the original lessee assigned its interests under the lease, the court considers what damages are owed the lessor under that lease. After reviewing the fairly typical remedies provision of the lease – entitling the lessor to choose one or more of a number of different remedies including demanding the immediate payment all rentals due under the lease and demanding a stipulated loss value (to be offset by the proceeds of a possible cash sale of the equipment) – the court finds such provisions to be substantively unconscionable because they purportedly permit the lessor to recover both future rent and the value of the equipment. Whether or not the court correctly interprets the phrase "all Rent Payments due under the Lease" to include future as well as past due payments, the court does find for the lessor by employing the lease's severability provision and applies that provision to enforce only those portions of the remedies which the court finds reasonable – the liquidated damages amount minus the proceeds of a commercially reasonable sale.

AEL Financial, LLC v. Hunt Club Pediatric Associates, P.A., 2012 WL 6642472 (U.S.Dist.Ct. N.D.Ill. Dec. 20, 2012)

This court denies a lessor's motion for summary judgment as to damages with respect to a lessee in default. The lessor had attempted to rely entirely upon an affidavit of its collections manager representing a payoff statement generated by the lessor's electronic accounting/payment management system setting forth amounts owed under a number of different categories presumably relating to the lease. The court understandably finds that because this statement provided no explanation of the lease provisions that purportedly justified these categories and the calculation of the amounts owing, more evidence would be needed to establish the amount of the lessee's liability.

Andersons, Inc. v. Lafarge North America, Inc., 2012 WL 5259149 (U.S.Ct.App. 6thCir. October 25, 2012)(not for publication)

After a lessee returned two hundred railcars to a lessor at the end of a ten year lease, the lessor deemed the cars to require substantial repairs in order to bring them into the condition required by the lease and, after being unable to agree with the lessee as to the repair costs, sued the lessee for damages consisting of the cost of repair, holdover rent, prejudgment interest and attorneys' fees. The Court of Appeals affirms the District Court's awards of the cost of repair and holdover rent and its denial of prejudgment interest and attorneys' fees. Of greatest interest is the description of the District Court's reasoning regarding the cost of repairs (disregarding the highest and lowest estimates of repair costs and averaging the two intermediate estimates) and the discussion of the award of holdover rent. With respect to the latter, the lease gave the lessor the right to demand holdover rent at the rate of one and one half times the lease rate if the cars were not delivered in the specified condition within thirty days of lease expiration.
The court finds that because the lessor did not have the use of the cars during the six

month period following lease expiration while it attempted a settlement with the lessee, the lessor was entitled to holdover rent for that period of time – and that such amount was not unreasonable in light of the difficulty of quantifying the damage and did not constitute an unenforceable penalty as argued by the lessee. The court also agrees with the trial court's finding that the lessor was not entitled to holdover rent for the period beyond the six months in that the lessor should have realized that settlement with the lessee would not be achieved and should have taken steps to mitigate its damages.

TBF Financial, LLC v. DRF Services, Inc., 2012 WL 1570141 (Minn.App. May 7, 2012) (unpublished opinion, see Minnesota rules before citing)

After entering into a lease forbidding the lessee from transferring the equipment or assigning its rights under the lease without lessor consent, the lessee did both of those things and the transferee began making lease payments instead of the lessee. When the lessor sued the lessee seeking damages for the breach, the lessee attempted to argue that it had a statutory right to assign its lease obligations under UCC 2A-303 concerning alienability of a party's interest under a lease. This appellate decision affirms a trial court's summary judgment in favor of the lessor in which the same statute is cited giving the lessor the rights and remedies (including damages) under UCC 2A-501(2) (which provides for rights and remedies under 2A as well as under the lease [unless limited by 2A]).

Philips Medical Capital, LLC v. P & L Contracting, Inc., 2012 WL 860324 (U.S.Dist.Ct. N.D.Miss. March 13, 2012)

This decision illustrates a relatively straightforward calculation of damages provided in a lease following a lessee default – including acceleration of remaining payments due plus a booked residual value, but without any discounting of such amounts to present value. There is also provision for pre-judgment interest under state law in this federal diversity action and for post-judgment interest allowable under federal law.

Lyon Financial Services, Inc. v. Jude's Medical Center, Ltd., 2011 WL 6029195 (U.S.Dist.Ct. N.D.Ill. Dec. 5, 2011)

Following the lessee's default, the lessor repossessed and sold the equipment being leased and then brought suit against the lessee for the deficiency. After rejecting a claim by the lessee that the lease created a security interest, the court nevertheless holds that even though Minnesota's Article 2A does not expressly require that a sale of leased goods following a default be commercially reasonable, Minnesota courts have found that concept helpful in determining mitigation of damages issues. Stating that there was insufficient information regarding the circumstances of the sale of equipment in this case to determine whether the sale was commercially reasonable, the court denies the lessor's motion for summary judgment.

Wells Fargo Bank Northwest, N.A. v. US Airways, Inc., 2011 WL 6141034 (N.Y.Sup.Ct. Dec. 1, 2011)(unreported disposition)

This decision upholds a provision in an aircraft lease providing for the payment of twice the ordinary monthly rental for the period following a default until the lessee returned the aircraft in the condition required by the lease. The court comments that liquidated damges for rental holdovers in multiples of the monthly rent have been upheld as not unreasonable in other New York cases and also notes that the lease in this case, like the leases in the other New York cases, was negotiated by sophisticated persons in the airline industry with experienced counsel.

<u>VFS Leasing Co. v. J & L Trucking, Inc., 2011 WL 3439525 (U.S.Dist.Ct. N.D.Ohio August 5, 2011)</u>

After a lessee default, the lessor repossessed and sold the four trucks that were subject to the lease. The lessee argued that since the lease created a security interest, it was an Article 9 transaction under which the lessor had a duty, among other things, to dispose of the equipment in a commercially reasonable manner. However, the court held that the lease was a true lease governed by Article 2A and that no commercial reasonableness requirement applied to the truck sale under North Carolina law.

<u>Canal Air, LLC v. McCardell, 2011 WL 5075724 (U.S.Dist.Ct. E.D. Mich. Oct. 26, 2011)</u>

After the lessor and lessee entered into a lease of an aircraft as a part of a sale/leaseback transaction, the lessee defaulted and relinquished the aircraft to the lessor, which thereupon sold it and brought suit against the lessee for the deficiency. Objecting to the lessor's motion for summary judgment, the lessee argued that the lessor (i) had not demonstrated that its sale of the aircraft had been commercially reasonable and (ii) had not provided the lessee with reasonable notice of the sale. The court agrees with the lessee and cites various sections of Article 9 to explain the obligations of the lessor in conducting such a sale. What is curious about this decision is that there is no discussion concerning whether Article 9 should apply at all – i.e., whether the lease of the aircraft was a true lease (in which case the default provisions of Article 2A would apply) or whether the lease instead created a security interest (in which case the provisions of Article 9 cited by the court would apply).

<u>TFG-North Carolina, L.P. v. Performance Fibers, Inc., 2011 WL 3040275 (U.S.Dist.Ct. D.Utah July 22, 2011)</u>

In this brief decision, the court carefully examines the terms of a lease to determine various portions of a plaintiff's damages claim. After finding that the lessee was liable for three unpaid base term payments (not to be reduced by the amount of interim rent payments made by the lessee, but reduced by the amount of the last month's rent paid as a security deposit) and for a twelve month extension triggered by the lessee not having given the required notice, the court finds against the lessor's claim for an additional six month period following the twelve month extension inasmuch as the lessor was on notice that the lessee would not would not be extending due to its default. The court also finds against the lessor with respect to an ambiguous lease provision for interest at eighteen percent per annum – since it was worded to apply only to payment and expenses incurred by the lessor, rather than the entire amount due.

GATX Corporation v. Appalachian Fuels, LLC, 2011 WL 3104070 (U.S.Dist.Ct. E.D.Ky July 8, 2011)

This case illustrates a number of possible sources of law necessary to conclude whether a grant of attorneys' fees is appropriate after a lessee default and what methods should be used to calculate the amount of such fees. According to the court, whether fees may be awarded at all is a matter of state law, but whether state or federal law determines the amount to be awarded is a closer call. The facts of this case – two equipment leases, one governed by California law and one by Kentucky law – affords an opportunity to observe how state laws may differ on this subject. Issues discussed include how to determine a reasonable hourly rate and how to calculate the number of hours reasonably expended.

Andersons, Inc. v. LaFarge North America, Inc., 2011 WL 2357895 (U.S.Dist.Ct. N.D.Ohio June 9, 2011)

This decision holds that the lessor was entitled to damages with respect to leased railroad cars that were not returned at the end of the lease in the condition required by the lease. According to the court, the trial centered on a battle of the experts as to the expenses that would be required to return the cars to serviceable condition. Rather than simply deciding in favor of one of the four experts, the court's conclusion reflects an average of the estimates of two of the four – the two (one hired by the lessor and one by the lessee) found most credible by the court.

GATX Corp. v. Appalachian Fuels, LLC, 2011 WL 2260695 (U.S.Dist.Ct. E.D.Ky. June 7, 2011) This case contains a very interesting, thorough discussion of damage claims made by the holder of two leases with the same lessee – one acquired from another lessor and one entered into directly with the lessee. The leases were stated to be governed by California and Kentucky law, respectively. Much of the discussion centers on the provisions for liquidated damages – a stipulated loss value in the former lease calculated by present valuing future rentals at a discount rate of three percent and stipulated loss values in the latter calculated using percentages of the original equipment cost. In assessing the reasonableness of these liquidated damages provisions, the court refers to Article 2A as in effect in both states. However, California's version of Article 2A also refers to a different provision of its civil code regarding liquidated damages – regarding reasonability under the circumstances existing at the time the contract was made. The court also takes into account provisions of both federal law and the applicable state law regarding pre and post-judgment interest. The decision is instructive regarding possible differences in state law regarding the calculation of damages.

Farnam Street Financial, Inc. v. Balaton Group, Inc., 2011 WL 1258512 (U.S.Dist.Ct. D.Minn. March 30, 2011)

In granting a lessor's motion for summary judgment against a defaulting lessee, this court gives the lessor all the damages listed in the lease without tempering them in a manner that other courts have employed – whether based on Article 2A or common law principles – to ease the lessee's burden. For instance, the lessor is awarded accelerated future rentals without provision for present valuing them and the lessee is ordered to return the equipment without provision as to whether any sales proceeds should be applied to mitigate the other amounts awarded the lessor.

G.E. Capital Information Technology Solutions, Inc. v. The Myler Company, Inc., 2011 WL 649684 (U.S.Dist.Ct. S.D.Ind. Feb. 11, 2011)(slip copy)

After defaulting under its lease, the defendant/lessee unsuccessfully asserted a creative argument to avoid summary judgment in favor of the lessor. The lessee contended that the liquidated damages provision in the lease was unenforceable as a penalty because it did not require the lessor to mitigate its damages. Rejecting this argument, the court indicates both (i) that the lease would have required the lessor to mitigate if the equipment had been returned by the lessee (instead the lessee had retained the equipment after default) and (ii) that the general rule is that while the nonbreaching party must mitigate, the burden is on the breaching party to demonstrate failure to do so (which this lessee was apparently unable to do).

Textron Financial Corp. v. Seven Falls Golf and River Club, LLC, 2011 WL 251115 (U.S.Dist.Ct. W.D.N.C. Jan. 25, 2011)(slip copy)

In this case, the court grants a lessor's motion for summary judgment as to a defaulting lessee's liability and damages owed under the lease. Inasmuch as the lease clearly set forth how to calculate the amounts that would be owing after a lessee default (past dues, estimated property tax to be owed by the lessor, future rentals discounted to present value, recovery and storage fees, and a credit to the lessee for proceeds of sale of the equipment), a considerable portion of this decision is spent on the calculation of reasonable attorneys' fees to be awarded the lessor based upon a number of factors enumerated in the Rhode Island (the law governing this lease) Supreme Court Rules of Professional Conduct.

PNCEF, LLC v.Hendricks Building Supply LLC, 2010 WL 4677772 (U.S.Dist.Ct. S.D.Ala. Nov.8, 2010); 2010 WL 3672257 (U.S.Dist Ct. S.D.Ala. Sept. 10, 2010)

After denying entry of a default judgment against a lessee in the earlier case and ordering the plaintiff (a successor to the original lessor) to submit further evidence to establish its claim for money damages, the court finds that the plaintiff is entitled to recover "stipulated loss value" – defined in the lease to include total delinquent rent (including late fees), all future rent and the estimated fair market value of the equipment at the end of the lease term. With respect to estimated fair market value, the court accepts the estimate provided by the plaintiff's representative based on her experience, her examination of web sites to determine the "going price" for such equipment and her consultations with other employees of the plaintiff. However, the court declines to award the plaintiff "reasonable" attorney's fees in excess of those actually incurred based on plaintiff's argument that "reasonable" should include potential future fees to be incurred due to difficulty of enforcement or possible contingency payments.

Columbus Bank and Trust Company v. Granger, 2010 WL 99055 (U.S.Dist.Ct. M.D.Georgia January 6, 2010)

A lessor's motion for summary judgment is denied regarding the amount owed to it by the lessee after the equipment had been sold by the lessor following a lessee default.

The court finds that there is a genuine issue of material fact as the whether the sale price was fair and therefore whether the sale was commercially reasonable. While the court is clearly applying Article 9 requirements and language (e.g., "collateral," "debt," "secured party") to the lease transaction, it does not explain how it concluded that the lease created a security interest (evidently the lessor did not contest this issue). The case serves as an illustration that a lessor's rights after default can be considerably different depending upon whether its lease is a true lease or not.

<u>Tango Transport, L.L.C. v. Transport International Pool, L.L.C., 2009 WL 3753559 (U.S.Dist.Ct. W.D.La. November 9, 2009)</u>

This court denies the lessor's motion for partial summary judgment on its claim that the lessee should be required to pay at the lease rate for trailers that it did not return to the lessor at the termination of the lease. Notwithstanding clear language to that effect in the lease, the court notes that the lease also called for the trailers to be returned to a particular "Return Location" set forth on the schedules and that such location was a distribution center that had been closed by the lessor. Thus the court was unwilling to award the lessor with damages on summary judgment without further investigation of the facts regarding possible discussion and agreement as to alternative return locations.

<u>Lyon Financial Services, Inc. v. Oxford Maxillofacial Surgery, Inc., 2009 WL 2170999 (U.S.Dist.Ct. D.Minn. July 17, 2009)</u>

While finding for the lessor on its summary judgment motion regarding the lessee's liability for breach of a finance lease (see discussion above in the Ability to Collect Rentals section), the court concludes that it cannot grant summary judgment on the issue of damages. It does so after finding that there was a genuine issue of material fact as to whether the lessor reasonably mitigated its damages. The court admits that the UCC's concept of "commercial reasonableness" in a secured transaction is not directly applicable in this leasing case, but goes on to state that Minnesota courts find it helpful in determining mitigation of damages issues when leased property is repossessed and sold.

<u>National City Healthcare Finance v. Refine 360, LLC, 607 F.Supp.2d 881 (N.D.Ill. April 9, 2009)</u>

In this case, the lessor had moved for a default judgment against both a lessee in default and an individual guarantor. This court denies the motion without prejudice to reassertion of a revised motion – but in a manner consistent with this court's views on the unenforceable penalty nature of the remedies set forth in the lease that were being requested by the lessor. Without citing Article 2A, the court asserts that American law (apparently, at least, case law) is universal in its condemnation of remedy provisions that provide for receipt of more than the sum of past due rents and the <u>present value</u> of both future rents and anticipated end-of-term fair market value of the leased property and then subtracting the current value of such property. In this case the lease contained what the court refers to as "a prototypical penalty provision of the type that to this Court's knowledge no court will enforce" – the lease's definition of "Stipulated Loss Value" (an amount that the lease permitted the lessor to demand) provided for no discounting to present value of either future rents or the estimated fair market value of the property. The court is apparently so outraged by the lessor's request here that it suggests that it may not be inclined to enforce another lease provision – requiring the lessee to pay the lessor's attorneys' fees.

C & J Leasing Corp. v. Beasley Investments, Inc., 2009 WL 777870 (Iowa App. March 26, 2009)(unpublished disposition, final publication decision pending)

After its lessee defaulted, the lessor took possession of the leased equipment and disposed of it before suing the lessee and personal guarantors. Apparently without deciding whether the lease was a true lease or one that creates a security interest, this court applies both Article 9 and Article 2 in reviewing a lower court's decision with respect to the lessor's claims for damages against the various defendants. The one defendant (a personal guarantor) that appeared at the lower court's trial prevailed at that trial by arguing that he had not been notified of the disposition, that such disposition was not commercially reasonable, and therefore that the lessor was not entitled to a deficiency judgment against him. This appellate court applies Article 9's rules in affirmation of the lower court's decision. This court then analyzes the damage claims against the remaining defendants by employing the damages provisions in Article 2. Notwithstanding this inconsistency, this portion of the decision correctly (assuming that the lease is a true lease to which Article 2, not Article 9, applies) distinguishes among the possibly applicable Article 2 provisions based on the facts of the case and provisions in the lease before remanding to the trial court for recalculation of the damages. The court also rejects the lessor's attempt to argue that the lessee would have exercised a purchase option, but for the default, and therefore that the calculation should include the full amount of that option price (as opposed to the lessor having to prove that it actually sustained a loss to its residual interest).

Giant Eagle, Inc. v. Phar-Mor, Inc., 528 F.3d 455 (6th Cir. 2008)

Reversing in part prior Bankruptcy and District Court decisions, the Sixth Circuit holds that under Pennsylvania law, a lessor's claim in bankruptcy for damages following the lessee's rejection of a lease does not disappear as soon as the lessor mitigates its damages by successfully re-leasing the equipment to another party. In this case, the other party (i.e., the new lessee) itself filed for bankruptcy shortly after entering into the new lease and subsequently rejected that lease. This decision indicates that since the lessor's attempt at mitigation proved to be less than completely successful, the lessor retained an unsecured claim in the initial bankruptcy for its losses. The court does affirm the holding of the lower courts that the lessor was entitled to administrative expenses in the form of post-petition rent payments from the date the lessee filed its petition in bankruptcy until the date it rejected the lease.

Western Peterbilt, Inc. v. Lozano, 2008 WL 1778324 (Wash.App.Div. April 21, 2008) (unpublished opinion)

After a lessee had made several late payments under its lease and then failed to abide by a lessor offer to bring itself current, the lessor terminated the lease, repossessed one of two trucks being leased and filed suit to repossess the other. Although the lessee argued that the lessor had waived its rights to terminate the lease and repossess the trucks by initially accepting late payments (along with late payment fees), this appellate court affirms summary judgment in favor of the lessor by the trial court, citing language in the lease providing (i) for multiple remedies for default, (ii) that no choice of any one remedy served to exclude exercise of others, and (iii) that no waiver of a default is a waiver of any other default or subsequent breach.

Holmes v. General Electric Capital Corp., 387 B.R. 896 (M.D.Ga. 2008)

This decision affirms the holding of a Bankruptcy Court that GECC was entitled to apply security deposits that it held and to claim further damages based upon a series of agreements (including a lease, an amendment to the lease requiring payment of a re-marketing fee, a security deposit agreement, and a cross collateral/cross default agreement) relating to the use of aircraft financed by GECC. The Bankruptcy Court's findings that GECC acted according to the terms of these agreements and in good faith were all affirmed.

Fairbrook Leasing, Inc. v. Mesaba Aviation, Inc., 2008 WL 564699 (U.S.Ct.App. 8th Cir. March 4, 2008)

After this Circuit Court had previously determined that a "Term Sheet Proposal" evidenced a binding preliminary agreement between the parties (in 2005: 408 F.3d 460), the lessor brought an action seeking expectancy (benefit-of-the-bargain) damages (e.g., for lost profits) for breach of the term sheet agreement. The Circuit Court here affirms the District Court's holding that the type of preliminary agreement evidenced by this term sheet (what federal courts in New York had called a "Type II" agreement in which the parties bind themselves to negotiate the final terms of a contract while complying with the terms of the preliminary agreement, as opposed to a "Type I" agreement that evidences essentially complete agreement on all material issues) does not warrant the award of expectancy damages.

Frank's International, Inc. v. Smith International, Inc., 249 S.W.3d 557 (Tex.App. 2008)

After determining that the first of two contracts at issue, although providing for a mixture of goods and services, was predominately for the lease of goods and thus governed by Article 2A, the court analyzes the effect of a mutual agreement by the parties to cancel this contract when entering into a second contract. Citing 2A-505's provision stating that following cancellation of a lease any rights based on prior defaults survive such cancellation (along with the retention of certain remedies) unless the parties have agreed otherwise, the court overturns a lower court's ruling that the rights of the lessor had been extinguished by the cancellation

Barr International, Inc. v. Paradise Produce Company, Inc., 2008 WL 162849 (Del.Super. Jan. 7, 2008)(unpublished opinion – not reported in A.2d)

In granting a lessor's motion for summary judgment, the court brushes aside the lessee's assertion that the lessor is limited to the measure of damages set forth in Article 2A's Section 528, by noting that the introductory language of such Section provides an exception permitting the lease agreement itself to determine the damages for breach. In this case the lease provided, among other things, that the lessor could require the lessee to purchase the goods for a designated amount. Such amount plus other accrued unpaid charges minus the amount realized by the lessor from a sale of the goods was awarded to the lessor as its damages.

Leasecomm Corporation v. Akpaffiong, 2007 WL 3309455 (Mass.App.Div. October 31, 2007)(not reported in N.E.2d)

This appellate court reverses a trial court decision in favor of a lessee who had continued to use equipment past the end of the lease term without making renewal payments. Finding that the transaction was clearly a commercial one and that the lease documents clearly spelled out the lessee's end-of-term responsibilities, the appellate court rejects the trial court's finding that the lease was unconscionable and holds that Leasecomm's entry into a consent decree regarding the non-cancellability of its leases and where it would institute collection suits has no effect on this lessee's obligations.

Star Leasing Co. v. Michael's Cooperage Co., Inc., 2006 WL 1995722 (U.S.Dist.Ct. S.D.Ohio July 13, 2006)

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.

Lanier Worldwide, Inc. v. Bridgecenters at Park Meadows, LLC, 2006 WL 1653323 (Ga.App. June 16, 2006)

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.

Addison Express, L.L.C. v. Medway Air Ambulance, Inc., 2006 WL 1489385 (U.S.Dist.Ct. N.D.Tex. May 19, 2006)

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."

Hewlett-Packard Financial Services Company v. One2One, LLC, 2006 WL 1281335 (U.S.Dist.Ct. D.N.J. May 8, 2006)(not for publication)

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.

TAL Financial Corporation v. CSC Consulting, Inc., 844 N.E.2d 1085 (Mass. 2006)

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.

Frontier Leasing Corporation v. Acevedo Grocery, Inc., 2006 WL 229501 (Iowa App. Feb. 1, 2006)

In affirming a district court's decision, this court rejects a lessor's argument that it was entitled to damages including the residual value of the equipment being leased due to the fact that the lessee's default prevented the lessee from exercising its purchase option under the lease. While conceding that the law permits a lessor to recover for loss to its residual interest actually caused by the lessee's default, the court criticizes the lessor for attempting to treat the purchase option as an obligation which the lessor would be entitled to accelerate upon the lessee's default.

Alaska Construction Equipment, Inc. v. Star Trucking, Inc., 128 P.3d 164 (Alaska 2006)

In a decision with no references to Article 2A, the court holds that under contract law a lessor may obtain damages for loss of use (as a form of special or consequential damages) where the lessee caused the equipment to be totally destroyed – in addition to previously acknowledged rights of a lessor to recover damages for loss of use in cases where the equipment merely needed to be repaired – and that the measure of such damages includes the period of time reasonably necessary to secure a suitable replacement (whether or not such a replacement is actually sought). Thus, a lessor's recovery in these circumstances is not limited to the market value of the damaged property.

U.S. Bancorp Oliver-Allen Technology Leasing v. Hall, Dickler, Kent, Goldstein & Wood, LLP. 2005 WL 1875459 (U.S.Dist.Ct. S.D.N.Y. August 8, 2005)

A discussion of the appropriateness of summary judgment relating to various claims for damages. While the amount of liquidated damages under the lease was not in dispute, the lessee argued that trial was necessary with regard to attorneys' fees, the proceeds of sale of returned equipment and the value of missing equipment. Under the facts of this case, the court holds that only the dispute concerning the value of missing equipment created a genuine issue of material fact for trial.

New York Career Guidance Services, Inc. v. Wells Fargo Financial Leasing, Inc., 2005 WL 1252315 (N.J.Super. May 2, 2005) (unpublished opinion)

Notwithstanding that the plaintiff was, according to the court's description, "a serially delinquent lessee of office equipment," the court grants the plaintiff's motion to certify a class and denies the defendant's motion to dismiss in this case relating to leases that permit the lessor to charge a late fee of ten percent of the late payment or up to $50, at the lessor's discretion. In this case, the lessor had attempted to collect a $50 late fee with respect to a monthly lease payment of not much more than that amount, with respect to which the court commented, "I have grave doubts that a late charge in a commercial environment of more than 90% of the late payment is reasonable." Although employing the word "commercial," the court comments that the plaintiff's New Jersey Consumer Fraud Act claim remains viable (in addition to common law and unjust enrichment theories of liability).

Oaks v. Bank One Corporation, 2005 WL 293677, 2005 Fed.App. 0096N (U.S.Ct.App.6th Cir. Feb. 8, 2005) (not recommended for full text publication)

The court holds that Tennessee law does not require a lessor to notify the lessee before disposing of the leased goods after a lessee default, even in the context of a lease that required such a sale to be done in a commercially reasonable manner. The court rejected lessee arguments invoking cases and statutes involving notice provisions found in Articles 2 and 9, as opposed to Article 2A.

Raymond Leasing Corporation v. Callico Distributors, Inc., 2005 WL 39772 (Mass.App. January 11, 2005)

The remedies provision of the lease in this case provided that the proceeds of any sale of the equipment after a lessee default would be deemed the rental value of the equipment for the remaining term of the lease, with the effect that all such proceeds would be credited against the lessee's obligations for such remaining term. This appellate court denies the lessor's appeal of the trial court decision, which applied the language of such remedies provision literally so as to include any residual interest the lessor may have had in the credit to the lessee.

AAR International, Inc. v. Vacances Heliades S.A., 349 F.Supp.2d 1114 (N.D.Ill. 2004)

In declaring a liquidated damages clause in an aircraft lease to be unenforceable (in the context of deciding certain motions before a trial to determine the lessor's damages), the court indicates that a lessor will not be permitted simultaneously to recover both actual and liquidated damages. Since in this case the lessor had repossessed the aircraft after the lessee defaulted early during the lease term, the court also notes that the liquidated damage provision did not credit the lessee with the difference between the estimated residual value expected at the end of the initial term of the lease and the greater value of the aircraft when it was repossessed in the early portion of that term.

Goodin v. TBF Financial, LLC, 2004 WL 813352 (Ky.App. April 16, 2004) (unpublished)

Section 2A-528, providing a formula for calculating damages after a lessee default in certain situations – including a provision for present-valuing the difference between the future rentals required by the lease and the market rent for the remainder of the term – is held not to be applicable inasmuch as the lease itself provided an alternative formula: an acceleration clause requiring the lessee to pay the sum of the remaining rentals. The court calculates the lessor's damages using this accelerated amount, crediting the lessee with the amount that the lessor received for the sale of the equipment.

Information Leasing Corporation v. Pall, Inc., 806 N.E.2d 178, 156 Ohio App.3d 378 (Ct. App. 2004)

In a case that appears mistakenly to apply leasing law to a transaction creating a security interest (the documentation included an obligation on the part of the lessee to buy the equipment at the end of the lease), the court discusses Article 2A's measure of damages following a lessee default in a case where the lessor retakes and sells the goods – employing the difference between the present value of the future rent due under the lease and the present value of the market rent over the same term.

Winthrop Resources Corporation v. Eaton Hydraulics, Inc., 361 F.3d 465 (8th Cir. 2004)

Upholds the propriety of a liquidated damages clause based upon pre-determined casualty values, even where this may result in a payment of four or five times the fair market value of the equipment, inasmuch as the end-of-term value of the computer equipment was speculative at the time the lease was entered into by sophisticated companies who had negotiated the lease – i.e., the casualty loss value was a reasonable forecast of just compensation for a harm that was very difficult of accurate estimation.

The CIT Group/Equipment Financing, Inc. v. Super DVD, Inc., 8 Cal.Rptr.3d 927 (Cal.App. 2004)

Lease provisions for calculating damages found to be sufficiently clear and definite to justify issuance of a writ of attachment under a California law requiring that the amount of the claim be a "fixed or readily ascertainable amount." The court also dismissed a contention that the declaration submitted in support of the right to attach order did not provide information regarding whether the equipment was sold in a commercially reasonable manner as required by Article 9, by stating that "Assuming division 9 is even applicable, the record reflects that appellants' contention is without merit."

In re Snelson, 305 B.R. 255 (Bankr.N.D.Texas 2003)

In a case involving a breach of a lease after it had been assumed by the debtor in bankruptcy, the court discusses the debtor's claim that the liquidated damages clause in the lease constituted a penalty in violation of New Jersey's Article 2A-504. The clause, which provided for discounting to present value the remaining rentals and the anticipated residual value of the equipment at the end of the lease term with a credit for disposition proceeds, was found to be reasonable and distinguishable from the clause determined to be a penalty in *In re* Montgomery Ward Holding Corp., 326 F.3d 383 (3rd Cir. 2003).

Wells Fargo Bank Northwest, N.A. v. Taca International Airlines, S.A. and JHM Cargo Express, S.A., 50 UCC Rep. Serv. 2d 811, 2003 WL 21180415 (S.D.N.Y. 2003)

Summary judgment granted to aircraft lessor seeking to enforce a liquidated damages formula including the present value of the amounts by which the stated rentals for the remainder of the lease term exceed the fair market rental value determined, as provided in the lease, by an appraiser chosen by the lessor.

ePlus Group, Inc. v. Panoramic Communications LLC, 2003 WL 1572000 (U.S.Dist.Ct. S.D.N.Y. March 27, 2003)

A lessor's motion for summary judgment based on a liquidated damages provision is denied on the basis that factual issues were in dispute which would indicate whether or not the provision would place the lessor in a better position than if the lease had been fully performed – a factor cited by the court as important for determining whether a liquidated damages provision is reasonable.

Linc Equipment Services, Inc. v. Signal Medical Services, Inc., 319 F.3d 288 (7th Cir. 2003)

Analysis by Judge Easterbrook of a lessor's claim for damages due to the equipment having been damaged during return and having to be taken out of service for ten months, in which the court cites Hadley v. Baxendale, 9 Ex. 341, 156 Eng. Rep. 145 (1854), and notes that while Article 2A does not explicitly provide for recovery of a lessor's consequential damages (specifying only incidental damages), neither does it preclude recovery of such damages. (The recently approved amendments to Article 2A add provisions for a lessor's recovery of consequential damages in 2A-530.)

<u>Renewals, Automatic Renewals, Return of Equipment</u>

<u>Pacific Space Design Corp. v. PNC Equipment Finance, LLC, 2014 WL 6603288 (U.S.Dist.Ct. S.D.Ohio Nov. 19, 2014)</u>

After the end of a sixty month lease, the lessee continued to make monthly lease payments for an additional thirty-four months before realizing that the initial term had ended nearly three years ago. When contacted by the lessee, the lessor transferred title, but did not return any of the extra payments. After the lessee sued for the return of payments on the basis of both breach of contract and unjust enrichment, this court simply cites the language in the lease regarding automatic renewal (stating that the lease would automatically renew for a single twelve month term and thereafter for successive one month terms unless the lessee provided sixty days written notice of its intent to return or purchase the equipment) and holds that the lessor was entitled to retain the extra payments. Interestingly, the court also finds that it does not matter, as the lessee attempted to argue, whether the lease was a true lease or a conditional sale. It seems possible that other courts might be inclined to require the lessor to return the extra payments collected if the lessee were deemed to have become the owner of the equipment at the end of the initial term (or even more severe, punish the lessor for having violated usury or other statutes protecting buyers or borrowers by collecting more than that to which it was entitled under a secured installment sale or a secured loan).

<u>Parimist Funding Corp. v. Suffolk Vascular Associates, PLLC. 2008 WL 399156, 18 Misc.3d 1131(A) (N.Y.Sup. January 30, 2008) (Slip Copy)</u>

This New York trial court decision refuses to enforce an automatic renewal provision in three leases of medical and office equipment, citing the lessor's failure to provide advance written notification as required by New York's General Obligation Law Section 5-901. The court first brushed aside the lessee's contention that because the leases were security interests rather than true leases, the lessee should be considered to own the equipment and have no further obligations after the end of the original sixty month terms (employing some questionable precedent, however, to reach the conclusion that they were true leases). What seems odd about this decision is that although the court states that "the leases obviously become month-to-month leases as they are terminable upon 30 days notice by either party," it ignores the exception contained in Section 5-901 for the advance notice requirement with respect to automatic renewal terms of thirty days or less. The court does, however, note that claims by the lessor sounding in conversion, replevin and for the value of the equipment are not precluded by Section 5-901.

<u>Farnam Street Financial, Inc. v. Trinity Valley Electric Cooperative, Inc., 2006 WL 1195904 (U.S.Dist.Ct. D.Minn. May 4, 2006)</u>

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.

Dayton Development Company v. Gilman Financial Services, Inc., 419 F.3d 852 (8th Cir. 2005)

After the lessor on a lease with the equipment user sold its interests in the equipment to another party and leased the equipment back from such other party, that other party brought suit against the sublessor after the sublessor (i) permitted the user to renew the user lease without providing written notice and (ii) thereafter negotiated a purchase price with the user under a fair market value purchase option. The court affirms the district court's decision that the plaintiff had no right to compel the sublessor to participate in an alternative valuation method for determining fair market value (to be employed if the parties to the user lease could not agree) and that the sublessor had not violated its agreement with the plaintiff not to modify the user lease without the plaintiff's consent by permitting the user to renew without having given written notice. With respect to the latter claim, the court holds that the sublessor had waived a requirement in the user lease, as opposed to modifying the lease. It seems apparent that the plaintiff's agreement with the sublessor was not as precise as it could have been in specifying exactly what the sublessor could and could not do in dealing with the user under the user lease.

Commonwealth Capital Corp. v.Getronics, Inc., 2005 WL 1817170 (U.S.Ct.App. 3d Cir. August 3, 2005)(not precedential)

Affirmation of a district court decision holding that a lease did not obligate the lessee to notify the lessor of repairs made to the equipment (unlike required notification for improvements) and that the lessor had failed to present enough evidence that the equipment was not returned in the condition required by the lease (as opposed to being returned with damages constituting only ordinary wear and tear or with missing parts that were insubstantial). The case illustrates the importance of precise wording in a lease regarding return conditions and the importance of presenting clear evidence of violation of those return conditions.

Information Leasing Corporation v. McGladrey & Pullen, L.L.P., 2005 WL 1706113 (U.S.Dist.Ct. D.Minn. July 21, 2005)

Another case illustrating the importance of very careful drafting of lease provisions regarding return and renewal. The court denies a lessor's summary judgment motion due to ambiguity of a lease provision clearly requiring prior notice of intent to exercise an option to purchase the equipment or renew the lease schedule, but not clearly requiring prior notice of intent to return the equipment. With respect to the lessor's claim that equipment returned by the lessee had not be returned in a timely manner, the court also finds that the lease did not explicitly require return by the expiration date of the schedule, and looks instead to usage of trade (based on 2A-202) to consider extrinsic evidence presented by the lessee that return within thirty days after expiration was all that was required.

Bradstreet Personnel Group, Inc. v. Wells Fargo Financial Leasing, Inc., 2005 WL 1252333 (N.J.Super. May 2, 2005) (unpublished opinion)

The same judge who decided the *New York Career Guidance Services* case discussed in the "Measures of Lessors' Damages" section above finds that the New

Jersey Consumer Fraud Act applies as well to corporate and commercial entities, but rules against the plaintiffs with respect to its claim that an automatic renewal provision in a lease form violated such Act. While admitting that they had not read the lease agreement to begin with, the plaintiffs argued that the renewal provision was so ambiguous that reading it would not have made a difference. Finding that the plaintiffs would have had the opportunity to inquire about the renewal requirements if they had read the provision, the court granted summary judgment in favor of the lessor with regard to the plaintiffs' claims of deceptive and unfair practices.

Dynamics Comm. Funding Corp. v. Robert W. Baird & Co., Inc., 2004 WL 1310155 (Va.Cir.Ct. May 5, 2004)

A strong affirmation of a lessor's right to enforce an automatic renewal provision requiring the lessee to give notice of termination ninety days before the end of the initial or any extended term. The facts of this case, however, indicate that only software was being financed and that the document gave the lessee a $1 purchase option at the end of the initial term (setting forth an understanding by both parties that such a purchase option operated only to release the lessor's interest in the software license). In addition to marking the end of a lessor's rights to the subject matter of a lease (whether equipment or software), the time for exercising a $1 purchase option might be thought also to signal the end of the lessor's right to collect rents.

Protection Industries Corp. v. DDB Needham Worldwide, Inc., 763 N.Y.S.2d 546 (App.Div. 2003)

Despite the lessee having made payments after the scheduled termination of an eight year lease, an eight-year automatic renewal clause in the lease is held to be not effective due to non-compliance with New York's General Obligations Law Sec. 5-901. This law – making unenforceable automatic renewal provisions for greater than a thirty day renewal period in personal property leases unless the lessor provides its lessee with fifteen to thirty days advance written notice of the date required in the lease for the lessee to give the lessor notice of the lessee's intention to terminate the lease – has previously been held to apply to New York lessees even when the lease is stated to be governed by the law of another state: Andin International, Inc. v. Matrix Funding Corporation, 756 N.Y.S.2d 724 (Sup.Ct. 2003). A more recent case, Ludl Electronics Products, Ltd. v. Wells Fargo Financial Leasing, Inc., 2004 WL 737049 (N.Y.App.Div. March 8, 2004), holds that this law cannot be used by lessees to recover lease payments made after the end of the initial term if the lessees have continued their beneficial use of the equipment.

Winthrop Resources Corporation v. Advanced Telecomm of Pittsburgh, 2002 WL 31777799 (D.Minn. Dec. 10, 2002)

Another in a series of victories for this lessor with respect to an evergreen renewal clause, following the earlier decisions mentioned below – in this case one year renewals, unless one hundred twenty days prior notice of termination is given.

Winthrop Resources Corporation v. Spearhead System Consultants (US), Ltd., 2002 WL 1127713 (D.Minn. May 29, 2002)

Lessor's summary judgment motion granted with respect to a lease provision mandating automatic one year renewals unless written notice of termination was provided one hundred twenty days before the scheduled end of the lease term – despite the court's stated reservations about such evergreen provisions (opining that it would be a better practice to ensure that both parties are notified in advance of such dates for notice of termination). It seems somewhat ironic, given the court's inclinations, that the possible application of the New York statute referenced in Andin above was not raised inasmuch as the lessee was a New York corporation with its primary place of business also in New York.

Winthrop Resources Corporation v. North American Lighting, Inc., 2002 WL 334410 (D. Minn. Feb. 12, 2002)

Lessor's summary judgment motion granted with respect to lease provision requiring automatic renewal for one hundred twenty day periods unless either party gave the other party written notice one hundred twenty days prior to scheduled termination.

[Wisconsin, Rhode Island, Louisiana and New York have statutes regulating automatic renewal clauses in commercial leases.]

Liability – Vicarious and Otherwise – of Lessors (mostly Motor Vehicle Lessors) for Equipment-Related Injuries and Damages

Scott v. A Betterway Rent-A-Car, Inc., 2018 WL 1558268 (U.S.Dist.Ct. M.D.Fla. March 27, 2018) *

This court finds that injured parties had failed to state a cause of action against the car rental company that rented a car to a driver of the automobile responsible for the plaintiffs' injuries. The court finds that the Graves Amendment preempts Florida's vicarious liability statute and also holds that the plaintiffs had not sufficiently alleged negligence or criminal wrongdoing that would be exceptions to the Graves Amendment's protections for motor vehicle lessors – stating, in particular, that the rental company did not have a duty to investigate the driver's ability to drive before renting the car.

Parker v. Miller, 2018 WL 898981 (U.S.Dist.Ct. S.D.Ohio February 15, 2018) *

The plaintiff was seriously injured by a tractor trailer driven by one of the defendants. The driver was employed by another defendant (Dakotaland) which had leased the truck from a third defendant (Fowlds). The plaintiff's claims included vicarious liability against Dakotaland and Fowlds for the driver's negligence as well as various other negligence claims relating to the driver. Although both parties felt it necessary to argue whether the two companies were "affiliates" as defined in the Graves Amendment, this court holds that the Graves Amendment is simply inapplicable in this case since its application is limited to claims that a vehicle owner is liable under state law "by reason of its being the owner of the vehicle." Not only does Ohio law not impose strict vicarious liability on vehicle lessors of the kind that the Graves Amendment was designed to preempt, but the plaintiff's claims all concern whether the lessor here was the driver's employer under Ohio law.

<u>Peters v. Hertz, 2017 WL 3136388 (Mount Vernon NY City Ct. July 13, 2017)</u>

In this small-claims action, the plaintiff sought to recover damages sustained by her vehicle due to alleged negligence of the driver of a truck rented from Hertz. Without explaining why, this court denies Hertz's summary judgment motion based upon the Graves Amendment, stating that the plaintiff had raised a triable issue of fact concerning whether Hertz had negligently entrusted the truck to the driver.

<u>Chase v. Cote, 2017 WL 3000739 (Conn.Super.Ct. June 12, 2017)(unpublished decision, check court rules before citing)</u>

The plaintiff instituted a personal injury action after sustaining injuries as a result of a motor vehicle accident caused by the alleged negligent actions of the driver of a motor vehicle who had leased the vehicle from Cheap Auto, a motor vehicle lessor. The lessor here was unable to win a summary judgment motion based on the Graves Amendment due to conflicting evidence concerning whether the rental agreement was still in effect at the time of the accident (the stated initial due date for returning the vehicle was March 25, 2014, and the accident occurred on June 6, 2014). The court notes that the protection of the Graves Amendment is limited to harm to persons or property that arises out of operation of the vehicle "during the period of the rental or lease."

<u>Negri v. Murphy, 2017 WL 1453894 (Conn.Sup.Ct. April 3, 2017)(unpublished decision, check court rules before citing)</u>

After the plaintiff was injured in an auto accident, she sued both the driver and the leasing company that had rented the car to the driver. The claims against the lessor were based upon vicarious liability for the recklessness and negligence of the driver as well as for negligently entrusting the car to the driver. The court quickly disposes of the vicarious liability claims, citing the Graves amendment, and also finds that there were not facts to support negligent entrustment – e.g., the lessor had no reason to believe that the driver was incompetent to operate a motor vehicle.

<u>Escobar v. Nevada Helicopter Leasing LLC, 2016 WL 3962805 (U.S.dist.Ct. D.Hawai'i July 21, 2016)</u>

In this lawsuit by a widow of a helicopter pilot who died in a crash of the helicopter, the plaintiff asserted state law tort claims against the lessor of the helicopter (among other defendants). The lessor had purchased the helicopter from another defendant and then leased it to a lessee owned by the same individuals that owned the lessor. According to the court, the lessor was formed to take advantage of federal and state tax incentives for entities established to purchase and lease helicopters. The court holds that the state law tort claims are preempted by a provision in the Federal Aviation Act entitled "Limitation of Liability" (49 U.S.C. Sect. 44112) stating generally that an owner, lessor or secured party of a civil aircraft is liable for personal injury, death, or property loss only when the aircraft is in the actual possession or control of such party. The court analyzes the history of the law and the law of preemption to come to this conclusion. In particular, the court states that "the legislative history of the statute established that the federal law's purpose and objective is to protect financiers, owners, and long-term lessors [persons leasing an aircraft for at least thirty days] of aircraft from liability when they were not in actual possession or control of the aircraft."

Stratton v. Wallace, 2016 WL 3552147 (U.S.Dist.Ct. W.D.N.Y. April 5, 2016)

This action is a motion by one of the defendants in the 2014 case decided by the same court (previously summarized) for an interlocutory appeal to the U.S. Court of Appeals for the Second Circuit. Not happy with the ruling in the previous decision that the Graves amendment does not preempt all state law regarding vicarious liability for motor vehicle lessors – since the Federal statute explicitly contains exceptions for negligence on the part of either the lessor or its affiliates – this defendant evidently hoped for a ruling from the Second Circuit that the preemption was broader. After a fairly detailed discussion of preemption law, this court denies the defendant's motion.

Johnke v. Espinal-Quiroz, 2016 WL 454333 (U.S.Dist.Ct. N.D.Ill. February 5, 2016)

This case grows out of an accident with multiple fatalities in which a driver had leased a truck from a lessor that previously employed him as a driver and knew that the driver had a visual impairment. Although the lessor was also in the business of delivering products, the court holds that it can still receive the benefits of the Graves amendment – i.e., someone in the business of leasing motor vehicles can still be protected from state vicarious liability laws even though it is not *solely* in the business of leasing. However, the court also indicates that the motor vehicle lessor/defendant in this case may be subject to liability under legal principles other than those based purely on vicarious liability due to its lessee's actions – such as employer-based claims seeking to hold the defendant liable for the negligence of its alleged statutory employee.

Eisenberg v. Cope Bestway Express, Inc., 2015 WL 5708479 (N.Y.App.Div. Sept. 30, 2015)

Gachlin v. Coastal International Trucks, LLC, 2015 WL 1500547 (Conn. Super. March 10, 2015)(unpublished opinion, check court rules before citing)

The two cases find that a grant of summary judgment with regard to personal injury damage claims is appropriate in favor of truck lessors where the Graves Amendment applies – i.e., the action was commenced on or after August 10, 2005; the truck or chassis qualifies as a motor vehicle under the Graves Amendment; the lessor/owner was engaged in the business of renting or leasing motor vehicles; and there are no allegations of negligence or criminal wrongdoing on the part of the lessor.

Houston v. McNeilus Truck and Manufacturing, Inc., 124 A.D.3d 1210, 999 N.Y.S.2d 284, 2015 WL 25075 (N.Y.A.D. January 2, 2015)

This case is an action for damages related to a death caused by a motor vehicle which invokes a legal principle of New York law not related to the Graves Amendment: "As a general matter, a finance lessor…that never possesses a product due to its direct shipment to the lessee and thus has no ability to inspect the product for defects may not be held liable in negligence for failure to inspect or warn of a dangerous condition." The majority of this appellate panel affirms a lower court's denial of a summary judgment motion by the owner of the vehicle (presumably a finance lessor) due to the existence of factual issues regarding whether the decedent's employer (a "corporate sibling" of the lessor) had been appointed by the lessor as an agent to inspect the vehicle. A dissenting opinion of two judges would grant the summary judgment motion, asserting that the plaintiff had failed to raise this agency argument in the motion court.

Fisher v. National Progressive, Inc., 2015 WL 105971 (U.S.Dist.Ct. W.D.Okla. January 7, 2015
Davis v. Elrac, LLC, 2014 WL 5394924 (Conn.Super. Sept. 26, 2014)(unpublished opinion, check court rules before citing)
DelPrete v. Senibaldi, 2014 WL 5286741 (Conn.Super. Sept. 16, 2014)(unpublished opinion, check court rules before citing)

These three cases are all attempts to hold lessors of motor vehicles liable for accidents caused by their lessees employing an exception for negligence or criminal wrongdoing under the Graves Amendment. The plaintiffs claimed that the lessor had negligently entrusted the vehicles to lessees who caused the accidents. In the Oklahoma case, the U.S. District Court states that although the Tenth Circuit had not yet addressed the issue of whether the Graves Amendment permits negligent entrustment claims, that District Court would act on its own precedent and consider whether the elements of negligent entrustment under Oklahoma law were satisfied in that case. In the two Connecticut decisions, the courts proceed on the assumption that negligent entrustment claims are permitted and go on to examine whether the claims are legally sufficient to keep the lessor from successfully barring the claim. In the context of discussing whether the lessors actually or constructively knew that the lessees should not be entrusted with the vehicle, the decisions indicate that automobile rental companies do not have an obligation to investigate the driving record of lessees other than checking the driver's license. In the Davis case, the plaintiff was found to have sufficiently alleged the lessor's failure to check the license to ensure it was facially valid, and thus the court denies the lessor's motion to strike. In the DelPrete case, the plaintiff's pleadings were found insufficient and the opposite conclusion was reached.

Stratton v. Wallace, 2014 WL 3809479 (U.S.Dist.Ct. W.D.N.Y. August 1, 2014)

After the owner of a tractor-trailer leased it to an affiliated (through common ownership) company, the lessee's driver struck a disabled car and killed the car's driver. The decedent's husband brought suit against the owner (among others), claiming that the owner should be held vicariously liable. This court decides that the Graves Amendment does not prevent such an action insofar as the statutory exception to shielding lessors from such liability states that "there is no negligence or criminal wrongdoing on the part of the owner (or an affiliate of the owner)." The court states that the natural reading of this portion of the statute is that if either the owner or its affiliate has been negligent, then the owner can be found liable simply by reason of being the owner. The court distinguishes this case from the typical kind of case to which the Graves Amendment was directed – where commercial leasing and rental companies have little control over their lessees.

Itha v. Stafford, 2014 WL 2696756 (Conn.Super. May 8, 2014)(unpublished opinion, check court rules before citing)

After a rented car driven recklessly by a minor injured the plaintiffs, they brought suit to recover damages against the vehicle owner and the leasing company. Although the court acknowledges that the Graves Amendment protects the owner and leasing company against any vicarious liability claims, it holds that the plaintiffs' allegations of negligent entrustment (based on the driver's age and very poor driving record) should not be dismissed.

37 South Fifth Ave Corp. v. Dimensional Stone & Tile, 2014 WL 1632212 (Mount Vernon, NY City Ct. April 24, 2014)

The defendant truck leasing and rental company (Penske) had entered into a truck rental agreement with a lessee whose employee negligently drove the truck and caused damage to the plaintiff's vehicle. While the court and the defendant lessee recognized that Penske could not be held vicariously liable under the Graves Amendment, a provision of New York's Vehicle and Traffic Law was invoked to hold Penske liable for not providing its lessee with a statutorily minimum amount of liability insurance coverage ($10,000) for property damage, and that like any rental car company, Penske could not contract away this responsibility by giving the lessee the option of declining the insurance coverage and providing its own.

Shew v. Hill, 2013 WL 5290005 (U.S.Dist.Ct. N.D.Ala. Sept. 18, 2013)

This case illustrates the fact that the Graves Amendment, while clearly preempting state vicarious liability laws with respect to motor vehicle lessors, also contains a savings clause that permits state law-based negligence actions against such lessors – e.g., for negligent entrustment of motor vehicles to parties that subsequently cause damage or injury while using the vehicles.

Kindard-Jennings v. The Yellow Cab Company, Inc., 2013 WL 4046584 (Conn.Super. July 19, 2013)(unpublished opinion, check court rules before citing)

A taxicab company attempted to use the Graves Amendment as a defense to a suit for damages caused by an automobile accident that alleged vicarious liability under Connecticut law. Citing the reasoning of a New York appellate court, this court agrees that there is no authority for the defendant's argument inasmuch as the protection of the Graves Amendment extends only to those engaged in the trade or business of renting or leasing motor vehicles. The New York appellate decision had also rejected an argument that the Graves Amendment violated equal protection by favoring leasing companies over other vehicle owners such as taxi owners, owners of repair shops providing loaner vehicles and car dealers permitting test drives.

Khan v. MMCA Lease Ltd., 2012 WL 5870341 (N.Y.App.Div. Nov. 21, 2012)

This appellate decision reverses a trial court's denial of a motion by a motor vehicle lessor to dismiss the complaint of someone whose vehicle was struck by the vehicle owned by the lessor and operated by its lessee. The plaintiff alleged that the lessor had negligently maintained its vehicle and thus could be held liable under the negligence exception in the Graves Amendment (which generally bars recovery against lessors in the business of leasing motor vehicles on grounds of vicarious liability). The court finds that the lessor does not engage in the repair and maintenance of vehicles that it leases, but instead such maintenance was the sole responsibility of the lessee.

Whitmore v. American Dream Logistics, Inc., 2012 WL 3872022 (U.S.Dist.Ct. E.D.Mo. Sept. 6, 2012)

Relatives of an individual killed by a tractor trailer sued the company leasing the truck as lessee and its driver and also sued the lessor on the ground that it had negligently failed to collect driver trip records from the driver, which allegedly would have revealed violations of regulations regarding the number of hours permitted for driving, which violation purportedly resulted in the individual's death. This court grants the lessor's summary judgment motion on the ground that the negligence savings clause contained in the Graves Amendment (which clause states that an owner can be held directly liable for harm caused by a lessee if the owner is itself guilty of negligence or criminal wrongdoing) would not apply in this case since nothing in the lease or law required the owner to monitor driver trip records for compliance with such driving hours rules.

Lewandowski v. Adelberg, 2011 WL 4424391 (Conn.Super. Sept. 6, 2011)(unpublished opinion; check court rules before citing)

This very brief decision illustrates that as long as a claim against a motor vehicle lessor alleges negligence (in this case, alleged failure to properly maintain the vehicle), a motion to strike based on the Graves Amendment's preemption of vicarious liability claims will not succeed.

Vreeland v. Ferrer, 2011 WL 2652187 (Fla.Sup.Ct. July 8, 2011)

Less than three months after holding that federal law clearly preempts Florida statutory law imposing vicarious liability on motor vehicle lessors (see the *Vargas* case below), the Florida Supreme Court holds that federal law concerning vicarious liability of aircraft lessors does not preempt the Florida common law doctrine of dangerous instrumentality imposing vicarious liability on such aircraft lessors with respect to certain classes of injured parties. Overturning lower Florida court decisions in favor of an aircraft lessor being sued by the estate of a passenger on the aircraft, this court holds that the federal law limiting liability (49 U.S.C. Sec. 44112 (1994)) neither explicitly nor implicitly preempts Florida law – in particular because the federal statute is worded to apply only to personal injury, death or property loss of people or property located "on land or water" – i.e., only *underneath* and not *on* the aircraft. Nothwithstanding a dissenting opinion stating that such a narrow interpretation of the federal statute "defies reality," the court cites federal legislative history and certain cases from other jurisdictions in support of its view (acknowledging that there are cases holding otherwise).

Lester v. Patinkin, 2011 WL 2479593 (Conn.Super. May 25, 2011)(unpublished opinion, check court rule before citing)

A plaintiff injured in a motor vehicle accident brought suit against the motor vehicle lessor as well as the driver/lessee. This decision holds that the Graves Amendment does not preempt claims of negligent conduct by the lessor such as failure to check whether the brakes were in good working order, and therefore denies the lessor's motion for summary judgment on such negligence claims.

Donnelly v. Rental Car Finance Corp., 2011 WL 2417317 (Conn.Super. May 17, 2011)(unpublished opinion, check court rules before citing)

The issue in this case is whether the Graves Amendment entirely precludes a negligent entrustment suit. After commenting that the issue has not yet been addressed by Connecticut appellate courts nor by the U. S. District Court for Connecticut or by the Federal Second Circuit Court of Appeals, the court concludes that an action for negligent entrustment may be pursued against a rental car company in some circumstances – i.e., that the rental company has an obligation to do at least some basic (not stringent) screening such as checking whether facts readily available would indicate the potential customer's unfitness to drive.

Vargas v. Enterprise Leasing Company, 2011 WL 1496474 (Fla.Sup.Ct April 21, 2011)

The Florida Supreme Court (with one dissent) here emphatically decides that provisions of Florida's statutes imposing vicarious liability on motor vehicle lessors are preempted by the Graves Amendment and do not fall under the financial responsibility law exception of the Graves Amendment that would preclude preemption. The federal preemption applies even though Florida had eliminated vicarious liability for certain categories of lessors and limited it for other categories.

Carton v. General Motors Acceptance Corp., 2010 WL 2732874 (U.S.Ct.App. 8thCir. July 13, 2010) After affirming a U.S. District Court's decision that the Graves Amendment precludes a finding of vicarious liability against a motor vehicle lessor, the Court of Appeals also affirms the District Court's dismissal of the claim that the lessor was negligent in continuing to entrust the vehicle that had caused the plaintiffs' injuries to the lessee (i.e., by not repossessing the vehicle) after the lessee had defaulted in its lease payments and failed to maintain required insurance coverage, and after the lessor had won a judgment for replevin. This decision finds that the lessee's fiscal irresponsibility and failure to obtain insurance did not itself pose an unreasonable risk of physical harm to others such that the lessor had a duty to repossess the vehicle.

Chapman v. Herren, 2010 WL 2927377 (Conn.Super. June 24, 2010)(unpublished opinion – check court rules before citing)

In this suit involving a claim against a car rental company for injuries sustained by the plaintiff allegedly caused by the lessee of the automobile, the court disposes of the plaintiff's allegation that the Graves amendment is unconstitutional by citing a recent Connecticut Supreme Court case, Rodriguez v. Testa, 296 Conn. 1 (2010), holding that the amendment's preemption of the state's vicarious liability statute was constitutional. The decision goes on to hold that the rental company was not independently negligent in the manner contemplated by the savings clause in the Graves amendment permitting claims against motor vehicle lessors on grounds other than vicarious liability. The court holds that there is no legal authority for concluding that Connecticut imposes a duty on rental companies to investigate a lessee's driving record – e.g., to determine whether there may have been past convictions for alcohol related offenses or reckless driving.

Wilson v. Camrac, Inc., 2010 WL 532450 (Conn.Super. Jan. 11, 2010) (unpublished opinion – check rules before citing)

This court grants a motion to strike a complaint against a car rental company, finding the federal Graves Amendment to be applicable to prevent a vicarious liability claim and rejecting the plaintiff's argument that the federal statute was an unconstitutional violation of the commerce clause of the U.S. Constitution.

Babiuk v. Lake, 2009 WL 4728010 (U.S.Dist.Ct. M.D.Fla. December 3, 2009)

In a vicarious liability action against a motor vehicle lessor, the lessor argued for dismissal based upon lack of federal diversity jurisdiction insofar as federal law limits liability to an amount below the dollar threshold for such diversity jurisdiction. This court dismisses the claim against the lessor – not for lack of jurisdiction based upon a dollar limit on liability, but because the federal statute (the Graves amendment) entirely preempts Florida vicarious liability law.

Petrushonis v. Andrews, 2009 WL 3839304 (Conn.Super. Oct. 20, 2009)(unpublished opinion – check court rules before citing)

Summary judgment in favor of truck lessor against a plaintiff injured in a motor vehicle accident. The plaintiff had made no allegation that the lessor was liable because of its own direct negligence or criminal actions. Although the court notes that the complaint does not specifically so allege, the court infers that the vicarious liability action against the lessor is premised upon a Connecticut statute providing for such – a statute that had been termed a "statutory suretyship." However, the court finds that such statute has been preempted by the federal statute (the Graves amendment) referenced in many recent cases on the subject (including Connecticut cases).

Reph v. Hubbard, 2009 WL 649910 (U.S.Dist.Ct. E.D.La. March 10, 2009)

After finding that a lessor of a motor vehicle involved in an accident was not independently negligent in a manner leading to the injury resulting from the accident, the court holds that the federal Graves amendment prevents the lessor from being found liable on an alternative theory of vicarious liability. In this case the lessor had satisfied its obligations under Louisiana law by verifying that the lessee had a valid driver's license and did not appear to be impaired at the time of the lease.

Garcia v. Vanguard Car Rental USA, Inc., 540 F.3d 1242 (11th Cir. 2008)

This Eleventh Circuit decision holds that the federal Graves amendment preempts Florida law – a common law "dangerous instrumentality" doctrine coupled with statutory recognition of that doctrine which places caps on motor vehicle lessor liability – under which motor vehicle lessors can be held vicariously liable for the negligence of their lessees. The decision rejects the plaintiffs' arguments that their lawsuits fall instead within the Graves amendment's savings clause, which concerns non-preemption of state financial responsibility and insurance standards. According to the court, to accept this interpretation of the savings clause would result in the exception swallowing the whole. The court also undertakes an extensive analysis of the Graves amendment's constitutionality under the Commerce Clause and finds it to be constitutional.

Brookins v. Ford Credit Titling Trust, 2008 WL 2744335 (Fla.App. July 16, 2008)

Acknowledging that its views are different than other Florida appellate court decisions on the subject (certifying conflict with such other decisions), this appellate court affirms the summary judgment granted by a trial court in favor of a motor vehicle lessor against a plaintiff injured by the lessee-operator, but only on the ground that the lessor was in compliance with Florida law requiring the maintenance of certain amounts of insurance in order to avoid the imposition of liability for injuries caused by its lessees. Contrary to the other appellate court decisions, this court holds that the federal Graves Amendment does not completely preempt either the Florida common law dangerous instrumentality doctrine or Florida statutes imposing vicarious liability if the lessor has failed to meet certain conditions. The court emphasizes the language of the Graves Amendment disclaiming any intention to supersede state laws imposing financial responsibility or insurance requirements on motor vehicle lessors.

Avelino v. Williams, 2008 WL 2252529 (Conn.Super. May 8, 2008)(unpublished opinion, not reported in A.2d)

Brief decision dismissing plaintiff's argument that the Graves Amendment is an unconstitutional exercise of power under the commerce clause, which argument was supported only by the original *Graham v. Dunkley* New York trial count decision, which was subsequently reversed, and by a U.S. District Court decision from the Southern District of Florida which has been criticized by other District Courts in the same Circuit.

Graham v. Dunkley, 2008 WL 269527 (N.Y.A.D. Feb. 1, 2008)

An Appellate Division reversal of a notorious lower court decision which held the Graves Amendment (the federal statute preempting state laws holding motor vehicle lessors to be vicariously liable for injuries caused by their lessees) to be contrary to the U.S. Constitution as a violation of the commerce clause. Consistent with a number of other listed decisions and contrary to the holding below, this court finds that the New York vicarious liability statute has a substantial effect on interstate commerce and that the federal statute preempting it is a legitimate exercise of federal power to govern interstate commerce. "There can be no real dispute that the rental and lease of vehicles, and the conditions under which such transactions occur, are economic activities which impact the national market….As detailed in amicus briefs, vicarious liability laws caused lessors to either cease leasing cars in states having them, opting for more expensive balloon note structures, or spread the cost of higher insurance premiums to lease customers nationwide."

Kumarsingh v. PV Holding Corp., 2008 WL 238955 (Fla.App. Jan. 30, 2008)

A brief decision affirming the holding of a lower court that the Graves Amendment supersedes and abolishes the Florida statute governing vicarious liability of auto lessors as of the federal statute's effective date (August 10, 2005). In this case, the appellate court agreed with the trial court's determination that the defendant lessors were liable only up to the limits of the statutory self-insurance financial responsibility minimums set forth in the Florida statute ($10,000), the auto's lessee who caused the injuries having been uninsured.

Ross v. Richardson, 2007 WL 3261558 (Conn.Super. October 19, 2007)(not reported in A.2d)
Kumarsingh v. PV Holding Corp., 2007 WL 2847956 (Fla.App. October 3, 2007)

These two decisions find against plaintiffs attempting to hold automobile leasing companies liable for injuries based upon state vicarious liability laws – due to the preemptive effect of the federal statute referenced below. The Connecticut court also holds against the plaintiff's argument that the leasing company did not comply with the federal statute's section indicating that the federal statute does not supersede state law imposing financial responsibility or liability insurance requirements, inasmuch as the plaintiff had not raised the issue in her complaint.

Poirier v. Papadopoulos, 2007 WL 2245893 (Conn.Super. July 19, 2007)(unpublished)

The plaintiff sued both the driver of a motor vehicle and the leasing company (Volvo Finance North America) from whom the driver leased the vehicle for injuries caused to the plaintiff. This court grants Volvo's motion for summary judgment based upon both the federal preemptive statute referenced in various cases below (the plaintiff attempted to argue that such statute was an unconstitutional violation of the commerce clause – an argument rejected by this court) as well as a Connecticut statute excepting lessors of private passenger motor vehicles where the lease term is one year or more and the leased vehicle is insured for bodily injury liability in amounts meeting that statute's minimum requirements.

McCloskey v. Klair, 2006 WL 3825270 (U.S.Dist.Ct. E.D.Mich. December 27, 2006)

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.

Coach USA, Inc. v. Van Hool N.V., 2006 WL 3523102 (U.S.Dist.Ct. W.D.Wisc. December 5, 2006)

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 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."

Moncrease v. Chase Manhattan Auto Finance Corp., 911 A.2d 315 (Conn.App. 2006)

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.)

Johnson v. Agnant, 2006 WL 4172893 (U.S.Dist.Ct.D.C. April 25, 2006)

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.

Davis v. Ilama, 2006 WL 1148702 (Conn.Super. March 14, 2006)

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).

King v. Car Rentals, Inc., 2006 WL 788716 (N.Y.App.Div. March 28, 2006)

A case illustrating the complexities of deciding which law to apply to a claim for personal injuries incurred in a motor vehicle accident that occurred in Canada with an auto rented from a New Jersey lessor by a driver with substantial New York connections. This court affirms a lower court decision to apply New Jersey (rather than New York) law, and thus not hold the lessor vicariously liable for the plaintiff's non-economic losses, since the driver was not the employee or agent of the owner – a condition for liability under New Jersey law, but not required by New York law.

Morales v. Rotino, 2006 WL 552443 (N.Y.App.Div. March 7, 2006)

Ford Motor Credit Company is held to remain vicariously liable under New York law as the lessor of a motor vehicle which injured plaintiff, notwithstanding the plaintiff's execution of a release in return for a monetary settlement with the driver of the vehicle.

Ford's attempt to argue that the language of the release – encompassing the defendant and its "heirs, executors, administrators, successors and assigns" – included Ford as an administrator and assignee of the defendant was rejected both by the lower court and this appellate court.

Chieffo v. Clifford, 2005 WL 2981771 (Conn.Super. Oct. 20, 2005) (unpublished opinion)

After Connecticut had amended its vicarious liability statute to except leases of private passenger motor vehicles if the total lease term is one year or more and the leased vehicle is insured for bodily injury liability in certain minimum amounts, the plaintiff argued that the statute was unconstitutional on various state and federal grounds in order to recover from the vehicle's lessor for injuries. This court finds against each of the plaintiff's grounds for unconstitutionality and grants the lessor summary judgment.

Sigovich v. Norma J. Haynes Trucking Co., 2005 WL 1971883 (Conn.Super. July 28, 2005)(unpublished opinion)

Lessor of a trailer moved for summary judgment in an action brought by a plaintiff injured in an accident allegedly caused by the negligence of the driver of the tractor (which driver was said by the trailer's lessor to have no relationship with such lessor) to which the trailer was attached. The lessor contested theories of liability based upon both a statutory presumption of agency in a motor vehicle context and statutory strict liability for motor vehicle lessors. Holding that there exists a split of authority as to both (1) whether summary judgment is appropriate in the context of the agency issue and (2) whether a trailer is a motor vehicle for purposes of the vicarious liability statute, the court denies the lessor's motion.

Coleman v. Windham Aviation Inc., 2005 WL 1793907 (R.I.Super. July 18, 2005)(unpublished opinion)

In deciding a summary judgment motion by a plaintiff requesting a declaration that the owner and lessor of an aircraft is vicariously liable under state law (both Connecticut and Rhode Island are similar in this respect) for injuries caused by the negligent operation of an authorized operator, the court rejects the lessor's argument that federal law preempts such state laws. Notwithstanding apparently clear language in the federal statute supporting the lessor's preemption argument, the court examines the recodification that resulted in the present federal statute and concludes that such recodification impermissibly extended the scope of the exemption beyond the intent of the predecessor statute. In a later opinion (also unpublished), a Superior Court in Connecticut comes to the opposite conclusion concerning federal law: *Mangini v. Cessna Aircraft, 2005 WL 3624483 (Conn.Super. Dec. 7, 2005).*

Fredette v. Keybank, USA, 2005 WL 1670808 (Conn.Super. June 14, 2005) (unpublished opinion)

After characterizing Connecticut's statute imposing vicarious liability on motor vehicle lessors for injuries caused by the negligence of its lessees as a "statutory suretyship," the court upholds the lessor's right to seek contractual (under the lease agreement) and common-law indemnity from the lessee and the lessee's permitted driver.

Chilberg v. Chilberg, 788 N.Y.S.2d 533 (App.Div. 2004)

In denying Ford Motor Credit Company's contention that Section 388 of New York's Vehicle and Traffic Law providing for the vicarious liability of owners of motor vehicles for damages caused by the negligence of the operators of such vehicles is unconstitutional as applied to long-term vehicle lessors, the court notes that the legislative purpose was to ensure that injured persons would have recourse to a financially responsible party and that imposing such liability on long-term lessors is not an unreasonable means of accomplishing that purpose.

Lanni v. O'Donnell, 2004 WL 2550452 (Mass.Super. Oct. 12, 2004)

Interpreting a Massachusetts law (General Laws c. 231, Sect. 85A) providing that registration of a motor vehicle in the name of the defendant in an action for damages arising out of an accident involving such motor vehicle is *prima facie* evidence that the driver was acting as an agent of the owner (requiring an affirmative defense by the owner that it was not responsible for the actions of the driver), the court denies a motion for summary judgment brought by the lessor/owner (Honda Lease Trust, a/k/a American Honda Finance Corp.) of the automobile. The court characterized standard lease provisions requiring greater than mandatory liability insurance, indemnity for claims arising from use of the automobile, and covenants regarding the vehicle's use, location and alteration as "measures of control" that create genuine issues of material fact about an agency relationship between the lessee and its lessor.

Litvak v. Fabi, 8 A.D.3d 631, 780 N.Y.S.2d 155 (App.Div. 2004)

Reversal of lower court ruling in favor of Keybank, which ruling was premised on a finding that the bank only held a security interest in a vehicle involved in an accident and thus could not be liable as an owner under New York's vicarious liability statute. Though the basis for the lower court's finding is not made clear, the appellate court finds that because the agreement between the bank and the customer was a lease and the bank held title to the vehicle, the bank was an owner within the meaning of the vicarious liability statute.

Adreozzi v. Brownell, 2004 WL 1542228 (R.I. Super. July 8, 2004) (unpublished opinion)

Automobile lessor is held to be subject to one of two Rhode Island statutes (G.L.1956 Sec. 31-33-6 and 31-34-4) providing for vicarious liability for injuries caused by the negligence of its lessee. The decision cites Oliveira v. Lombardi, 794 A.2d 453 (R.I. Sup. Ct. April 3, 2002), in which the Rhode Island Supreme Court found that the purpose of that state's statute was to find "well-funded pockets" and "additional sureties" for the satisfaction of negligence claims, and commented that if this would have a negative impact on the motor-vehicle financing business in the state, the forum for seeking change was the state legislature. After the lease discussed in this case had been entered into, Rhode Island's legislature did indeed amend those two statutes to provide for either no owner liability or liability limits under various circumstances; however, those amendments contained a sunset provision making them effective only until July 1, 2004, originally, which sunset date has been twice extended until July 1, 2006. The decision also cites a recent article surveying the laws of thirteen states providing for unlimited or potential vicarious liability of motor vehicle lessors: Kenneth J. Rojc and Kathleen E. Stendahl, *Vicarious Liability of Motor Vehicle Lessors*, 59 Bus.Law. 1161 (2004).

Gardner v. Hinman, 2004 WL 616140 (Conn. Super. March 17, 2004)

Commenting that Connecticut's General Statute Sec. 14-154a imposing liability on lessors of motor vehicles for damages caused by the operators to whom the motor vehicles are leased creates a liability even greater than vicarious liability at common law, this court holds that a discharge of the operator's liability in bankruptcy does not bar a claim against the lessor under this statute. The court distinguishes the legal consequences of such a bankruptcy discharge from those of a release of an operator (and his insurer in return for a payment to the injured party) which was held also to release the lessor in Cunha v. Colon, 792 A.2d 832 (Conn. Sup. Ct. April 2, 2002).

Sierra v. A Betterway Rent-A-Car, Inc. d/b/a Budget Rent-A-Car of Atlanta, 863 So.2d 358 (Fl.Ct.App. 2003, rehearing denied Jan. 16, 2004)

Georgia car rental company that knew a car would be driven to Florida and did nothing to prohibit such is held to be subject to personal jurisdiction in Florida and the plaintiff's vicarious liability claim is to be governed by Florida, rather than Georgia, law. [Morales v. The Coca-Cola Company, 813 So.2d 162 (Fla.Dist.Ct.App. 2002) holds that under Florida's common law dangerous instrumentality doctrine as applied to motor vehicles (unique to Florida, according to the court), the owner of a motor vehicle is liable to third parties for injuries caused by the negligent use of the motor vehicle by someone to whom the owner entrusted the vehicle. While "mere naked title" may not entail vicarious liability, the beneficial ownership ordinarily evidenced by legal title does.]

[Vicarious liability for motor vehicle lessors has been the subject of much controversy in recent years. Threats of withdrawal from the motor vehicle leasing business by various finance companies caused Connecticut to amend its version of such a vicarious liability statute (General Statute Sec. 14-154a) not to apply to certain motor vehicle leases of one year or longer and caused Rhode Island to amend its statutes as noted above. Many motor vehicle leasing companies ceased doing business in New York, which maintained unlimited vicarious liability for lessors. As mentioned in the more recent cases above, on August 10, 2005, a federal highway, transit and reauthorization bill (H.R. 3, Public Law 109-59, 49 U.S.C. Sect. 30106) known as the Graves Amendment was enacted, a portion of which is intended to preempt state law concerning vicarious liability of motor vehicle lessors.]

Product Liability of Lessors

Jenks v. New Hampshire Motor Speedway, Inc., 2011 WL 3627290 (U.S.Dist.Ct. D.N.H. August 17, 2011)

Following an accident involving a golf cart being used to carry people doing charity work at a motor speedway event, the plaintiff's representative brought suit against a number of defendants including a strict product liability claim against the manufacturer of the cart. During the proceedings, the financing subsidiary of the manufacturer, which had purchased the cart in order to lease it for use at the speedway, was brought into the suit on the same theory. In this decision, that subsidiary is granted summary judgment on this claim. The court finds the reasoning of other cases persuasive in determining that financing companies are outside the chain of distribution and are not in the business of selling carts to the public.

Wert v. Jefferds Corp., 2008 WL 204479 (U.S.Dist.Ct.W.D.Va. Jan. 25, 2008)(slip copy)

After being injured in a forklift accident at his workplace, this plaintiff sued the lessor of the forklift, which lessor also responsible for maintaining the forklift, on a variety of theories of liability – including product liability. After commenting that lessors such as this defendant may be subject to product liability claims since they "distribute" goods (even though not selling them) – citing the Restatement (Third) of Torts: Product Liability – the court grants the lessor's motion for summary judgment based on the facts of this case. Probably due to the responsibilities undertaken by this lessor, there was no discussion about how product liability might apply to lessors that are strictly financial lessors.

Massey v. Cassens & Sons, Inc., 2007 WL 773380 (U.S.Dist.Ct.S.D.Ill. March 12, 2007)

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.

Wengenroth v. Formula Equipment Leasing, Inc., 784 N.Y.S.2d 123 (App.Div. 2004)

In a product liability action for injuries incurred by an operator of a tractor hitched to a water wagon, summary judgment motions of the manufacturers of the tractor and wagon and of the leasing company who leased the two pieces of equipment to the employer of the operator are denied. The court held that the lessor may be held liable regardless of the fact that it did not manufacture either part of the vehicle inasmuch as it selected the tractor without a door and installed a non-oscillating hitch – each being an issue that raised potential liability (to be decided at trial) for the manufacturers as well.

Svege v. Mercedes-Benz Credit Corp., 329 F.Supp.2d 272 (D.Conn. 2004)

Assignee of a truck lease is held to be a "product seller" under Connecticut's Product Liability Act and thus potentially liable for damages resulting from a motor vehicle accident involving the truck. While the court comments that being an assignee of a lease or providing financing for the product manufacturer does not necessarily entail potential liability under this Act, Mercedes-Benz Credit Corp.'s financing program with

Freightliner is held to constitute sufficient involvement in the steam of commerce sending Freightliner trucks into the state so as to render MBCC a "product seller" under the Act. The court also comments in a footnote that MBCC did not argue, and the court did not therefore address, whether the Connecticut Supreme Court would reject strict product liability for entities performing the role of "finance lessor," as has been the case in certain other states.

Other Conflicting Interests under Article 2A

Textainer Equipment Management Limited v.The United States, 2012 WL 5465983 (U.S.Ct.Fed.Cl. November 6, 2012)

This case from the U.S. Court of Federal Claims is interesting and unusual in that the United States (specifically, the Army) was able to take advantage of Article 2A to avoid a takings claim under the Constitution's Fifth Amendment. The Army had entered into a master lease agreement as lessee with a company that leased intermodal shipping containers. Under the terms of that master lease, the Army would take title to any containers that were lost or deemed lost ninety days after the end of the lease term. After the end of the master lease term, the government paid the lessor for approximately 1000 containers that the government claimed it could not find. The issues in this case arose because the containers leased to the Army were obtained by the lessor under lease agreements with a number of other companies (which can be referred to as the prime lessors). When these prime lessors were either not paid or only partially paid for the lost containers by the Army's lessor (which went out of business), they sued the government and claimed that their containers had been taken by the Army without paying the prime lessors just compensation in violation of the Fifth Amendment. After examining the facts of the case, including the time at which the government was notified by the prime lessors that the Army's lessor was in default to them under their leases of the containers, this court holds that the government qualified as a buyer in the ordinary course under 2A-305: taking the containers free of the existing prime leases inasmuch as it bought the containers from someone in the business of selling goods of that kind without knowledge at such time that the sale violated the rights of the prime lessors. The decision indicates that if it had not qualified as a buyer in the ordinary course, the government would have been deemed to have taken the containers without having paid just compensation.

Rent-N-Roll v. Highway 64 Car and Truck Sales, 2010 WL 4629604 (Tenn.Ct.App. Nov. 16, 2010)

In a well-reasoned decision regarding Article 2A's provisions dealing with conflicts between lessors of accessions to goods and those having other interests in the whole of such goods, this appellate court affirms a judgment granting priority to a lessor of custom wheels and tires. A dealer perfected a security interest in an automobile that it sold to a woman who subsequently leased custom wheels and tires from a company that had to cut into the body of the car in order to install the wheels and tires. After the woman defaulted under both the security agreement with the dealer and the leases with the lessor of the wheels and tires, the dealer repossessed the car and the lessor sued the dealer to obtain possession of its wheels and tires. After a thorough examination of 2A-

310, Lessor's and Lessee's Rights When Goods Become Accessions, the court concludes that the lessor of the wheels and tires was entitled to obtain possession of those leased goods from the secured party/dealer, but that it must first compensate the dealer for the damage done to the car when installing the wheels. Although the court does not attempt to explain the rationale behind the statute, 2A-310 makes a critical distinction regarding the priority of the lessor of accessions depending upon whether the lease of the accessions was entered into (i) before, or (ii) at the time or after, the goods became accessions. The interests of the lessor (as well as of the lessee) have priority only in the former case with respect to previously existing competing interests in the whole such as the dealer's security interest.

<u>Farm Credit Leasing Services Corp. v. Ferguson Packaging Machinery, Inc., 2007 WL 4276841 (U.S.Dist.Ct. E.D.Pa. Dec. 3, 2007)</u>

This suit was brought by a lessor's assignee (of both the lease and the equipment) against the buyer of the equipment from the lessee. The lease, as might be expected, prohibited such a transfer by the lessee, but the buyer apparently was unaware of the existence of the lease. This court agrees that the assignee may have a valid case for recovery of monetary damages against the buyer based upon claims of conversion and unjust enrichment, and thus denies the defendant's motion to dismiss such claims (left undecided was a possible ground for dismissal based upon the statute of limitations). It is not clear whether the plaintiff/assignee had considered enforcing the lease against the buyer under 2A-305, which indicates that the buyer took the equipment subject to the lease (inasmuch as it could not qualify as a buyer in the ordinary course from a merchant/lessee).

<u>The CIT Group/Equipment Financing, Inc. v. M & S Grading, Inc. (*In re* M & S Grading, Inc.), 457 F.3d 898 (8th Cir. 2006)</u>

A lessee of certain equipment, which lessee was apparently also a dealer in equipment of that type, sold the leased equipment to a buyer which subsequently filed for bankruptcy. When the buyer listed the equipment as property of the bankruptcy estate, the lessor brought an action to obtain possession. The Eighth Circuit upholds the decision of the bankruptcy court in the lessor's favor based upon the provisions of Article 2A-305, which first provides generally that a buyer from a lessee takes subject to the existing lease, second provides an exception for buyers in the ordinary course from dealers of goods of that kind, and third provides an exception to such exception in cases where the goods are subject to a certificate of title statute and such statute provides otherwise. In this case, the applicable Nebraska certificate of title statute states that a buyer of a vehicle covered by such statute cannot obtain title to the vehicle until the buyer has both physical possession of the vehicle and the certificate of title for the vehicle. Since the lessor still retained the title, it was entitled to have the vehicle turned over to it. (Apparently, at this stage of the proceedings, no one was contesting the true lease nature of the lease; otherwise Article 2A would not have been applicable.)

<u>Mercedes-Benz Credit Corporation v. Johnson, 1 Cal.Rptr.3d 396 (Ct.App. 2003)</u>

In a dispute between an individual who had purchased a car from a used car dealer, which dealer had previously leased the car for his personal use, and the lessor of the car to the dealer, the court holds that the lessor had the superior right to the car. The decision rests on the court's interpretation of "entrusted" as employed in California's version of 2A-305, which states that an ordinary course buyer from a lessee, who is in the business of dealing in the kind of goods entrusted by the lessor to the lessee, takes free of the existing lease contract. Article 2A-103(3) refers to Article 2-403(3) for a definition of "entrusting." To the concepts of delivery and acquiescence in retention of possession found in the standard version of Article 2, California added the phrase "for the purpose of sale, obtaining offers to purchase, locating a buyer, or the like." The lessor here had no such purpose. The court goes on to opine that even the ordinary dictionary definition of "entrust" indicates that a lessor under a lease prohibiting assignment could not be said to have entrusted the car to someone who would be expected to default on the lease by selling the car and running off with the proceeds.

Leasing One Corporation v. Caterpillar Financial Services Corp., 776 N.E.2d 408, 48 UCC Rep. Serv.2d 1505 (Ind.Ct.App. 2002)

Decision in which the facts are unfortunately not made clear and the statements of law appear to be mistaken. A lessee (which may or may not be a dealer in the type of equipment being leased) under a lease agreement (which may or may not be a true lease) sold the equipment being leased to a third party (who is alternatively stated to be the user of the equipment or its source of financing). While this case is not very clear concerning the facts and the law, different variations on the factual background can be used to illustrate the rights of third parties who buy from someone who either has granted a security interest to, or has leased the equipment from, a financing source.

Vendor Issues

General Electric Capital Corp. v. Rhino Business Systems, Inc., 2017 WL 693654 (U.S.Dist.Ct. E.D.Ca. February 17, 2017)
General Electric Capital Corp. v. Rhino Business Systems, Inc., 2016 WL 2743557 (U.S.Dist.Ct. E.D.Ca. May 11, 2016)

GECC had entered into a financing agreement with a vendor of office equipment and related services to finance the purchase or lease of that equipment by customers of the vendor. After the vendor allegedly violated a number of representations that it had made to GECC in the agreement (e.g., that it would not upgrade or refinance the transactions financed by GECC without GECC's consent) and also took actions encouraging the vendor's customers to breach their contractual obligations to GECC, GECC sued to force the vendor to repurchase the transactions as required in the financing agreement. Since the vendor never responded to GECC's complaint, in the earlier case, the court grants GECC's request for a writ of attachment in the amount owed GECC under the financing agreement against the proceeds of the sale of the vendor's assets to another company (Ray Morgan RMC, Inc.). In the more recent case, the court grants GECC's motion for default judgment (in the amount of $404,164.18 plus attorneys' fees and costs).

Lyon Financial Services, Inc. v. Illinois Paper and Copier Co., 577 Fed.Appx. 606 [2014 WL 4257774] (U.S.Cir.Ct.App. 7th Cir. August 29, 2014)

Based on the answer provided by the Minnesota Supreme Court to the reformulated questions certified to that court by the Seventh Circuit, the Seventh Circuit reverses the District Court decision in favor of Illinois Paper, holding that Lyon has stated an actionable claim for breach of a contractual representation of future legal compliance, but remands to the District Court for a consideration of the remaining factual issues regarding a determination of damages. Although this case concerned a representation of *future* legal compliance – inasmuch as the enforceability representation in the vendor agreement concerned contracts to be offered to Lyon by Illinois Paper – the freedom of contract/allocation of risks rationale arguably also apply to representations about the *present* legal compliance of contracts being offered (or assigned if a vendor or other assignor is assigning a contract to a finance company) at the time the representation is being made.

Lyon Financial Services, Inc. v. Illinois Paper and Copier Co., 2014 WL 2965404 (Minn.Sup.Ct. July 2, 2014)

Addressing questions certified to them by the U.S. Court of Appeals for the Seventh Circuit, the Minnesota Supreme Court reformulates the questions to decide whether a claim for breach of a contractual representation of future legal compliance is actionable under Minnesota law without proof of reliance. This question is answered in the affirmative, and the court goes on to comment that Minnesota public policy favors the freedom to contract and "Under freedom of contract principles, parties are generally free to allocate rights, duties and risks…In this case, the parties agreed to allocate the risk of legal noncompliance to Illinois Paper." This answer is consistent with some of the Seventh Circuit's comments in its 2013 decision, and led the Seventh Circuit to reverse the District Court decision in favor of Illinois Paper.

Lyon Financial Services, Inc. v. Illinois Paper and Copier Co., 732 F.3d 755 (7th Cir. 2013)

This is an appeal from a 2012 decision of the U.S. District Court in Illinois [2012 WL 401493 (U.S.Dist.Ct. N.D.Ill. Feb. 6, 2012)] in which the District Court held that one party to a contract is not entitled to rely on a representation of law by the other party inasmuch as both parties are presumed to be equally capable of knowing and interpreting the law. In this case the lessor of office equipment had obtained a representation from the vendor that leases presented to the lessor for review would be valid and fully enforceable. After it turned out that a six year lease violated an Illinois statute prohibiting leases with municipalities extending beyond five years, the lessor brought suit against the vendor for breach of that representation. This Circuit Court panel is evidently less certain than was the District Court that such representations cannot form the basis for recovery if it turns out that a contract is not enforceable. After a rather lengthy discussion about whether such a representation might be a representation of fact rather than of law and whether it is actionable in contract or in tort, the court decides to certify questions to the Minnesota Supreme Court, since Minnesota law governed the contract between the lessor and the vendor. One portion of this court's discussion should be considered especially relevant: "While *someone* must assume the burden of knowing the law and ensuring that the parties' contract and dealings comply with it, we see no particular reason why the contracting parties cannot allocate that task to one or the other of them…Why not, then, allow contracting parties to allocate the task of legal compliance and the corresponding risk (i.e., the financial cost) of noncompliance?"

Fortran Group International, Inc. v. Tenet Hospitals Limited, 543 Fed.Appx. 934 (U.S. Ct.App. 11th Cir. November 1, 2013)(not for publication in the Federal Reporter, see Federal and Eleventh Circuit rule of procedure before citing)

The Eleventh Circuit Court of Appeals affirms a District Court's ruling in favor of a copier manufacturer and against a copier leasing company. Those two parties had signed a non-circumvention agreement with respect to a particular leasing opportunity for a lessee. After entry into the lease, the lessee and leasing company agreed to an early buyout by the lessee and termination of that lease. Subsequently, the lessee entered into a new lease for additional equipment directly with the manufacturer. The leasing company brought suit claiming a violation of the non-circumvention agreement, but this court affirms the decision of the trial court stating that the non-circumvention agreement applied only to the initial lease.

Key Government Finance, Inc. v. E3 Enterprises Inc., 923 F.Supp.2d 733 (D.Md. 2013)

This case illustrates the importance of careful wording regarding the responsibilities of parties to a program agreement with respect to events having an effect on payments from the obligor. The plaintiff/financing source was party to a program agreement with vendors of copier equipment and services that were used by the United States Army. After the Army decided not to renew a lease of copier equipment, the plaintiff demanded that one of the vendors pay it the discounted balance of payments for the renewal period pursuant the terms of the program agreement. The program agreement indicated that the plaintiff was entitled to such a payment in the event of a non-renewal other than for non-appropriation of funds. The defendants argued that such amount would only be payable to the plaintiff if the non-renewal were caused by some fault of the defendants; however, after observing that there was no non-appropriation of funds by Congress, the court finds for the plaintiff, holding that the program agreement did not require non-renewal to be the result of the defendants fault.

U.S. Express Leasing, Inc. v. Elite Technology (N.Y.), Inc., 928 N.Y.S.2d 696 (N.Y.App.Div. August 25, 2011)

The plaintiff/lessor and defendant/vendor were parties to a Master Purchase Agreement & Assignment of Leases (MPA) pursuant to which the vendor would lease equipment to its customers and then sell both the equipment and the lease to the lessor. However, with respect to one particular customer the lessor entered into a lease directly with a customer after having been provided by the vendor with what was apparently an inaccurate and unsigned accountant's report. After the customer defaulted, the lessor sued the vendor for breach of representations and warranties made in the MPA and also for fraud. This appellate court agrees with the trial court's decision to dismiss the claim for breach of representations and warranties – which were never triggered since the MPA did not apply inasmuch as the financing did not take the form contemplated by that agreement – but disagrees with the trial court's dismissal of the fraud claim (finding that the lessor had alleged enough facts to satisfy the elements of such a claim).

Express Blower, Inc. v. Earthcare, LLC, 2010 WL 5023244 (U.S.Ct.App. 5thCir. Dec. 9, 2010)(not selected for publication in the Federal Reporter; see federal rules of appellate procedure regarding citation)

Inasmuch as the background of this case involves a vendor's payment in full to a lessor of a defaulted lessee's obligations, it does not illustrate any issues that need to be resolved between a lessor and its vendor. However, it may be of interest as an example of the application of legal principles of suretyship in the context of the vendor subsequently seeking recovery from the lessee.

NCMIC Finance Corporation v. Brican America, Inc., 2010 WL 543339 (U.S.Dist.Ct. S.D.Fla. Feb. 9, 2010)

In this brief decision the court denies cross motions for summary judgment in a dispute between a finance company and a vendor for whom the finance company provided lease financing for the vendor's customers. In the vendor agreement between the two parties, the vendor represented that it had entered into no agreements with lessees other than the lease documents of which the finance company was aware. At some time after the finance company learned that the vendor had entered into undisclosed marketing agreements with the lessees and a third party, the finance company claimed breach of warranty and demanded repurchase of the leases according to the terms of the vendor agreement. The court denies summary judgment to the finance company inasmuch as it finds that there was a genuine issue of material fact as to whether the finance company had waived its right to demand repurchase because it continued to fund leases for some time after learning of the marketing agreements. According to the vendor, the finance company only made its repurchase demand after the finance company's lender expressed a desire for the finance company to diversity its portfolio by reducing its concentration of business with that particular vendor.

Capital Solutions, LLC v. Konica Minolta Business Solutions U.S.A., Inc., 2010 WL 446936 (D.Kan. Feb. 5, 2010)

Although this decision describes few of the facts that underlie the dispute, it can generally be inferred that the main parties are a lessor that either originates equipment leases for the customers of a vendor of such equipment or perhaps takes assignment of such leases originated by the vendor (the vendor also apparently services the leases for the lessor) and a bank which in turn funds the leases of the lessor by making loans to the lessor and taking back a security interest in the leases and equipment. After the lessor apparently defaulted under it financing agreements with the bank, the bank attempted to enforce its security interest in its collateral (which the court finds to have been properly perfected), but was opposed by the vendor which claimed a prior right to the equipment resulting from its having bought back equipment pursuant to a buy-back obligation with the lessor. Notwithstanding the bank's knowledge of such obligation, the court holds that the bank had not authorized the sale of the equipment to the vendor free of the bank's security interest, and thus the bank retains the right to enforce such security interest against the equipment in the hands of the vendor.

Susquehanna Commercial Finance, Inc. v. Vascular Resources, Inc., 2010 WL 95127 (U.S.Dist.Ct. M.D.Pa. January 6, 2010)

This case is more interesting for its facts and yet-to-be resolved issues than for the specific decisions rendered. The lessor funded nearly $3 million to the vendor to finance a lease of medical equipment by a lessee medical practice. The vendor, however, had not delivered the equipment more than a year later, alleging both that the lessee was not yet prepared to accept the equipment and that the lessee has continued to make payments under its lease. After noting the "curious posture of this case," in which neither the lessor nor the vendor availed itself of the opportunity to join the lessee as an indispensable party, the court denies both the lessor's request for a preliminary injunction requiring the vendor to freeze and set aside the amount of money funded by the lessor and the vendor's request to dismiss the case for failure to state a claim.

BBAS, Inc. v. Marlin Leasing Corporation, 289 S.W.3d 153 (Ark.App. 2008)

This appellate court affirms a lower court grant of summary judgment in favor of a lessor which, after its lessee defaulted, learned that the vendor had delivered only a small portion of the equipment to the lessee for which the lessor had paid in full and that the vendor had "refunded" the value of the undelivered equipment to the lessee instead of to the lessor. Rejecting the vendor's argument that awarding the lessor damages would amount to recourse against the vendor -- recourse to which the vendor had never agreed -- the court finds that summary judgment in favor of the lessor for the value of the equipment not delivered to the lessee was appropriate based upon the common law tort of conversion committed by the vendor.

T-M Vacuum Products, Inc. v. TAISC, Inc., 2008 WL 4093684 (U.S.Dist.Ct. S.D.Tex. August 28, 2008)

The court finds in favor of a vendor who sued a lessor for the balance of payments owing to the vendor for furnaces to be leased by the lessor to a lessee. The lessor claimed that because the vendor had delivered the furnaces after the original delivery deadline, (i) the lessor was not obligated to pay the balance to the vendor and (ii) the lessor was entitled to a return of the conditional payments made by the lessor to the vendor prior to delivery. Noting that the lessee had agreed to extend the delivery deadline and that the lessee had made all payments owing to the lessor under the lease, the court granted the vendor's motion for summary judgment.

Capitol Business Solutions, LLC v. Konica Minolta Business Solutions USA, Inc., 2008 WL 2761307 (U.S.Dist.Ct. D.Kansas July 14, 2008)

While this decision focuses on the particularities of the plaintiff-lessor's pleadings, it serves to illustrate potential risks when a lessor relies on its vendor partner to bill and collect lease payments from the lessees whose use of the vendor's equipment is being financed by the lessor. Here the lessor contends that the vendor failed to remit such payments to the lessor in a timely manner, causing various types of damage to the lessor including injury to its relationship with its bank.

M & I Equipment Finance Co. v. Lewis County Dairy Corp., 2007 WL 128879 (U.S.Dist.Ct. N.D.N.Y. Jan. 11, 2007)

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 (U.S.Dist.Ct. N.D.Ill. April 27, 2006)

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.

Wesley v. Schaller Suburu, Inc., 893 A.2d 389 (Conn. 2006)

Plaintiffs had successfully argued in trial court that Subaru Auto Leasing, to whom an auto dealer had assigned a lease contract, was liable under an earlier version of

Connecticut's vicarious liability statute for injuries caused by the car's driver. The lessor's defense that the driver was not listed as an authorized driver on the lease was rejected by the trial court, which first found that the dealer clearly understood that the car was intended to be driven by the person involved in the accident and that the leasing company could be held responsible inasmuch as the dealer was acting as its agent to have the lease executed. The Supreme Court reverses, finding that the dealership agreement made the dealer an agent only with respect to titling the leased cars and commenting that decisions in other jurisdictions nearly all hold that auto dealers are not agents of auto financing companies.

<u>Human Resources Development Press, Inc. v. Ikon Office Solutions Company, Inc., 2006 WL 149043 (U.S.Dist.Ct. D.Mass. Jan. 12, 2006)</u>

While not especially instructive concerning principles of leasing law, in dealing with various motions for summary judgment, the court's discussion of the facts illustrates potential problems regarding the impact on a lessor's rights of actions and promises made to a lessee by a vendor. In this case the vendor had purportedly taken back malfunctioning equipment that was on lease by its financing source and provided new equipment under a new lease – while representing to the lessee that the lessee's obligations under the first lease would cease, when in fact such obligations continued.

<u>Citicorp Vendor Finance, Inc. v. Premier Support Services, Inc., 2005 WL 3505554 (Conn.Super. Nov. 4, 2005)</u>

A copier equipment vendor had entered into both a lease agreement and a separate service agreement with respect to the same equipment. After the lease was assigned to a finance company, the lessee ceased paying under the lease and claimed that the vendor had failed to provide promised maintenance services. When the finance company sued on the lease, the lessee sought indemnification from the vendor. This decision holds that the two agreements were separate and entered into for distinct purposes, and thus there was no common law right of indemnification by the vendor for the lessee's failure to pay under the lease.

<u>Leasecomm Corporation v. Starbuck, 2005 WL 1009740 (Mass.Super. March 14, 2005)</u>

In an action by a leasing company against an equipment vendor for violation of a vendor agreement between such parties, the court awards damages to the lessor after finding that an employee of the vendor had either forged or fraudulently obtained signatures of lessees on leases of equipment paid for by the lessor.

<u>Wiltel Communications, LLC v. Sunrise International Leasing Corporation, 2005 WL 354030 (Minn.App. Feb. 15, 2005) (unpublished opinion)</u>

Summary judgment granted by a lower court against a lessor in favor of a manufacturer is reversed. The manufacturer shipped equipment to a lessee after (i) the lessor and lessee had signed lease documents, (ii) the lessor had collected a down payment from the lessee (consisting of the first and last months' rent), and (iii) the lessor had placed two purchase orders with the manufacturer. The lessor argued that the manufacturer had never accepted the purchase orders by providing proper invoices indicating delivery of the equipment and that the lease transaction had never closed. The lessee filed for bankruptcy in the meantime, and the lessor did not pay the manufacturer for the equipment. Notwithstanding the lower court's ruling that the lessor owed the manufacturer for the equipment, this court holds that there are material issues of fact regarding the existence of a contract between the manufacturer and the lessor.

Engel Machinery, Inc. v. Wells Fargo Equipment Finance, Inc., 2004 WL 2973824 (U.S. Dist.Ct. N.D.Ill. Nov. 30, 2004)

In connection with a proposed lease, the prospective lessor/finance company entered into certain agreements with the equipment vendor including, among other provisions, that the finance company would not fund the vendor until the lease had commenced. The equipment was delivered before, but was only fully installed and accepted after, the finance company's commitment to fund, as expressed in its agreements with the vendor, had expired. The finance company never signed the lease with the lessee (a condition for the commencement of the lease) and shortly thereafter the lessee filed bankruptcy with the vendor not having been paid. This decision grants the finance company's motion for summary judgment based in part on the court's reading of the Illinois Credit Agreements Act to mean that the finance company would have had to sign the lease before it would be considered bound under that Act to pay the vendor.

Fortinet, Incorporated v. OFC Capital, 2004 WL 2496184 (U.S.Dist.Ct. N.D.Cal. Nov. 5, 2004)

Summary judgment is denied an equipment vendor suing a leasing company for failure to pay for equipment delivered to a lessee, which shortly thereafter entered bankruptcy. Although the vendor argued that a contract for payment was established by a series of e-mails between the vendor and the lessor, the court noted some additional correspondence that conditioned the lessor's payment on such steps as installation and inspection of the equipment and the lessee's execution of a delivery and acceptance form.

Wells Fargo Financial Leasing, Inc. v. LMT Fette, Inc., 382 F.3d 852 (8th Cir. 2004)

Notwithstanding claims by the equipment vendor made to the lessee that he was acting as an agent for the lessor on a lease of the equipment and promises by such vendor to take over the lease, the court refused to release the lessee from liability to the lessor in the absence of any showing of fraud or misconduct by the lessor, citing clear language in the lease that the vendor was not the agent of the lessor and could make no representation on behalf of the lessor.

Transfer of a Manufacturer's Warranty to a Lessee

A. Lopresti & Sons, Inc. v. General Car & Truck Leasing System, Inc., 79 Fed.Appx. 764, 2003 WL 22442932 (U.S.Ct.App. 6th Cir. Oct. 27, 2003)

After finding no evidence that a truck lessor had not fulfilled its obligations to service the trucks and that the lessor had made no warranty that the trucks delivered would be free from mechanical defects, the court goes on to consider the lessee's claim against the manufacturer of the engines. This claim is denied on the basis that the manufacturer's warranty ran to the owner (i.e., the lessor) and that there was no evidence that the lessor had transferred the warranty to the lessee. The court evidently did not have to consider whether the warranty was assignable.

Lease Commencement Issues

Citrus Tower Boulevard Imaging Center, LLC v. David S. Owens MD, PC, 752 S.E.2d 74 (Ga.Ct.App. 2013)

This appellate court affirms the trial court's decision in favor of the lessor. Although this lessor is not a finance company, the statement in its lease that the lease term would commence when the equipment is "functionally operational" is not uncommon in finance company leases for such equipment (MRI imaging equipment). Although the imaging facility had begun scanning patients with the equipment under lease, the lessee never made any lease payments and argued that the term "functionally operational" was intended to encompass a number of specific and unsatisfied criteria not set forth in the lease. This court agrees with the trial court that the lessee's attempt to introduce such extrinsic evidence was not warranted given the fact that the numerous scans made satisfy the plain meaning of the words. The lesson here is that such disputes may be more avoidable to the extent that the term "functionally operational" can be given a clearer, more detailed meaning in the lease.

End-of-Term Issues

Onset Financial, Inc. v. Victor Valley Hospital Acquisition, Inc., 2018 WL 1662611 (U.S.Dist.Ct. D.Utah April 4, 2018) *

In this case a lessee's arguments focuses primarily on the differences between end-of-term provisions in proposal letters from the lessor and in the final version of such provisions found in the executed master lease and schedules. The lessee attempted to argue in favor of equitably rescinding or reforming the lease agreement based on a doctrine of unilateral mistake. Finding such arguments to be implausible, the court indicates that (i) the proposals were clearly not binding commitments, (ii) the lessee had the burden of reading and understanding the lease, and (iii) the lessee had the opportunity to amend master lease provisions regarding automatic renewals in the schedules just as it had negotiated changes in other end-of-term provisions in such schedules.

First Technology Capital, Inc. v. BancTec, Inc., 2017 WL 4296339 (U.S.Dist.Ct. E.D.Ky. September 26, 2017)

The lessor and lessee under a master lease became embroiled in a dispute over the end-of-term provisions under two equipment schedules. One of the schedules contained an end-of-term provision stating that after the expiration of the initial term, if no definitive election to either purchase, renew or return the equipment were made, the lease would continue on a month-to-month basis until the lessee had made total monthly payments equal to the equipment's fair market value. The court rules that no default had occurred, no holdover rent was due, and sufficient month-to-month rentals had been paid to entitle the lessee to own the equipment. The issue under the other schedule involved the parties' intent regarding the intended lease term (60 or 61 months). Here the court rules that all of the documents associated with this schedule may be considered (not simply the wording of the master lease) and that the issue was ambiguous enough to require a jury trial.

Winthrop Resources Corp. v. Apollo Education Group, Inc., 2017 WL 3531516 (U.S.Dist.Ct. D.Minn. August 16, 2017

In this case, the lessee had notified the lessor that it chose not to renew its lease of about 1000 servers, it returned all of the servers it could find, and it told the lessor that about 3% of the equipment had been lost. With respect to the lost equipment, the lessee sent a check for its fair market value as calculated by an independent third party. Instead of simply accepting the equipment and the check (or, if it disagreed with the FMV calculation, raising that issue), this lessor sued, contending that the lease called for renewal of the entire lease if not all equipment was returned. Noting that the lessor had not given any reason for not accepting the FMV check, the court refuses the lessor's motion to strike the lessee's claim of breach of the implied covenant of good faith and fair dealing. The court even goes so far as to admit allegations made by the lessor's attorney, when that attorney was representing lessees in previous cases, that this lessor had a history of deceptive and bad faith conduct.

Midwest Railcar Corp. v. Everest Railcar Services. Inc., 2017 WL 1383765 (U.S.Dist.Ct. S.D.N.Y. April 13, 2017)

A lessee of railcars, under a lease that provided for an irrevocable option notice (to be received by the lessor between 180 and 360 days prior to lease expiration) to either extend the lease or purchase the railcars, contacted the lessor in a letter during the relevant time period stating, "This letter will serve as our written notice to either renew the lease at terms to be negotiated or exercise a purchase option at an amount to be negotiated." The renewal and purchase options in the lease stated that the rental and purchase amounts were to be equal to "the then fair market value of the Units, as determined by Lessor,…" The lease also stated that the lessee had to provide a minimum of 180 days irrevocable notice of its intention to return all of the units. The court ruled that the lessee's letter constituted an irrevocable notice either to renew or to purchase and a rejection of the option to return the railcars at the end of the lease. Although the lessee argued that the letter did not constitute the exercise of an irrevocable option, but instead only a willingness to negotiate specific terms of either a renewal or purchase, and notwithstanding the lessee's claim that the lessor's offers of specific renewal and purchase prices were above fair market value, the court holds that since "fair market value can be determined objectively," the letter triggered an irrevocable obligation on the part of the lessee. Since the lessee did not either renew or purchase, the lessor had stated a claim for breach of contract as a result of the lessee's revocation of its exercise of the irrevocable option (with damages to be determined, evidently, after further proceedings). This ruling constitutes a lesson in fully understanding the meaning of end of term provisions and in very carefully addressing those provisions when the time comes. The ruling may seem a bit harsh from the lessee's point of view, but the court does indicate that the lessor will be held to a standard of reasonableness when deciding what dollar amount will constitute fair market value.

Mid-Missouri Spray Service, Inc. v. South Delta Aviation, Inc., 2015 WL 3828246 (U.S.Dist.Ct. E.D.Ark. June 19, 2015)

A lessee of an aircraft sued its lessor for damages, claiming that the lessor had refused to consummate the sale of the aircraft to the lessee according to the terms of a purchase option given the lessee. The court grants the lessor's motion for summary judgment, concluding that, even if the lessee had given the lessor timely notice under the option agreement (a fact disputed by the lessor), the lessee did not have the ability at the time the lease expired to make the purchase option payment because it did not have the funds available or approval for a loan for which it had applied. This court bases its conclusion on common law, citing the Restatement (Second) of Contracts, even though the Arkansas Supreme Court has not addressed the issue.

Thomas Energy Corp. v. Caterpillar Financial Services Corp., 2014 WL 7366676 (Tenn.Ct.App. Dec. 26, 2014)

After encountering financial difficulties, the plaintiff contacted the lessor to attempt to change certain terms of various lease agreements including, in particular, permission to return the equipment early as part of his satisfying his obligations under the leases. Plaintiff claimed that lessor had previously agreed orally to such a return, but then subsequently reneged on that promise, forcing him to sell the equipment himself and then pay off the leases. After plaintiff sued the lessor for failure to fulfill this oral modification, the trial court granted summary judgment in favor of the lessor. This appellate court agrees with the trial court's determination that the plaintiff was a merchant for purposes of Tennessee's Article 2A provision [208(2)] stating that a requirement in a signed lease supplied by a merchant that excludes modification except by a signed writing must be separately signed by the other party unless that other party is also a merchant. Thus the plaintiff's argument that this provision in its leases needed to be separately signed by the plaintiff was to no avail.

Full Gospel Baptist Church Fellowship International v. Capital One, 2013 WL 5570328 (U.S.Dist.Ct. E.D.La. Oct. 9, 2013) An aircraft lessor and lessee negotiated an amendment to the original lease after the lessee requested additional financing for replacement of the aircraft's engines. The amendment included, among other things, a residual guaranty clause in which the lessee promised to pay the difference between the casualty loss value as of the final date of the lease term and the proceeds received by the lessor from a sale of the aircraft following its return. Although the lessee attempted to argue that the original purchase price stated in the original lease was meant to be used in calculating the casualty value, the court agrees with the lessor that the larger original purchase price set forth in the amendment was required to be used for purposes of the residual guaranty clause.

Winthrop Resources Corporation v. GroupEx Financial Corporation, 2012 WL 6097292 (MinnApp. Dec. 10, 2012)(designated as unpublished and not to be cited except as provided by Minn. statutes)

This appellate court affirms a lower court's grant of summary judgment to a lessor regarding a lease's provisions (i) contemplating the possibility of multiple installation dates for various pieces of equipment listed on the same lease schedule having a single commencement date and therefore a single end-of-term date for all equipment on that schedule, and (ii) requiring no less than 120 days' notice before the end of the lease term of the lessee's intent to terminate the schedule and return the equipment. The decision illustrates the consequences of not paying close enough attention to the meaning and application of such end of lease provisions.

<u>Graphic Pallet and Transport, Inc. v. Balboa Capital Corp., 2012 WL 1952745 (U.S.Dist.Ct. N.D. Ill. May 30, 2012)</u>

After entering into a number of leases with the lessor, the lessee alleged that an employee of lessor had told the lessee that it could acquire the equipment at the end of each lease term for one dollar. Since the leases themselves indicated otherwise, the lessee claimed that various exceptions to the parol evidence rule (e.g., fraud and mistake) should apply and cause the court to decide in favor of the lessee/plaintiff. This court instead grants the lessor/defendant's motion to dismiss.

<u>TFG-Illinois, L.P. v. United Maintenance Company, Inc., 2011 WL 5239728 (U.S.Dist.Ct. D.Utah Nov. 1, 2011)</u>

In a case involving a number of claims by both the lessor and lessee, the primary issue involved whether the lessor had a right to claim the payments owing under the lease for an automatic twelve-month renewal term, which renewal term resulted from the failure by the lessee to provide the requisite prior notice of its election among the stated end-of-term options. Agreeing with the lessor that the lessee was liable for these renewal term payments, the court rejects arguments by the lessee (characterized by the court as a sophisticated party assisted by counsel) that certain e-mails between the parties constituted substantial compliance with the notice requirement. The decision also deals with whether an assignment agreement between the plaintiff and the previous lessor needed to be in writing and, even if the unwritten assignment was invalid (the court held it was valid), whether the plaintiff had standing as a servicer of the lease. One of the other claims raised by the lessee was that the lease was actually a security agreement, although it was not made clear how the lessee would benefit from such a finding. In any event, the court denied the lessee's summary judgment motion in this regard, stating that it could not decide as a matter of law that the lessor did not retain any residual interest in the equipment subject to the lease.

<u>TFG-North Carolina, L.P. v. Performance Fibers, Inc., 2011 WL 2010002 (U.S.Dist.Ct. D.Utah May 23, 2011)</u>

Plaintiff/lessor and defendant/lessee entered into a lease having end-of-term options providing for either the purchase of the equipment for a price to be agreed upon by both parties or, in the event of no agreement to purchase, then a twelve month extension at the rate in the lease followed by successive six-month renewals at the same rate subject to termination by either party by giving prior notice one hundred eighty days before the end of the renewal period. The lessee argued that its obligations came to an end at the end of the initial term of the lease, but the court agrees with the lessor that the parties viewed the transaction as a lease and that the lessee was obligated under the end-of-term provisions.

Republic Bank v. Ethos Environmental, Inc., 2011 WL 587772 (U.S.Dist.Ct. D.Utah February 9, 2011)

After the lessee had defaulted under a lease, the assignee of the original lessor moved for summary judgment. In granting this motion, the court considered and rejected a number of lessee arguments for not enforcing the lease. Among the more interesting was the lessee claim that the end of term provisions in the lease constituted the sort of perpetual obligation to endlessly renew the lease found to be unenforceable in another case. The court correctly distinguishes this provision from the one cited by the lessee by noting that one of the end of lease alternatives – purchase for a price to be agreed upon; terminate the lease and return the equipment, but then enter into a required new lease of equipment replacing the returned equipment; or continue for additional twelve then six month terms at the same rental followed by additional six month terms unless notice of termination is given by either party – eventually permitted the lessee to terminate.

House of Flavors, Inc. v. TFG-Michigan, L.P., 719 F.Supp.2d 100 (D.Maine 2010)

In this case the court concludes that a lessee was fraudulently induced to enter into a lease with a particular lessor when, after considerable negotiation regarding the lessee's request for a fixed price purchase option, the lessor – claiming it was unable to clearly provide what the lessee wanted because doing so might jeopardize the lessor's tax benefits – gave the lessee a somewhat vaguely worded side letter of intent meant to assure the lessee. When the lessee attempted to exercise its purchase option at the price it thought had been agreed to, the lessor refused. After determining that the lessee had been defrauded, the court went on to determine damages due the lessee from the lessor that would put the lessee in the position it should have been had the lessor honored what the lessee thought had been promised by the lessor.

Frost National Bank v. L&F Distributors, Ltd., 165 S.W.3d 310 (Texas May 27, 2005)

After an intermediate appellate court had ruled that language in a lease giving the lessee the right to buy the equipment for a stated amount "on or before the Expiration" of the lease meant that the lessee could purchase the equipment for that amount at any time before the end of the scheduled sixty month term, the Texas Supreme Court holds that the poorly worded provision could only have been meant to permit the exercise of that option at the end of the term and that the lessee's and appellate court's interpretation was "unreasonable, inequitable and oppressive."

First American Commercial Bancorp, Inc. v. Interior Architects, Inc., 2004 WL 2011398 (U.S. Dist.Ct. N.D.Ill. Aug. 31, 2004)

Citing a lease's integration clause and Article 2A-202, Final Written Expression: Parol or Extrinsic Evidence, the court holds that an unsigned facsimile side letter placing a cap on the fair market value purchase option found in an addendum to the master lease could not be enforced by the lessee. Prior to the initiation of litigation, there had been a number of instances in which the lessor and lessee had negotiated purchase prices that exceeded the purported cap. The court also held that the term "fair market value" – not defined in the lease – was not ambiguous as a matter of law, at least with respect to the purported cap at issue. The court cites definitions of "fair market value" in *Black's Law*

Dictionary and in some Illinois case law, while acknowledging that there may be a number of nuances in determining fair market value – none of which were present in this case.

Central Funding, Inc. v. Compuserve Interactive Services, Inc., 2003 WL 22177226 (Ohio App. 10 Dist. Sept. 23, 2003), appeal not accepted for review, 802 N.E.2d 155 (OhioSup.Ct. 2004)

A case illustrating the benefits of very careful wording – in this case, in connection with a lessee's exercise of a fair market value purchase option. Following lessee's timely notice of its intent to exercise that purchase option, the lessor attempted to set the purchase price based upon a formula for early buy-out during the lease term. After the lessee rejected this suggestion and the lessor rejected a lessee suggestion for fair market value appraisals, the lessor demanded return of the equipment and the lessee refused. The definition of fair market value in the lease stated that "Fair Market Value is mutually determined by Lessor and Lessee as the amount obtainable in a transaction between an informed and willing user….", but the lease provided no required mechanism to determine that value. Holding that the language was ambiguous and that in the absence of sufficient parol evidence, the language should be construed against the drafter, the court rejects the lessor's argument that exercise of the option by the lessee depended upon mutual agreement as to the purchase price – finding instead that the lessee's exercise had created an obligation on the part of the lessor to sell at fair market value and that such exercise by the lessee also extinguished any obligations under the lease after the scheduled end of term.

Accepting an Offer from a Lessee in Default to Return the Equipment

IOS Capital, Inc. v. Jacobi, 105 S.W.3d 909 (Mo.Ct.App. 2003)

After picking up its equipment following the defaulted lessee's request to pick it up and cancel the lease, the lessor sued to recover the balance owing under the lease. Although the trial court held that the parties had reached an accord and satisfaction releasing the lessee from further obligations, the appellate court reverses inasmuch as the lessor was merely exercising its rights to the equipment under the lease and there was not any evidence that the lessor was accepting the lessee's offer to pick it up in return for canceling the lease. The lower court's decision is difficult to understand in view of the lessee's testimony that no one from the lessor had ever told her that the lease would be canceled and the fact that the receipt provided by the lessor when it picked up the equipment specifically stated that the lessee's obligations were not being released.

Lease Treatment for "Software Leases"

Leaf Financial Corp. v. ACS Services, Inc., 2010 WL 1740884 (Del.Super. April 30, 2010)(unpublished opinion, check court rules before citing)

See discussion in "Ability to Collect Rentals" section above.

Fieldtech Avionics & Instruments, Inc. v. Component Control.Com, Inc., 262 S.W.3d 813 (Tex.App. 2008)
See discussion in "Ability to Collect Rentals" section above.

In re CNB International, Inc., 307 B.R. 363 (Bankr.W.D.N.Y. 2004)

A lease schedule including only software (related hardware was listed on a separate schedule) is held not to be a lease for purposes of obtaining the advantages of Section 365(d)(10) of the Bankruptcy Code. Having made no arrangement with the licensor of the software to obtain possessory and conditional use rights to the software – with an understanding that the possessory right would be transferred to the lessee – the lessor never had a possessory interest in the software that it could transfer to the lessee as required by Article 2A's definition of "lease" (2A-103(1)(j) in the uniform version): "No lessor may lease that which it does not own or in which it does not enjoy at least some interest or right of possession." It would be interesting to know how this court would have ruled if the hardware and related software had been included on the same schedule. While such a document would be considered "chattel paper" for purposes of Revised Article 9, courts could conceivably adopt this decision's view for bankruptcy and other purposes and attempt to separate the two components.

Indemnity Clauses

United Rentals (North America), Inc. v. Conti Enterprises, Inc., 2018 W.L. 1413260 (U.S.Dist.Ct. S.D.N.Y. March 6, 2018) *

An equipment rental company was sued by employees of a contractor who were injured after the rented equipment malfunctioned. This case involves the rental company's attempt to seek indemnification under its rental contract with the contractor. The indemnity provision required the contractor to indemnify the rental company against all claims against the rental company, whether or not such claims were for negligence on the part of the rental company or any claims of strict or product liability, breach of warranty or any other theory of law. New York General Obligations Law has a provision stating that indemnity provisions in contracts related to various construction, repair or maintenance activities (this case involved repair work on a New York City bridge) that indemnified against the negligence of the indemnitee are unenforceable. Here, the contractor attempted to move for the court to grant summary judgment on its claim that the rental company's demand for indemnification under the rental contract's indemnity provision is unenforceable. The court denies this motion inasmuch as there had been no findings yet with respect to the negligence of the parties involved.

Barnette v. Paxton Van Lines of North Carolina, Inc., 772 S.E.2d 256 (N.C.Ct.App. June 2, 2015)

After the driver of a car was injured when her car was struck by a truck, she sued the truck driver, its employer and the lessor of the truck to the employer, alleging negligence in failing to inspect and maintain the braking system on the truck. The lessor, a truck dealer, had been granted a motion for partial summary judgment against the lessee/employer in the trial court based upon a provision in the rental agreement in which the lessee agreed to indemnify the lessor against all claims related to the use of the truck. This appellate court affirms the trial court's ruling by citing a North Carolina Supreme Court case upholding the right of a party to contractually provide for indemnification against its own negligence, and further finding that such a right extends to negligent acts committed by the party to be indemnified prior to entry into the rental agreement containing the indemnification agreement. [It should be noted that the possibility of being indemnified for one's own negligent acts is not the case in all states.]

<u>XTRA Lease LLC v. Pacer International, Inc., 2012 WL 10491 (U.S.Dist.Ct. E.D.Mo. Jan. 3, 2012)</u>

This case illustrates how important it can be for an indemnity clause in a lease to be very clear as to whether the lessee is obligated to indemnify and defend a lessor for the lessor's own negligence. The court finds that under Missouri law, the language "indemnify…for any and all losses" did not clearly include losses that might have arisen due to the lessor's own negligence. For an indemnity provision to cover the lessor's own negligence, such intention must be expressed in clear and unequivocal terms.

<u>Lexington Insurance Company, 900 N.E.2d 536 (Mass.App. 2009) (opinion not published in printed volume – only appears in a table; may be cited for persuasive value, but not as binding precedent)</u>

Lessee's insurer claimed that the lessor's negligence caused damage to property of the lessee and lessee's customer (for which damage the insurer paid). The Massachusetts Appeals Court here affirms the trial court's grant of summary judgment in favor of the lessor based upon the indemnity provision in the lease. Although that provision did not explicitly include losses caused by the lessor's negligence, the court holds that its broad reference to "any and all claims" suffices to include such lessor-caused losses.

<u>Feldman v. CSX Transportation, Inc., 2006 WL 2065297 (N.Y.App.Div. July 25, 2006)</u>

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.

<u>H&H Painting & Waterproofing Co., 2006 WL 708214 (Fla.App. March 22, 2006)</u>

A lower court finding in favor of a construction equipment lessor seeking indemnity from a lessee under a lease agreement for losses due to the lessor's own negligence is reversed. The appellate court holds that the lease lacked the clear and unequivocal language necessary to enforce such an indemnity agreement.

Eagle High Reach Equipment, Inc. v. Precision Drywall, Inc., 2004 WL 938428 (Cal. App. 2 Dist. May 3, 2004) (unpublished opinion)

Summary judgment in favor of a lessor based upon a lease provision requiring the lessee to indemnify the lessor against third-party claims for injuries caused by use of leased equipment is upheld where the indemnity clause was not unconscionable and there was no evidence of active negligence on the part of the lessor.

Forum Selection, Jurisdiction and Choice of Law

Signature Financial LLC v. Neighbors Global Holdings, LLC, Case1:17-cv-06089-JSR (U.S.Dist.Ct. S.D.N.Y. December 19, 2017) *

Everbank Commercial Finance, Inc. v. Neighbors Global Holdings, LLC, 2017 WL 5598216 (U.S.Dist.Ct. D.N.J. November 21, 2017) *

Both of these cases involve leases between the same lessor (All Points Solution, Inc.) and the same defendant/lessee (Neighbors Global Holdings, LLC – owner of emergency medical centers in Texas and other states). The leases had been assigned by the lessor to Signature Financial (based in New York), in the more recent case, and to Everbank Commercial (based in New Jersey), in the earlier case. Both leases contained a "floating" forum selection clause permitting an assignee of the lease to bring suit against the lessee in the state of the assignee's principal place of business. After the lessee defaulted, each assignee brought suit in the state of its principal place of business and the lessee attempted to have the suits dismissed for lack of personal jurisdiction, or, in the alternative, to have the venue transferred to Texas. Both decisions enforce the validity of the forum selection clause and find that transfer of venue is not warranted. The New York court's decision is especially thorough in distinguishing between the various types of forum selection clauses and reviewing previous cases regarding the validity of "floating" forum selection clauses in particular. This decision contrasts the abuse of such clauses in the context of the nationwide NorVergence fraud with the legitimate economic rationale of same to facilitate the loan assignment market as explained, for example, by Judge Posner in the 2006 case of *IFC Credit v. Aliano Brothers*.

Central Bank of St. Louis v. NEC Amarillo Emergency Center, 2017 WL 4888981 (U.S.Dist.Ct. E.D.Mo. October 30, 2017)

The leases in default contained a "floating" forum selection clause that called for adjudication in either the lessor's or its assignee's principal place of business. The original lessor had assigned the leases to a finance company who in turn assigned them to a bank based in St. Louis, Missouri. The lessee had stopped making payments on the leases - claiming fraud, breach of contract and other reasons not to pay - and brought suit in state court in Texas, where it was based. After the bank then filed this action in Missouri claiming breach on all leases, the lessee filed a motion either to dismiss the bank's action or transfer venue to Texas. After considering Eighth Circuit cases involving the "first-filed rule," this court stays the proceedings in its court until the Texas court rules on a motion by the bank that the Texas court does not have personal jurisdiction over the bank. Following that, this court will have a hearing to consider the lessee's motion either to dismiss or transfer venue.

XTRA Lease LLC v. 4D Daylight-To-Dark AG Services, LLC, 2017 WL 4778588 (U.S.Dist.Ct. E.D.Mo. October 23, 2017)

The lessor on a lease guaranteed by two individual guarantors brought suit in St. Louis County, Missouri against the lessee and guarantor alleging breach of both the lease and guaranty. The guarantors then removed the case to this federal court based on diversity. The lease contained a provision in which the lessee agreed to jurisdiction in the state court and also waived any objection to venue there. The guaranty contained a provision in which the guarantors agreed to jurisdiction in either the state court or this federal court. Although the lessee consented to removal to the federal court, this court rules that the lessee's waiver of its right to object to venue in the state court also prevented it from consenting to removal to the federal court. This court further rules that under the "rule of unanimity," all defendants in a multi-defendant case must consent to removal, or the case will be remanded. Because the lessee had waived its right to consent to removal, the court rules that the case be remanded to state court.

In re Varilease Finance, Inc., 2016 WL 4572274 (Tex.Ct.App. September 1, 2016)

After a trial court had refused to enforce a forum selection clause in a lease, the lessor filed a petition for writ of mandamus in this appellate court to compel the trial court to enforce such clause. This court conditionally grants the petition for writ to give the trial court time to vacate its order denying the lessor's motion to dismiss and signing a new order granting such motion. Citing language in the lease's forum selection clause ("…such controversies [any controversies relating to the lease] shall be tried by a judge alone before the federal or state courts in Oakland County, Michigan."), this court holds that the forum selection clause is mandatory and should be enforced unless the opposing party clearly shows that enforcement would be unreasonable and unjust. It also notes that the lessee's suit against the lessor alleging fraud is directed against the entire agreement rather than the inclusion of the forum selection clause specifically.

CP Anchorage Hotel 2, LLC v. Onset Financial, Inc., 2014 WL 5606634 (U.S.Dist.Ct. E.D.Ky. Oct. 15, 2014)

After a lessee of televisions sued the lessor in this Kentucky federal court, claiming that the lessor had orally promised to sell it the televisions for ten percent of their original cost at the end of the lease (the lessor offered a sixty percent purchase price instead at lease termination), the lessor moved to transfer the case to Utah based upon the forum selection clause in the lease providing for exclusive jurisdiction in Utah. When the lessee attempted to argue that the entire lease was the product of the lessor's fraudulent purchase option promise, this court holds that transfer to Utah was appropriate since the lessee had not met its burden of proving that the forum selection clause itself was a product of fraud.

Marlin Business Bank v. The Halland Companies, LLC, 18 F.Supp.3d 239 (E.D.N.Y. 2014)

After the lessor brought suit in the Philadelphia County Court of Common Pleas in Pennsylvania alleging breach of the lease by the lessee, the lessee, a New York limited liability company, had the case removed to a U.S. District Court in Brooklyn, NY. Since the lease contained a forum selection clause stating that any suit regarding the lease could be brought only in a state or federal court in Pennsylvania, this court concludes that the case was not properly removed to New York and grants the lessor's motion to remand the case to the court where the lessor originally filed suit.

<u>U.S. Bank National Association v. San Bernadino Public Employees' Association, 2013 WL 6243946 (U.S.Dist.Ct. D.Minn. Dec. 3, 2013)</u>

After the lessor brought suit in Minnesota against a California lessee in default, the lessee sought dismissal for lack of personal jurisdiction and, in the alternative, sought transfer of the case to California for reasons of convenience and fairness. The lease contained a "floating" forum selection clause providing for adjudication in either the state of the lessor or of the lessor's assignee. After noting that federal courts have generally upheld the validity of such forum selection clauses, and concluding that it had jurisdiction over the matter based on this clause in the lease, the court grants the lessee's request to transfer the case to California on grounds of convenience for the lessee and also because the supplier of the equipment was located in California.

<u>Winthrop Resources Corp. v. Hospital Authority of Ben Hill County, 2013 WL 4199672 (U.S.Dist.Ct. D.Minn. August 15, 2013)</u>

A Minnesota lessor and a Florida lessee negotiated choice of law and choice of forum provisions of their lease which stated that the lease was to be governed by Minnesota law and that both parties consented to the jurisdiction of any federal court in Georgia. However, the provision went on to specify that the lessor could select an alternative forum in its sole discretion. When the lessor commenced a suit in Minnesota (initially a state court, subsequently removed by the lessee to this federal court), the lessee moved to dismiss for lack of personal jurisdiction, or alternatively, to transfer to a federal court in Georgia. Due to the selection by both parties of Minnesota law and various other factors establishing contacts with Minnesota, this court concludes that the lessor has demonstrated enough minimum contacts to establish jurisdiction in Minnesota and also denies the lessee's motion to transfer the case to Georgia.

<u>Inheanacho v. ABC Bus Leasing, Inc., 2013 WL 636876 (U.S.Dist.Ct. W.D.N.C. Feb. 20, 2013)</u>

After a lessor repossessed three buses from a lessee, the lessee brought suit in a federal court in the lessee's state (North Carolina) making various allegations against the lessor. This court affirms a magistrate judge's recommendation to grant the lessor's motion to transfer the case to a federal court in Minnesota. In reviewing the factors required by federal law to determine whether to grant such a motion, the court relies heavily on the fact that the lessee had signed fifteen lease agreements with the lessor, including the one at issue, consenting to litigation of all issues between the parties relating to the leases in Minnesota – citing the U.S. Supreme Court's presumption towards enforcing such agreements.

Financial Planning Alternatives, Inc. v. De Lage Landen Financial Services, Inc., 2012 WL 2588553 (Mass.App.Div. June 28, 2012)

This decision affirms a dismissal by a trial court of an action by a lessee against a lessor after the lessor had obtained a default judgment in a Pennsylvania court predicated upon a clause in the lease consenting to the jurisdiction of Pennsylvania courts. This appellate court notes both that Massachusetts generally enforces forum selection clauses and also notes that the lessee is a sophisticated entity in the business of financial planning. However, in a footnote, this court states that "While recognizing and applying the established law that compels the decision in this matter, we are not unmindful of the inequities potentially created by De Lage's use of a boilerplate forum selection clause." In this footnote, the court goes on to mention a decade-old dispute between Leasecomm, based in Massachusetts and a "standard bearer for the use of forum selection clauses in finance equipment leases with small businesses," and the Massachusetts attorney general which resulted in a settlement in which Leasecomm abandoned its use of such clauses and agreed to bring its collection suits "where the consumer resided or did business."

Canon Financial Services, Inc. v. Eufaula School District, 2012 WL 1989225 (N.J.Super.A.D. June 4, 2012)(unpublished opinion, check court rules before citing)

This appellate decision affirms a trial court's dismissal of a lessee's motion to dismiss a complaint by a lessor. The lessee/defendant, a school district in Oklahoma, had allegedly defaulted on four photocopier lease agreements containing a clause in which the lessee agreed to the jurisdiction of New Jersey courts. Noting that forum selection clauses are generally enforced in New Jersey, this decision holds that none of the exceptions cited by the lessee – including serious inconvenience – applied.

U.S. Bancorp Equipment Finance, Inc. v. Healing Earth Rejuvination Center, LLC, 2012 WL 254494 (Minn.App. Jan. 30, 2012)

This court affirms a trial court's judgment in favor of a lessor. The lessee did not appear at trial and on appeal argued that the district court should not have exercised personal jurisdiction over the lessee since the minimum contacts requirement had not been satisfied. This brief decision notes simply that (i) the lease contained a forum selection clause agreeing to jurisdiction in Minnesota, (ii) such clause was not unreasonable, and therefore (iii) the minimum contacts requirement was irrelevant.

DeLage Landen Financial Services, Inc. v. Leighton K. Lee Law Office, 2011 WL 6304226 (N.J.Super.App.Div. Dec. 19, 2011)(unpublished opinion, check court rules before citing)

This appellate decision reverses a trial court's dismissal of an action filed by the lessor based upon a lack of personal jurisdiction over the defendants. The lease contained a consent to jurisdiction in New Jersey that was explicitly non-exclusive. The court distinguishes a prior case in which a floating selection clause was held to be invalid for failure to provide any notice of where an action might be instituted. Unlike in that case, the court states that here defendants were on notice that they were subject to being sued in New Jersey.

National City Commercial Capital Corp. v. Bullard, 2011 WL 5419747 (Ohio App. Nov. 7, 2011)(check Ohio Supreme Court rules for reporting of opinions and weight of legal authority)

In upholding a trial court's decision in favor of a NorVergence lessee that the assignee could not bring suit in Ohio based on the lease's floating forum selection clause, this appellate court finds that the facts of this case were similar enough to apply the holding from Ohio's Supreme Court in *Preferred Capital v. Power Engineering*. The majority decision disagrees with the arguments of the plaintiff and of a dissenting judge on this appellate panel that the fact that the leases were not assigned until a month after they were executed was enough to distinguish this case from *Preferred Capital* where the Supreme Court emphasized the "superior knowledge" of the assignor with respect to its almost immediate assignment to an assignee unknown to the lessee.

De Lage Landen Financial Services, Inc. v. New Life Anointed Ministries International, Inc., 2011 WL 2601542 (U.S.Dist.Ct. E.D.Pa. June 30, 2011)

After the lessee defaulted, the assignee of the original lessor brought suit in a federal district court in Pennsylvania, although the lease contained a clause providing for the parties submission to the non-exclusive jurisdiction of New York state and federal courts. This court dismisses the suit for lack of jurisdiction, agreeing with the lessee – a corporation organized in Delaware and located in Virginia – that its promise to make payments to the lessor in Pennsylvania was not sufficient to support personal jurisdiction.

Canon Financial Services, Inc. v. GR Graphics, Inc., 2011 WL 734860 (U.S.Dist.Ct. D.N.J. Feb. 18, 2011)

This decision denies a defaulting lessee's request to transfer the case to its home state after the lessor brought suit in New Jersey, the venue named in the lease's forum selection clause. The court's denial is based on its finding that the lessee had failed to demonstrate that litigation in New Jersey would be so gravely difficult that the defendant would be effectively deprived of its day in court.

S & L Birchwood, LLC v. LFC Capital, Inc., 2010 WL 4052187 (U.S.Dist.Ct. E.D.N.Y. Oct. 13, 2010)

In deciding whether to dismiss a lessee plaintiff's suit against its lessor or to transfer the suit to a different forum, this court has occasion to discuss the differences between mandatory and permissive forum selection clauses and to analyze the language in the lease to decide which was intended. After the lessor had accelerated the remaining balance of lease payments following an alleged lessee default, the lessee filed suit in New York seeking a declaratory judgment that it was not in default. The lease contained a provision stating that "Lessee irrevocably submits to the jurisdiction of any federal or state court located therein [Illinois]…". The lessee argued that since this provision does not explicitly state that suits must be brought in Illinois, it should be construed as permissive and its suit should be heard in New York. After noting that the lease provision used neither the word "must" nor the word "may," the court holds that the words "irrevocably submits" indicated that the parties intended Illinois to be the venue for any dispute, and so decides to transfer the suit to Illinois.

Frontier Leasing Corporation v. Hunt, 2010-2813781 (N.C.App. July 20, 2010)(unpublished disposition – see N.C. rules before citing)

This North Carolina appellate decision affirms a trial court's order granting a motion by the original lessor's assignee to enforce a default judgment entered by an Iowa state court against the lessee, a golf professional in North Carolina. The lessee had signed a lease containing a consent to personal jurisdiction and venue in Iowa courts. (The facts underlying the litigation are common to many other cases involving the leasing of golf beverage carts with respect to which the lessees were told that payments to them for advertising on the carts would equal the payments owing under the leases. After the advertising payments stopped, many of the lessees stopped making payments under their leases.) This court finds that Iowa law would hold the forum selection clause enforceable notwithstanding the lessee's claims that the clause was not prominently displayed on the lease form and that he was not a sophisticated businessman. The court distinguishes the facts in this case from those in a Pennsylvania case in which that court declined to enforce the forum selection clause against a lessee who was an immigrant with limited understanding of the English language.

O'Neill Farms, Inc. v. Reinert, 780 N.W.2d 55 (S.D. 2010)

This South Dakota Supreme Court decision examines whether a very brief forum selection clause in a two-page lease should be enforced under the circumstances of this case. In reversing a lower court's finding that the clause was unreasonable based upon a set of factors mentioned in an earlier Supreme Court decision, this decision holds that a simple weighing of the factors used by the lower court was not enough, and that a strong showing of unreasonableness must be made before finding that the clause is unreasonable. In this case, the fact that the lessor's business involved leasing equipment throughout the Midwest helped lead to the court's conclusion that the clause's inclusion in the lessor's contracts was reasonable.

Merchants and Farmers Bank v. Marquette Equipment Finance, LLC, 2009 WL 2767678 (U.S.Dist.Ct. N.D.Miss. August 27, 2009)

In granting a motion by the original lessor's successor-in-interest to transfer venue to Utah of an action regarding a lease option brought by the lessee, this court decides that it should not rely solely on the lease clause providing for venue in Utah. The court finds that the clause at issue did not clearly provide for exclusive venue in Utah. However, after considering convenience factors under the federal statute regarding motions to transfer, it ultimately decides to grant the finance company's motion.

Frontier Leasing Corp. v. Singh, 2009 WL 2782681 (Conn. Super. July 31, 2009)(unpublished opinion)

This Connecticut court grants a motion for summary judgment by the leasing company recognizing a default judgment against the lessee obtained in Polk County, Iowa. In doing so, the court cites other Connecticut cases that have upheld forum selection clauses absent a showing of fraud or overreaching.

National City Commercial Capital Corporation v. All About Limousines Corporation; v. Cotton; v. Page, 2009 WL 683786; 683777; 683773 (Ohio App. March 16, 2009)

In these three cases, decided by the same appellate court on the same date, the court reviews a lower court's decisions not to enforce forum selection clauses in NorVergence leases in favor of the Ohio-based plaintiff as assignee of such leases. The appellate court agrees with the lower court in denying the plaintiff's arguments in favor of personal jurisdiction based upon certain lessees having sent payments to Ohio and/or having filed counterclaims in the lower court. With respect to whether the "floating" forum selection clause in the leases should be enforced in favor of the assignee, this court remands the cases to the trial court in light of the reasoning set forth in the Ohio Supreme Court's *Preferred Capital v. Power Engineering* decision not to enforce such a clause when the lessor possessed information not disclosed to the lessee of its intent almost immediately to assign the lease to an assignee in a foreign jurisdiction (absent a clear showing that the lessee had knowingly consented to litigate in any forum). The lower court was directed to look further into the details of the program agreement between NorVergence and the assignee and other facts of these cases.

New Horizons Electric, Inc. v. IFC Credit Corp., 2008 WL 4597419 (Colo.App. October 16, 2008)(unpublished)

This Colorado appellate court affirms the dismissal of actions brought by a number of NorVergence lessees against a group of NorVergence assignees. The dismissal was the result of enforcing forum selection clauses in the leases -- some containing the so-called "floating" forum selection clause -- requiring that actions be brought in other states. Holding, consistent with another Colorado appellate court, that forum selection clauses are prima facie valid, this court finds that the plaintiff-lessees did not demonstrate that they were fraudulently induced to agree to the forum selection clauses specifically (as opposed to being fraudulently induced to enter into the leases generally). The court also dismissed plaintiffs' arguments that their agreement to the forum selection clauses were induced by fraud in the factum inasmuch as such claim was tied to a claim of relief base on the Uniform Consumer Credit Code, which the court holds is not applicable to commercial transactions such as these.

Polzin v. Appleway Equipment Leasing, Inc., 191 P.3d 476 (Mont. 2008)

The Montana Supreme Court reverses a lower court's denial of a lessor's motion to dismiss for improper venue. The lease contained provisions choosing the State of Washington – both for the law governing the lease and for the venue of any action (if elected by the lessor). The decision holds both that Washington law recognizes forum selection clauses as valid and that, contrary to statements in the lower court's opinion, Montana law does not regard such clauses as void as against public policy.

In re Lyon Financial Services, Inc., 2008 WL 2487092 (Tex.Sup.Ct. June 20, 2008)(not released for publication, subject to revision or withdrawal)

After a trial court had rejected a lessor's motion to dismiss in an action by the lessee asserting various claims against the lessor, which motion to dismiss was based upon forum selection clauses in the lease and subsequent restructuring agreement that selected courts in Pennsylvania, the lessor sought a writ of mandamus from the Texas

Supreme Court directing the trial court to vacate its order denying the lessor's motion to dismiss. The Texas Supreme Court agreed with the lessor that there was no reason not to enforce the forum selection clause inasmuch as there was no showing that the clause itself had been procured by fraud or that it was so inconvenient, unfair or subversive of Texas public policy as to warrant its not being enforced.

<u>*In re* Boone (Greater Peace Baptist Church, Inc. of Opelika v. Boone), 2008 WL 619169 (Bankr.M.D.Ala. March 3, 2008) (Slip Copy)</u>

A brief decision granting a motion by a Wells Fargo Financial Leasing as lessor to dismiss the claims against it for improper venue. The lease contained a forum selection clause requiring legal actions to be instituted in Iowa and because the plaintiff, whose burden it was to show that the contractual forum is sufficiently inconvenient to justify retention of the suit in Alabama, filed no brief in opposition to the lessor's motion, the lessor's motion was granted.

<u>OFC Capital v. Schmidtlein Electrical Inc., 656 S.E.2d 272 (Ga.App. 2008)</u>

After OFC Capital, as assignee of a NorVergence lease, brought suit against the lessee for breach of the lease, the trial court granted the lessee's motion to dismiss, which motion had alleged both the unenforceability of the "floating" forum selection clause and a failure to join NorVergence as an indispensable party. This appellate decision refers to a recent case in the same court involving the same lessor upholding the enforceability of this particular forum selection clause. Because the appellate court could not determine the precise ground for the trial court's dismissal, it remands the case to the trial court to make appropriate findings concerning the issue of not joining NorVergence as an indispensable party.

<u>National City Commercial Capital Corp. v. Gateway Pacific Contractors, Inc., 2007 WL 3232440 (U.S.Dist.Ct. S.D.Ohio Oct. 31, 2007) (Slip Copy)</u>

This court follows the Sixth Circuit's *Sarasota Kennel Club* decision (see below) in holding the NorVergence "floating" forum selection clause to be unenforceable against an Ohio lessee under Ohio law – the facts in this case not being distinguishable from those in the Ohio Supreme Court's *Power Engineering Group* decision (see below).

<u>Seymour Lodge, No. 462 v. Frontier Leasing Corp., 872 N.E.2d 703 (Ind.App. 2007)(unpublished memorandum decision)</u>

Affirmation of an Indiana trial court's entry of summary judgment in favor of an Iowa lessor based upon a default judgment that had been obtained by the lessor in Iowa pursuant to a forum selection clause in the lease whereby the Indiana lessee agreed to venue in Iowa. Notwithstanding the lessee's objections, the court holds that such clauses are enforceable and that judgments in other states pursuant to such clauses should be given full faith and credit unless enforcement of the clause would be unjust or the lessee's agreement to the clause had been procured by fraud.

Studebaker-Worthington Leasing, Corp. v. New Concepts Realty, Inc., 16 Misc. 3d 1119(A) (N.Y.Dist.Ct. 2007)(unpublished slip opinion)

This New York court does not accept a Colorado lessee's argument that the NorVergence "floating" forum selection clause is invalid and unenforceable. Acknowledging that serious questions concerning the use of fraud in procuring the lease had been raised, the court notes that no evidence was presented that specifically addressed whether the forum selection clause – appearing in bold font – had been itself procured by fraud. The court also strongly rejects an argument – purportedly supported by legal scholars and attorneys general around the country – that the agreement constituted a consumer lease (requiring 10-point type to be enforceable under New York law). This argument is dismissed based upon the definition of "consumer" and "consumer lease" found in Article 2A of the UCC as requiring use of the goods being leased for personal, family or household purposes – not the case in this commercial context.

OFC Capital v. Colonial Distributors, Inc., 648 S.E.2d 140 (Ga.App. 2007)

This court reverses a trial court's dismissal of a lessor's suit brought pursuant to the NorVergence "floating" forum selection clause. Although the lessee argued that the lease agreement was procured by fraud, this court notes that the lessee had not produced any evidence that the forum selection clause was itself so procured. The court also notes that the forum selection clause was highlighted in bold and that the lessee's executive director had initialed the page of the lease containing that clause.

Susquehanna Patriot Commercial Leasing Co., Inc. v. Holper Industries, Inc., 928 A.2d 278 (Pa.Super. 2007)

This decision reverses the decision of a trial court that found the NorVergence "floating" forum selection clause to be unenforceable. Recognizing a split of authority around the country regarding this issue, this court holds the clause to be enforceable to the extent, among other considerations (e.g., it is not so unfair or inconvenient as to deprive a party of the opportunity to be heard and it does not violate public policy), that it was not itself induced by fraud or overreaching.

Frontier Leasing Corporation v. Shah, 931 A.2d 676 (Pa.Super. 2007)

This lessor initially obtained a default judgment in Iowa against an individual doing business in Pennsylvania pursuant to a lease containing a forum selection clause that simply provided that any suit pertaining to the lease would be "proper" if filed in Iowa. After the lessor filed this judgment in a Pennsylvania county court, which denied the lessee's petition to strike the judgment, this Pennsylvania Superior Court reverses and grants the lessee's motion to strike. The decision purports to apply Iowa law in finding that because the lessee was an inexperienced individual (a Pakistani immigrant with no formal training in English) and because the forum selection clause was inconspicuous (not highlighted as other clauses were), it would be unreasonable and unjust to enforce it.

Polk County Recreational Association v. Susquehanna Patriot Commercial Leasing Company, Inc., 2007 WL 2068663 (Neb. July 20, 2007)
Lyon Financial Services, Inc. v. bioMerieux, Inc., 2007 WL 2123564 (U.S.Dist.Ct. D.Minn. July 20, 2007)

In these two cases, coincidentally decided on the same day, the Nebraska Supreme Court and a federal district court in Minnesota consider the enforceability of forum selection clauses in leases against lessees complaining of fraud related to the lease transaction (as well as the inconvenience and/or unreasonableness of requiring the lessees to litigate in a foreign jurisdiction). The Nebraska Supreme Court upholds the clause against lessees caught up in the Royal Links golf cart program problems (see *C and J Leasing v. Hendren Golf* in the "Ability to Collect Rentals…" section above) on the basis that alleged fraud relating to the procurement of the leases as a whole does not invalidate the enforceability of a forum selection clause that was not itself procured by fraud. The Minnesota District court, on the other hand, finds that under the facts of its case, the leases were procured by "fraud in the factum" and thus were entirely void – including, of course, the forum selection clause. Nevertheless, the court dismisses defendants' arguments asserting lack of personal jurisdiction and also denies motions to transfer venue.

Preferred Capital, Inc. v. Sarasota Kennel Club, Inc., 489 F.3d 303 (6th Cir. 2007)

The assignee of a NorVergence lease containing its typical "floating" forum selection clause initially brought suit against the lessee (a Florida corporation) in an Ohio state court. After the lessee removed the case to an Ohio federal District Court, that court held that the clause was unenforceable under both Ohio and federal law because of fraud and overreaching by NorVergence. Although the Sixth Circuit had previously held such a clause to be enforceable under both federal and Ohio law (see the *Associates in Urology* case below), because (i) the Ohio Supreme Court subsequently found the clause to be invalid under Ohio law (see the *Power Engineering Case* below) and (ii) this Sixth Circuit panel now determines that Ohio law should apply to the issue in this case, this decision dismisses the assignee's claim due to lack of personal jurisdiction (affirming the federal District Court's judgment, but on different grounds).

Liberty Bank, F.S.B. v. Best Litho, Inc., 2007 WL 1201724 (Iowa App. April 25, 2007)

Iowa appellate court affirmation of a lower court holding that the NorVergence "floating" forum selection clause is enforceable by an Iowa assignee of NorVergence equipment rental agreements. After quoting some of the rationale expressed in *IFC Credit v. Aliano Bros.* in favor of enforcement, this court indicates that it finds the reasoning of cases upholding such clauses more persuasive than those invalidating them (such as in *Preferred Capital v. Power Engineering*).

Preferred Capital, Inc. v. Power Engineering Group, Inc., 860 N.E.2d 741 (Ohio 2007)

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* (see below).

<u>Patriot Commercial Leasing Company, Inc. v. Kremer Restaurant Enterprises, LLC, 915 A.2d 647 (Pa.Super. 2006)</u>

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.

<u>Sterling National Bank as Assignee of NorVergence, Inc. v. Eastern Shipping Worldwide, Inc., 826 N.Y.S.2d (App.Div. 2006)</u>

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.

<u>Preferred Capital, Inc. v. Aetna Maintenance, Inc., 2006 WL 3421829 (U.S.Ct.App. 6th Cir. Nov. 29, 2006)(not recommended for full-text publication)</u>
<u>Preferred Capital, Inc. v. Associates in Urology, 453 F.3d 718 (6th Cir. 2006)</u>

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.), which the Ohio Supreme Court did on February 7, 2007 (see above).

<u>Preferred Capital, Inc. v. Ward, Asel and Associates, P.C., 2006 WL 3291044 (Tex.App. November 14, 2006)</u>

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.

<u>Johnson v. Key Equipment Finance, 627 S.E.2d 740 (S.C. 2006)</u>

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.

<u>Citicorp Vendor Finance, Inc. v. Trillium Eye Plastic Surgery, P.C., 2006 WL 355180 (Mich.Ct.App. Feb.16, 2006)(unpublished opinion)</u>

The plaintiff lessor had obtained a default judgment in New Jersey against the lessee pursuant to a forum selection clause in the lease. After a Michigan circuit court declined to recognize the New Jersey judgment, this appellate court reverses and finds that neither New Jersey law (the governing law according to the lease) nor Michigan law precludes enforcing a forum selection clause merely on the basis of unsupported allegations by the defendant of inconvenience, abuse of economic power, or violation of public policy.

<u>Secure Financial Service, Inc. v. Popular Leasing USA, Inc., 892 A.2d 571 (Md.App. 2006)</u>

After a circuit court dismissed a lessee's action against an assignee of a NorVergence lease for a declaratory judgment that the lease's floating forum selection clause was not enforceable, Maryland's highest court remands to the circuit court for a complete statement of the rights and obligations of the parties. This decision mentions the presumptive enforceability throughout the United States of forum selection clauses generally, and also lists a number of decisions involving Norvergence in particular (the majority of which uphold the clause), but evidently requires that the lower court more clearly address the lessee's arguments.

IFC Credit Corporation v. Aliano Brothers General Contractors, Inc., 437 F.3d 606 (7th Cir. 2006)

This Seventh Circuit decision written by Judge Posner provides a powerful endorsement of the enforceability of floating forum selection clauses of the type discussed in the cases below. Without deciding whether federal or state law applies, the decision holds that such a clause is clearly valid under federal law and also valid under Illinois law given the facts of this case – a commercial lessee that could not be characterized as a "hapless consumer". Judge Posner finds the clause to be "clear and specific" (even if the forum may not be known to the lessee at the time the lease is signed) and reasons that if such clauses were not enforceable, the assignment of contracts might be impeded, resulting in higher costs to lessees. In remanding to the Illinois District Court that had dismissed the lessor's suit, Judge Posner notes that it will be open for the lessee to attempt to prove fraud in the procurement of that forum selection clause and also notes that, notwithstanding an FTC default judgment obtained against NorVergence (the original lessor) in other proceedings, no such evidence of fraud had been presented by the lessee in this case.

Partners Equity Capital Company, LLC v. Broward Title Company, 2006 WL 231780 (U.S.Dist.Ct. E.D.Pa. Jan. 30, 2006)

A brief decision upholding a floating choice of law provision in the NorVergence form of lease (contained in the same paragraph as the floating forum selection clause discussed in a number of cases in this section) which makes applicable the law of the state in which the assignee's principle office is located. The Florida lessee unsuccessfully argued that the issues in this case brought by an assignee of the lease involved a service agreement as well, and thus the choice of law provision in the lease should not govern.

Lyon Financial Services, Inc. v. Nowobilska Medical Center, Ltd., 2005 WL 3526682 (U.S.Dist.Ct. D.Minn. Dec. 22, 2005)

In this case, the court analyzes factors relevant to the enforcement of a floating forum selection clause in a lease with Bluedot Funding as original lessor (a different lessor than most of the other cases discussed in this section) that places venue in the home state of the lessor's assignee in the event of an assignment, and concludes that such a clause is enforceable under both federal and Minnesota law. One factor mentioned by the court was the lessee's agreement not to raise any defenses against an assignee that it might have been able to raise against the original lessor – thus making irrelevant the convenience of some other forum for the lessee to raise claims against that original lessor.

SRH, Inc. v. IFC Credit Corporation, 619 S.E.2d 744 (Ga.App. 2005)

After the trial court had dismissed a lessee's action for rescission of a lease against the lessor's assignee, which dismissal was based upon the type of floating forum selection clause discussed in the cases below (the lessee had brought the action in a court within its state rather than in the state of the lessor's assignee, as provided in the lease), this appellate court reverses the dismissal and holds that a complaint alleging fraud on the part of both the original lessor and its assignee should not be dismissed unless there are no possible sets of facts that would entitle the lessee to relief.

Popular Leasing USA, Inc. v. Terra Excavating, Inc., 2005 WL 1523950 (U.S.Dist.Ct. E.D.Mo. June 28, 2005)

This decision is a strong endorsement of the enforceability of the kind of floating forum selection clause discussed in the cases below. In its decision the court also (i) holds that a fraud will only render the clause invalid if the inclusion of that clause in the contract was itself the product of fraud or coercion, and (ii) places a relatively heavy burden on the defendant (not overcome in this case) before it would consider granting a motion to transfer venue.

IFC Credit Corporation v. Burton Industries, Inc., 2005 WL 1243404 (U.S.Dist.Ct. N.D.Ill. May 12, 2005)

The same court as in the *Eastcom* case discussed below (a different judge, however) holds that the type of floating forum selection clause at issue in *Eastcom* and a number of the other cases summarized in this section is enforceable. In this case, the defendant is located in Michigan and is characterized by the court as a sophisticated business enterprise capable of bargaining for a different clause.

Studebaker-Worthington Leasing Corp. v. Michael Rachlin & Co., LLC, 357 F.Supp.2d 529 (E.D.N.Y. 2004)

After being sued in a New York state court by an assignee of a lease containing a floating forum selection clause, the lessee (based in New Jersey) removed the case to a New York federal court and argued that the case should be heard by the bankruptcy court (in New Jersey) presiding over the bankruptcy of the original lessor, because the lessee intended to assert a counterclaim against the assignee related to a claim of fraud against the lessor. The federal court in New York holds that such does not constitute sufficient grounds to confer subject-matter jurisdiction and remands the case to the New York state court. [It is not clear why this case is said to be decided on February 22, 2004, while referencing dates related to the original lessor's bankruptcy in June and July of 2004.]

IFC Credit Corporation v. Eastcom, Inc., 2005 WL 43159 (U.S.Dist.Ct. N.D.Ill. Jan. 7, 2005)

The court grants the lessee-defendant's motion to transfer the case from the jurisdiction in which the principal offices of the assignee (the plaintiff) of the lessor (NorVergence) are located to the jurisdiction in which the lessee and the leased equipment are located, notwithstanding a forum selection clause in the lease agreeing to venue in whatever jurisdiction the lessor's assignee happens to be located. The court questions whether Illinois law would enforce such a provision that fails to specify a particular jurisdiction, but bases its decision on an evaluation of the convenience and fairness of transfer given the facts of this case (including the fact that the defendant is located in California). Some of the reasoning by this District Court is called into question by a more recently decided Seventh Circuit case noted above (*IFC Credit v. Aliano Brothers General Contractors*).

<u>Commerce Commercial Leasing, LLC v. Jay's Fabric Center, 2004 WL 2457737 (U.S.Dist.Ct. E.D.Pa. Nov. 2, 2004)</u>

In denying a lessee's motion to dismiss a breach of contract action brought by the lessor's assignee for lack of personal jurisdiction, the court cites well-established authority for generally enforcing forum selection clauses – even those that refer only to whatever forum that the lessor or its assignee (unknown at the time the lease is signed) chooses (sometimes referred to as a "floating forum selection clause").

<u>*Ex parte* Leasecomm Corporation (*In re* Sisk v. Kelleher), 879 So.2d 1156 (Ala.Sup.Ct. 2003)</u>

Although a lessee sued his lessor with regard to malfunctioning equipment and alleged fraud in the inducement as a general matter, the Alabama Supreme Court enforced the forum selection clause contained in the lease (choosing Massachusetts as the exclusive forum) in favor of the lessor, since the lessee had not established that he was fraudulently induced to permit that particular clause to be included in the lease (and the clause was not otherwise unfair or unreasonable).

<u>Statute of Limitations under Article 2A</u>

<u>ESP Financial Services, LLP v. Vielot, 794 N.Y.S.2d 337 (App.Div. 2005)</u>

The court holds that a lease provision waiving, to the extent permitted by law, "any and all rights and remedies conferred upon a lessee by Article 2A" did not include Massachusetts' Article 2A's four-year statute of limitations. Since the plaintiff brought this suit more than four years after it had declared the lessee to be in default – but within the six-year period for actions on a contract that would otherwise apply – and the waiver was held not to apply, the lessee's motion to dismiss was granted.

<u>Waivers of Trial by Jury</u>

<u>Hitachi Capital America Corp. v. Shiloh Imaging Center, LLC, 2012 WL 876778 (U.S.Dist.Ct. W.D.Okla. March 14 2012)</u>

Illustrating, perhaps, a potential for extreme sympathy from the bench, this court refuses to enforce a jury trial waiver found in a lease that was part of a provision printed in all capital letters – and also refuses to enforce the same waiver in related guaranties printed in all caps and in bold. Although stating that such printing indicated that the lessor did not attempt to bury the waiver provisions, the court holds that a "gross disparity in bargaining power between the parties" made the waiver unenforceable. The court characterizes the lessor as a "large national corporation" while referring to the defendant as a "small local limited liability corporation" (and referring to the guarantors as a "small town doctor" and other "unsophisticated" individuals). The court notes that the waiver was never brought to the attention of the defendants, who were not represented by counsel.

In re Key Equipment Finance Inc., 2012 WL 669043 (Tex.App. Feb. 27, 2012)

This appellate court grants relief to an assignee of a business equipment lease from a lower court's denial of a motion to strike the lessee's demand for a jury trial. The court finds that although the jury waiver provision was not conspicuous in comparison to any other provision in the lease contract, the assignee had met its burden of showing that the lessee, a sophisticated party whose practice it was to have its in-house counsel review all contracts, had knowingly accepted the provision.

Key Equipment Finance Inc. v. Poag & McEwen Lifestyle Centers, LLC, 2010 WL 2696195 (U.S.Dist.Ct. W.D.Tenn. July 6, 2010)

Applying a four-factor test used by courts to determine whether a waiver of the right to a jury trial was knowing and voluntary, the court rejects the lessee's arguments that the waiver should not be enforced. With regard to one of the factors – whether the clause was inconspicuous – the court notes that although the lessee had argued that the waiver was in fine print in a form agreement, the waiver provision in fact appeared in all-capital typeface, making it distinct within the text of the relatively short agreement.

AEL Financial LLC v. City Auto Parts of Durham, Inc., 2009 WL 2778078 (U.S.Dist.Ct. N.D.Ill. August 31, 2009)

In granting the lessor's motion to strike defendant's jury demand, the court finds that the jury waiver provision in the equipment lease and related guaranty are not unconscionable, notwithstanding the lessee's claims that the provision was inconspicuous and that the lessee did not see the provision. The court goes on to state that evidence of fraud in the inducement by the lessor would not change this result, but appears to leave the issue open in the event that fraud in factum had occurred with respect to defendants' entry into the documents containing such a waiver (in which case the entire agreement could be void).

TFG-North Carolina, LP v. Performance Fibers, Inc., 2009 WL 1415968 (U.S.Dist.Ct. D.Utah May 15, 2009)

The lessee and guarantor (evidently the parent company of the lessee) argued that a master lease agreement and guaranty were both unenforceable and void for lack of consideration and therefore that the waivers of jury trial found in both documents also could not be enforced. This court grants the lessor's motion to strike a jury demand by the defendants noting that there was no gross disparity in bargaining power, that the jury waivers were conspicuous (capitalized and in bold print), and that allegations of fraud in the inducement regarding a contract as a whole are not sufficient to invalidate a waiver of jury trial (as to which alleged fraud must apply specifically).

IFC Credit Corporation v. United Business & Industrial Federal Credit Union, 2008 WL 126552 (U.S.Ct.App.7th Cir. Jan. 15, 2008)

After bringing suit against a lessee for unpaid rent, this NorVergence assignee lost its case after the Federal District Court had ruled the jury trial waiver in the lease to be invalid and the jury found against the assignee. On appeal, the Seventh Circuit (in an opinion authored by Judge Easterbrook) reverses the judgment and remands for a new trial before a judge. The Court of Appeals finds no more reason under Illinois law to deny validity to an agreement for a bench trial than any number of other provisions in the lease. The court also has occasion to make some interesting remarks concerning the difference between fraud in the factum (the ground on which the defendant prevailed before the jury) and fraud in the inducement, in the context of assignees who claim to be holders in due course. The former kind of fraud – one of the "real defenses" that apply even to a holder in due course – would have voided the entire contract including the jury trial waiver. The example used by the court to illustrate this type of fraud ("If a person signs a contract thinking it to be something else – say, a request for sales literature – then the pact is void.") strongly suggests that this court agrees with the plaintiff which had argued that the defendant's defense of fraud in the factum was simply a misnamed defense of fraud in the inducement, which would not have rendered the contract void and which would not have been a defense against holders in due course.

See IFC Credit Corp. v. United Business & Industrial Federal Credit Union, 2006 WL 3692403 under the first topic heading above: "Ability to Collect Rentals under Article 2A Finance Leases..."

Popular Leasing USA, Inc. v. Terra Excavating, Inc., 2005 WL 2468069 (U.S.Dist.Ct. E.D.Mo. Oct. 6, 2005)

This decision holds that the lessee/defendant did not knowingly and voluntarily waive its right to a jury trial inasmuch as the waiver clause was placed inconspicuously at the end of a paragraph titled "Applicable Law", which paragraph was printed in the same small font as most of the rest of the lease. The court comments that, although the Eighth Circuit has apparently not yet decided which party bears the burden of proving that such a waiver is knowing and voluntary, the court is persuaded that the party seeking to enforce the waiver should bear the burden. The court notes its disagreement with other judges in the same district that have reached a contrary conclusion regarding a jury trial waiver documented on the same form of lease (which is the same form of lease at issue in a number of the forum selection clause cases discussed above).

FGDI, Inc. v. Bombarier Capital Rail Inc., 383 F.Supp.2d 1350 (M.D.Fla. 2005)

A master lease was amended by the parties so as to change the governing law and venue from Minnesota to Florida. While the original paragraph in the master lease (entitled "Governing Law") also contained an irrevocable waiver by both parties of the right to a trial by jury, the paragraph in the amendment (entitled "Governing Law and Venue") did not. The court grants the plaintiff's demand for a jury trial after finding that (i) there is a strong preference in the federal courts for permitting jury trials, (ii) the jury waiver provision in the amended lease was ambiguous (in that it was not clear whether the paragraph in the amendment was intended to replace all or merely a part of the original paragraph), and (iii) ambiguities in contracts should generally be construed against their drafters.

Wells Fargo Bank, National Association v. Stargate Films, Inc., 795 N.Y.S.2d 18 (App.Div. 2005)

A brief opinion holding that an equipment lease's waiver of a right to trial by jury does not apply to a sufficiently pleaded defense by the lessee that amounts to a claim of fraudulent inducement challenging the validity of the lease. The court goes on to say that the lease assignee/plaintiff's claim to be a holder in due course, entitling it to enforce the "hell or high water" clause in the lease regardless of the lessee's fraud defense, was premature and therefore not properly raised on this appeal.

Assignments of Leases

Liberty Bell Bank v. Rogers, 2018 WL 834197 (U.S.Ct.App. 3dCir. February 13, 2018) *

This affirmation of a District Court summary judgment in favor of the plaintiff regarding its federal RICO claim and of the damages awarded illustrates elements of a fraud perpetrated on bank assignees by various affiliated originators of office equipment leases. The originators obtained loans from the banks ostensibly to finance the equipment leases, which loans were secured by the leases. However, in certain cases the equipment was never purchased, some leases were cancelled, the same leases were financed by more than one bank, and some loans were repaid from empty bank accounts via a check kiting scheme. It is not clear whether the banks were able to recover any of their losses.

First Guaranty Bank v. Republic Bank, Inc., 2017 WL 8777420 (U.S.Dist.Ct. D.Utah November 17, 2017) *

Leases of medical equipment had been assigned by the original lessor to Republic Bank which in turn assigned them to First Guaranty (FG). When two lessees under three of the fifty-three leases assigned to FG ceased making payments owing under the leases, FG sued Republic and requested a writ of attachment (since Republic had commenced an orderly liquidation of itself) on a variety of theories – such as a breach of a warranty regarding FG's right to collect lease payments; a failure to deliver certain supplemental documents to FG; and a failure to timely inform FG that one of the lessees had declared bankruptcy. The court holds that FG's inability to establish a convincing connection between any of these claims and its non-receipt of the payments under the defaulted leases necessitates a denial of FG's motion for a writ of attachment

United Leasing, Inc. v. Balboa Capital Corp., 2017 WL 3674926 (U.S.Dist.Ct. S.D.Ind. August 25, 2017)

This case illustrates how important it can be to both the buyer and seller of lease transactions to be clear about precisely what is being represented, or not, by the seller with regard to such issues as financial statements issued by the lessee. When an assignor qualifies its representations with a "to its knowledge" preamble, and also disclaims any representations with respect to the creditworthiness of the lessee, the assignee will not be able to recover for losses due to false lessee financials unless the assignor clearly knew about that deception. Here the assignor's motion to dismiss the assignee's breach of warranty claim is granted.

Hollywood Boulevard Cinema, LLC v. FPC Funding II, LLC, 23 N.E.3d 381, 2014 IL App (2d) 131165, 2014 WL 6230021 (Ill.App. Nov. 17, 2014)

This case discusses the issue of under what circumstances a third party – i.e., not a party to an assignment of a transaction – has standing to challenge the validity of that assignment. Here the guarantor of a lease challenged the alleged assignment of the lease from the original lessor (IFC Credit Corporation, which had filed for bankruptcy after the alleged assignment, and which had been terminated as servicer of the lease after its bankruptcy filing) to the defendant, FPC. To complicate matters further, FPC had pledged the lease as collateral for a loan made to FPC. While this court holds that the guarantor clearly had standing to challenge the sufficiency of evidence of the assignment (presumably to establish to whom the guarantor owed its obligations) – but that the guarantor had forfeited this argument due to insufficiency of his pleadings – he did not have standing to question whether the assignment was voidable (though he may have had standing to raise a defense that the assignment was absolutely invalid – i.e., void). The court cites other federal court cases discussing third party rights to challenge assignments and also notes that no particular form of assignment is required and that an assignment can be either oral or written. In this case, the guarantor had cited a provision in the purchase agreement between IFC and FPC that seemed to require a written assignment listing the lease to be conveyed as a condition precedent to any assignment.

Wells Fargo Equipment Finance, Inc. v. Titan Leasing, Inc., U.S.Ct.App. 7th Cir., No.13-2291, September 30, 2014

A railroad equipment vendor entered into a lease for a locomotive with a lessee, after which time various issues occurred during its delivery to the lessee causing the lessee to dispute the condition of the locomotive, never to use it and never to make payments under the lease agreement. Prior to the time that the locomotive was finally delivered to the lessee following repairs necessitated by problems during the initial delivery attempt, the vendor assigned the lease to its leasing affiliate who simultaneously assigned the lease to the plaintiff pursuant to a non-recourse note and security agreement under which representations were made regarding equipment delivery and acceptance as well as other matters. The Seventh Circuit reverses a District Court decision in this case (2012 WL 6184896, N.D.Ill. December 7, 2012) denying the plaintiff's claims that these warranties were breached (the breach of which would entitle the plaintiff to receive a prepayment of its note). Although the District Court had focused almost exclusively on the specific criteria in the lease as to what constitutes delivery and acceptance (concluding that there had been delivery and acceptance under those terms), the Circuit Court agrees with Wells Fargo that a broader understanding of those words was intended in the security agreement and goes on to say that such warranty plus others in the security agreement (which were also breached) are "designed to ensure that the lessee is satisfied with the locomotive. A satisfied lessee is more likely to pay."

Federal Deposit Insurance Corporation v. Lowis & Gellen, LLP, 2013 WL 788188 (U.S.Dist.Ct. N.D.Ill. March 1, 2013)

In this case, the FDIC, as receiver for a bank, brought suit against a law firm for giving incorrect advice about perfecting the bank's security interest in chattel paper constituting collateral for loans made by the bank to IFC Credit Corporation which had allegedly double-pledged collateral securing the bank's loans and which subsequently filed bankruptcy. The law firm defendant then bought suit against another law firm alleging that the other firm, which had been retained by the bank to represent it in matters related to IFC, was responsible for forcing IFC into bankruptcy quickly – the result of which was to render a UCC filing by the second law firm on behalf of the bank covering the chattel paper preferential. The outcome of this particular case was a refusal of the court to dismiss the complaint of the first law firm against the second law firm. But the case illustrates what can happen when an interest in chattel paper is not properly perfected and/or not perfected in a timely manner. The FDIC alleged that on advice of the first law firm the bank believed that it had perfected its interest in the chattel paper by having IFC hold possession on behalf of the bank – which is not a permissible means of perfecting by possession under Article 9. The bank also allegedly was told that no UCC filing to perfect its interests in the chattel paper was necessary because the funded leases had been on IFC's books for less than ninety days – also incorrect. Eventually, the second law firm filed a financing statement for the bank against IFC, but that turned out to have been filed within ninety days of IFC's bankruptcy filing, resulting in such filing being found avoidable as a preference under bankruptcy law.

In re Roden (Farmers Exchange Bank v. Roden), 2013 WL 414450 (Bankr.N.D.Ala. Jan. 30, 2013)

Although the case concerns whether or not the managing member and sole employee of a leasing company should be held personally liable for a non-dischargeable debt in his own bankruptcy, it illustrates the risks for lease assignees in permitting the assignor to collect rentals from its lessees and then remit them to the assignees. The particular bank assignee bringing suit in this case had made a series of loans to the leasing company secured by particular leases and the related equipment. The leasing company collected the payments from these lessees as well as other lessees whose leases had been assigned to other lenders, and deposited all payments into a single bank account. When certain lessees – not those assigned to the plaintiff in this case – defaulted under their leases, the managing member of the lessor decided to, in effect, have his lenders share the losses by remitting less than what was due the plaintiff so that he could pay other lenders in part. The court finds that the amount that the plaintiff was shorted is a non-dischargeable debt of the managing member who had misdirected the funds.

In re Brooke Corporation (Northern Capital, Inc. v. The Stockton National Bank and Brooke Capital Advisors, Inc.), 458 B.R. 579 (Bankr.D.Kan. Sept. 28, 2011)

While not involving the assignment of leases specifically, this case may be of interest to finance companies which assign their leases but continue to collect the payments from lessees and then remit such payments to the assignees. In this case, a bankruptcy trustee for an obligor on a loan attempted to recover payments made by the obligor to a bank that had sold participations in such loan to a number of other banks.

Although the lead bank had remitted to each of the participants their share of each payment, the trustee argued that the lead bank was liable for the recovery of all payments which qualified as preferential under the Bankruptcy Code as "the initial transferee of such transfer." Rejecting various arguments of the trustee and of the participants, the court holds that under the terms of the participation agreements, the lead bank was merely a conduit and should not be deemed the initial transferee (a term not defined by the Code). Under the participation agreements, the lead did not have true dominion and control over the funds even though the funds received from the obligor were commingled with the lead's other funds.

Standard Office Systems of Atlanta, Inc. v. U.S. Express Leasing, Inc., 2011 WL 223472 (U.S.Dist.Ct. D.N.J. Jan. 24, 2011)(slip copy)

This case raises more questions than it answers, but the questions are interesting. The plaintiff/original lessor entered into leases of office equipment with its customers and sold them and the related equipment to defendant/finance company under a master purchase agreement. After a lessee defaulted under two leases, the finance company discovered that the actual vendor of the equipment was not the plaintiff, but a different distributor of office equipment. The finance company argued that this breached a representation made by the plaintiff in the master purchase agreement – that the plaintiff was to be the owner of the equipment when it sold the lease to the defendant – entitling the defendant to demand a repurchase of the transaction by the plaintiff (the master purchase agreement provided for repurchase as a remedy for a breach as opposed to a simple indemnity for losses resulting from the breach). When the defendant set off this repurchase amount against other amounts owed to the plaintiff by the defendant, the plaintiff brought suit. In deciding in favor of the defendant that it suffered a material breach of representation by the plaintiff, the court never makes clear the flow of title to the equipment. For example, if the plaintiff only "brokered" (a term used by the plaintiff and accepted by the court without a clear description of what this in fact meant) the transaction between the actual equipment distributor and the lessee, what sense can be given to the existence of a lease between the plaintiff and the lessee? If the lease was a true lease, title at some point must have passed to the plaintiff – e.g., either from the other distributor or from the lessee (via a sale/leaseback). If the lease only created a security interest, then perhaps title passed directly from the other distributor to the lessee – in which case the plaintiff would have held a security interest in the equipment. The case contains no such analysis. The court also ruled against the plaintiff's argument that the master purchase agreement only required that the defendant would obtain either good title to the equipment (regardless of how title flowed) or a first priority security interest in the equipment (which could have been the result of the lease creating a security interest). The court cites the statement in the lease (found in many lease forms) that the plaintiff/lessor owns the equipment as an indication that the plaintiff was representing such to the defendant. Whether or not the court accurately interpreted the master purchase agreement or understood the flow of title to the equipment, the case demonstrates the advantages of having a repurchase remedy for breach of representations rather than a simple indemnity.

Overland Leasing Group, LLC v. First Financial Corporate Services, Inc., 2009 WL 4981632 (U.S.Dist.Ct. D.N.J. December 17, 2009)

After an assignee purchased a lease and related equipment from a lessor, the lessee filed for bankruptcy and the assignee brought suit against the lessor for fraud and breach of contract – for misrepresenting the condition (that it was in good working order) and cost of the equipment to the assignee and for failing to repurchase the lease and equipment from the assignee as a result of such misrepresentations. This decision denies the lessor's motions for summary judgment, finding that there are genuine issues of material fact regarding the assignee's claims. (The assignee had also sued accountants who had done work for the lessee, but the court granted the accountants' motions for summary judgment.)

Gaia Leasing LLC v. Wendelta, Inc., 2009 WL 4810685 (D.Minn. Dec. 11, 2009)

An assignee of a lease and the related equipment had sued the lessee following the lessee's default. Prior to the lessee's default, however, the original lessor entered bankruptcy proceedings (involuntarily) and the lessee filed a motion claiming that the assignment had not taken place until after the bankruptcy filing and therefore the lease and leased equipment remained property of the bankruptcy estate to be dealt with in the lessor's bankruptcy proceedings. Notwithstanding considerable ambiguity with respect to the dates of assignment of the lease assignment agreement and related bill of sale for the equipment (a four and one half month difference between what the assignee argued was the actual assignment date and wording on the lease assignment agreement concerning what was to be the "effective date" of the assignment), this court agrees with the assignee and denies the lessee's motion. In particular, the court refers to language in the bill of sale ("…does hereby unconditionally and irrevocably sell…") as "absolute language" indicating an immediate assignment. While this decision is limited simply to picking the actual date of effectiveness of the assignment, it should cause leasing attorneys to consider the consequences of a lessor's bankruptcy as it relates to the language and legal structure of an assignee's prior assignment from that lessor. If the assignee's financing takes the form of a non-recourse loan secured by the lease and equipment, such collateral remains property of the lessor and part of its bankruptcy estate. On the other hand, a lease assignment – whether or not accompanied by a transfer of some interest in the equipment – can be structured an absolute sale of such lease, rather than a mere security interest. Article 9 treats both structures similarly for certain purposes, but leaves it up to other law to decide whether a true sale has taken place.

Bremer Bank, National Association v. John Hancock Life Insurance Company, 2009 WL 702009 (U.S.Dist.Ct. D.Minn. March 13, 2009), aff'd 601 F.3d 824 (8th Cir. 2010)

This case, a U.S. District Court decision affirmed by the Eighth Circuit Court of Appeals, illustrates a number of the issues that can arise when a lessor finances a lease transaction by assigning its interests in the lease and granting a security interest in the equipment to another financing source – commonly referred to as a "leveraged lease." This particular case is one involving very expensive equipment (an aircraft leased to Northwest Airlines) and a set of relatively complex documents (a participation agreement, an indenture, a trust agreement, an assignment agreement, etc, in addition to the lease); but the same issue can arise in much simpler instances of lease financing as well – i.e., following a default by the lessee, are there are restrictions on what an assignee of the lease and holder of a security interest in the equipment may do in enforcing its interests in the equipment that serve to protect the lessor's residual interest in the equipment? In this case, the court rejected the equipment owner's arguments based upon what the owner claimed was (i) an "equity squeeze protection" clause in the documents and (ii) the lender's alleged violation of standards imposed by the U.C.C. (Article 9's commercial reasonableness requirements with respect to foreclosures and, in general, the implied covenant of good faith and fair dealing). While legal requirements often cannot be varied, the negotiated provisions of the agreements comprising the transaction should be carefully assessed with respect to the rights under various circumstances of those parties with an interest in the equipment.

<u>Federal Deposit Insurance Corp. v. Kipperman (*In re* Commercial Money Center, Inc.), 392 B.R.814 (Bankr.App.Panel 9th Cir. 2008)</u>

This case decides one of the issues left open by previous rulings in this interesting legal drama. Following a purported assignment of payment streams under equipment leases to a bank, the assignor (CMC) 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 previously ruled 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. (This particular decision has been questioned by various legal practitioners and scholars and is criticized in a draft of an amendment to the Official Comments to Article 9 being proposed for adoption by the Permanent Editorial Board of the UCC. If rental payments can be "stripped" away from leases and lose their character as chattel paper, the priority rules favoring purchasers of chattel paper could be in jeopardy.) But that panel also agreed 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. This panel now decides that the bank did not perfect its interest in the payment streams by taking possession of the leases through an agent – the one remaining hope for the bank (in the case, represented by the FDIC – the receiver for the bank) since there had been no UCC filing done by the bank listing either the leases or the payment streams as collateral.

<u>FirstMerit Bank, N.A. v. Vision Financial Group, Inc., 2006 WL 2806566 (U.S.Dist.Ct. W.D.Pa. Sept.28, 2006)</u>

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.

Day v. Case Credit Corporation, 427 F.3d 1148 (8th Cir. 2005)

An equipment dealer for Case International Harvester first orally negotiated terms for financings (mostly leases) of farm equipment and then fraudulently prepared written agreements (representing sales) with higher payment terms, employing forged signatures of it farmer-customers, before assigning such agreements to Case Credit. When Case became aware of the fraud, it attempted to have the farmers sign verifications of the written agreements – which the farmers initially refused to do because of the inflated payment amounts, but then agreed after assurances from Case that the verification forms would only be used to confirm their possession of the equipment. Case later allegedly attempted to use these verifications to collect the full higher amounts. Holding that Case could enforce neither the forged written agreements – since they were void – nor the oral agreements – on the basis that no one ever contemplated that oral agreements would be assigned – the Eighth Circuit reversed the District Court's grant of summary judgment in favor of Case under a contract theory of liability. While the Circuit Court agreed with the District Court that there was no evidence that Case had acted as an agent of the fraudulent dealer, it agreed with the farmers that evidence of Case's "unclean hands" conduct might bar it from recovering on a theory of unjust enrichment, and remanded to the District Court for further proceedings.

Savings Bank of Manchester v. Ralion Financial Services, Inc., 881 A.2d 1035 (Conn.App. 2005)

After the lessee defaulted on its lease entered into with the lessor/defendant, the assignee of the lease sued the lessor for alleged misrepresentations in the assignment documents regarding, among other things, the location of the equipment at the time of the assignment. Reversing the judgment of the trial court in favor of the assignee, the appellate court holds that since the assignee's loan officer had testified that he knew the equipment had not been delivered to the place designated in the lease at the time of the assignment, the assignee could not have reasonably relied on that misrepresentation and therefore could not prevail in its action for negligent misrepresentation.

General Electric Capital Corporation v. ePlus, Inc., 2005 WL 700954 (U.S. Dist. Ct. S.D.N.Y. March 24, 2005)

As an assignee of certain leases, the plaintiff attempted to recover post-petition rentals from the lessee's successor under Bankruptcy Code Section 365(d)(10) after such successor had filed bankruptcy. After the bankruptcy and district court (on appeal) both held that the lease was not a true lease (i.e., it was instead a lease that created a security interest), the plaintiff brought a summary judgment motion against the lessor's successor based on an alleged breach of its warranty in the non-recourse loan and security agreements that it had good title to the equipment. The court holds that the phrase "except for the interest of the Lessee under the Lease" qualifying the good title warranty created enough of an ambiguity to deny summary judgment. The court also noted evidence offered by the defendant of examples of warranty clauses that much more clearly guarantee true lease characterization. This case indicates why lessors, who are unsure about the characterization of leases they wish to finance, should consider warranting either good title or a first priority security interest.

Lessors' Rights in Bankruptcy Proceedings

Williams v. Ford Motor Credit Company, LLC, 2016 WL 2731191 (U.S.Dist.Ct. E.D.Mich. May 11, 2016)

This Chapter 7 proceeding involves the bankruptcy of an individual who initially decided to assume one of its two motor vehicle lease agreements and accordingly signed a lease assumption agreement with Ford Motor Credit. The agreement explicitly stated that it was being entered into pursuant to a provision in the Bankruptcy Code permitting debtors to assume pre-petition personal property leases and not requiring bankruptcy court review or approval (11 U.S.C. Sec. 365(p)). When the debtor changed its mind, the argument was raised that the agreement was not enforceable since it had not been approved by the court as a reaffirmation of debt requiring court approval under 11 U.SC. Sec. 524(c). This court affirms a Bankruptcy Court order holding that an assumption agreement entered under the former Code section is enforceable following discharge even if the debtor did not affirm the obligation with Court approval under the latter Code section. This court acknowledges that other federal courts have been deeply divided on this issue in bankruptcy proceedings.

In re Republic Airways Holding Inc., 547 B.R. 578 (Bankr.S.D.N.Y. 2016)

The airline debtor in this bankruptcy proceeding was seeking, pursuant to Section 1110 of the Bankruptcy Code, to return numerous aircraft that it either owned, subject to a security interest granted to a financing source, or leased from a financing source. This court rejects any suggestion that such a return must comply with all of the return conditions for surrender in the underlying leases or security agreements between the parties, and states that this is the position of other courts ruling on the same issue. Here, in particular, the court rejects Citibank's suggestion that the debtor return the aircraft with their matching engines as was required by the underlying agreements. The court does permit Citibank to make a claim for any costs related to what it might have to do to put the aircraft in the condition required by the underlying agreements.

In re Equipment Acquisition Resources, Inc. (Brandt v. The CIT Group/Equipment Financing, Inc.), 2012 WL 4754957 (Bankr.N.D. Ill. Sept. 28, 2012)
[See the summary in the Ability to Collect Rentals section above.]

In re Smith, 449 B.R. 35 (Bankr.E.D.Pa. 2011)

The individual debtor in bankruptcy attempted to assume a motor vehicle lease and then purchase it in his Chapter 13 plan by making payments over the five year life of the plan. Agreeing with the objecting lessor, the court finds that Section 365 of the Bankruptcy Code requires that in order to assume the lease and exercise an option under the lease to purchase the vehicle, the purchase price would have to be paid in a lump sum. Additionally, a necessary condition of assuming the lease under Section 365 would be to cure his monetary default under the lease (or provide adequate assurance of a prompt cure) as well as providing adequate assurance of future performance under the lease.

In re Double G Trucking of the Arlatex, Inc., 2010 WL 5525387 (Bankr.W.D.Ark. Dec. 20, 2010)

After the bankruptcy court ruled that a TRAC lease of three tractors was a true lease, the lessee in bankruptcy (which had argued that the lease was instead a secured transaction and therefore that the lessor was entitled to adequate protection payments only) rejected the lease and, a month later, surrendered the tractors to the lessor. The lessor attempted to obtain administrative expense treatment (with its special priority) for all obligations owing as to all three tractors – both during the first 59 days after the bankruptcy filing (the period after which the Bankruptcy Code generally requires fulfillment of all obligations under the lease until the lease is rejected) and for all the time thereafter until it obtained possession of the tractors. The court rules that since one of the tractors was inoperative during the entire period after the filing and therefore benefit to the estate resulted only from the actual use of the other two operable tractors, the lessor was entitled to administrative expense treatment for only those two tractors for the initial 59 day period. With respect to the subsequent period of time, the court holds that the bankruptcy statute requires payment of the full lease rental for all three tractors (i.e., regardless of benefit to the estate) until rejection of the lease (not, as the lessor had argued, until the equipment was surrendered).

Ali v. CIT Technology Financing Services, Inc., 6 A.3d 890 (Md.Ct.App. 2010)

This case concerns a lessor's rights after bankruptcy. After defaulting on its lease with the plaintiff/lessor (more precisely, the successor to the original lessor), the lessee filed a petition in bankruptcy, which case was subsequently dismissed after the lessee had not complied with bankruptcy procedures in completing an acceptable plan of reorganization. When the lessor filed suit to enforce its rights under the lease six months after the dismissal of the bankruptcy case, the lessee argued that the suit was barred under Maryland's three-year statute of limitations. This appellate court upholds decisions in two lower courts and concludes – in what is apparently a case of first impression in Maryland – that a federal bankruptcy petition constitutes "a petition in insolvency" under a very old (but repeatedly recodified) Maryland statute serving to toll the statute of limitations such that the lessor could maintain this action against the lessee.

Barber v. Reynolds Motor Leasing Company (*In re* My Type, Inc.), 2009 WL 1705851 (Bankr.C.D.Ill. June 17, 2009)

This bankruptcy court decision begins with the following sentence: "Rearing its ugly head in this case is the issue of whether a lessor of a fleet of trucks whose leases are recharacterized as disguised security agreements is thereby rendered unperfected because the lessor is identified on the titles as owner instead of lienholder." After certain of the lessor's leases were so recharacterized by the court, the trustee alleged that the lessor was unperfected on such leases. This court, however, agrees with the majority of decisions holding that in cases where leases are determined in fact to create security interests, the lessor/secured party is nevertheless properly perfected in the vehicle when its name appears on the certificate of title as owner and not as lienholder.

In re Northwest Airlines Corp., 2008 WL 756388 (Bankr.S.D.N.Y. March 21, 2008)

This dispute between two parties to a leveraged aircraft lease transaction – the owner trustee and beneficial owner of the aircraft on the one hand and the indenture trustee and lenders on the other – involved determining who had the right to claim lease rejection damages after the bankrupt airline rejected an aircraft lease. The bankruptcy court determines that this right continues to reside in the owner because the foreclosure sale conducted on behalf of the lenders included only title to the aircraft without any mention of rights under the lease including damages for its rejection.

In re Student Finance Corporation, 2007 WL 4225573 (Bankr.D.Del. November 28, 2007)

After the lessee filed bankruptcy, the lessor undertook a number of different actions (including drawing on a letter of credit and sending a letter accelerating the balance under the lease), the effect of which – according to the bankrupt lessee's trustee – was to breach or terminate the lease and thus prevent the lessor from recovering lease rejection damages pursuant to Bankruptcy Code Section 365(d)(5). Interestingly, this court finds that the exercise of certain of these remedies by the lessor was void – as a violation of the automatic stay – and therefore the lease was not terminated before the relevant date with regard to the lessor's claim for lease rejection damages. The court thus denies the trustee's summary judgment motion, and orders a status hearing to examine the claims further.

In re Federal-Mogul Global Inc., No. 05-2423 (U.S.Ct.App.3d 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.

U.S. Bancorp Equipment Finance, Inc. v. Edwards' Transportation, Inc., 2005 WL 6083461 (U.S.Dist.Ct. S.D.W.Va. August 9, 2005) (Slip Copy)

After a lessor of truck tractors had consented to the assignment and assumption of the lessee's interests in the lease and equipment to another party, that other party filed for bankruptcy. The lessor then brought suit in federal District Court against the original lessee and guarantors on the lease, all of whom had agreed to remain liable following the assignment and assumption. This court grants a motion by the defendants to exercise the court's discretion and refer the matter to the bankruptcy court based upon the relatedness of the claims to matters in the bankruptcy – and notwithstanding the fact that the lessor would not be able to obtain a jury trial in the bankruptcy court.

In re The IT Group, Inc., 331 B.R. 597 (Bankr.D.Del. 2005)

The court finds in favor of defendants from whom allegedly preferential payments were sought to be recovered based upon the "Kiwi Defense." This defense is predicated on a Third Circuit decision involving Kiwi Airlines, which held that assumption of an unexpired lease or executory contract under Section 365 of the Bankruptcy Code bars the later recovery under Section 547 of pre-petition payments made during the preference period under such lease or contract.

CIT Communications Finance Corporation v. Midway Airlines Corporation (*In re* Midway Airlines Corporation), 406 F.3d 229 (4th Cir. 2005)

This Circuit Court agrees with the majority interpretation of Bankruptcy Code Section 365(d)(10) as it relates to a case where no post-petition payments had been made on a lease prior to its rejection. The court holds that the lessor's claim for all payments owing under the lease following the sixty-day period after the bankruptcy filing should be entitled to administrative expense treatment, rejecting the trustee's and bankruptcy court's position that the lessor was entitled only to a reduced allowance because the equipment was of little use to the lessee. The court also rules, however, that immediate payment of the amount claimed by the lessor was not required.

In re Smith, 315 B.R. 77 (Bankr.W.D.Ark. 2004)

Decision illustrating that if a lease has been assumed by a debtor in bankruptcy and is later rejected, the damages resulting from such breach are generally entitled to administrative priority.

Bartholomew v. General Electric Capital Corporation (*In re* Tricord Systems, Inc.), 2004 WL 2066817 (U.S. Dist.Ct. D.Minn. August 27, 2004)

In a case in which the lessor drew on a letter of credit while its lessee was in bankruptcy, the court affirms that letters of credit are not assets of the bankruptcy estate and that drawing on them is not a violation of the automatic stay. However, the district court remanded to the bankruptcy court the issue of whether the lessor drew on the letter of credit for an amount greater than the amount to which it was entitled under the lease agreement. After remand and another appeal to the District Court, the lessor was held liable for drawing too much. 2005 WL 910531 (D.Minn. April 15, 2005)

In re BankVest Capital Corp., 360 F.3d 291 (1st Cir. 2004), cert. denied, 124 S.Ct. 2874 (2004)

The First Circuit holds that Section 365(b)(2)(D) does not require that non-monetary defaults be cured before the debtor in bankruptcy can assume an unexpired lease. The court finds the wording of the statute to be ambiguous, finds no helpful legislative history, and agrees with most bankruptcy commentators who have written that such an interpretation is consistent with general bankruptcy policy. The court also indicates its disagreement with the contrary holding of the Ninth Circuit in *In re* Claremont Acquisition Corp., 113 F.3d 1029 (9th Cir. 1997). Although the Supreme

Court denied a petition for writ of certiorari, this issue was finally resolved in favor of the Claremont court's position by recent amendments to the Bankruptcy Code.

Lease Formation; Authority to Bind a Lessee Under a Lease

De Lage Landen Financial Services v. St. Bernard's Episcopal Church, 2012 WL 489149 (N.J.Super.A.D. Feb. 16, 2012)

This appellate court affirms the grant of summary judgment by a trial court in favor of the assignee of a lease of a copy machine. After entering into a five-year lease, a church made payments for over two years before a new treasurer determined that a much lower cost copier would be adequate for its needs. The church obtained such a lower cost machine and packed the one it had used to be picked up by the assignee. Instead, the assignee brought suit for the amount of remaining lease payments. Among the lessee's arguments was that the executive assistant who signed the lease on behalf of the church had neither the actual nor apparent authority to bind the church. This decision rejects that argument, finding that the use of the machine and payment of the rentals for over two years ratified the lease even if the person who had signed was not authorized.

Frontier Leasing Corporation v. Links Engineering, LLC, 2010 WL 1838406 (Iowa Supreme Ct. May 7, 2010)(not yet released for publication)

In an action by a leasing company to enforce a defaulted lease, the lessee argued that the person signing the lease on its behalf did not have authority to do so. The lessee owned a golf course and the signatory was a golf professional hired to run the day-to-day operations of the golf course. The lessee asserted that the golf professional did not have the authority to enter into financing arrangements on its behalf. While a lower court had granted summary judgment in favor of the leasing company, the Iowa Supreme court reverses, finding that the facts (to be further investigated on remand) could have supported a conclusion that the signatory had neither actual nor apparent authority – the latter predicated on common law principles (e.g., estoppel, ratification) that might lead to a conclusion that an agent had the authority to bind its principal.

First Union Rail Corporation v. Heller Performance Polymers, Inc., 2007 WL 4224341 (U.S.Dist.Ct. N.D.Ill. November 27, 2007)

Without reference to Article 2A, this decision employs certain basic elements of contract law (e.g., offer and acceptance, consideration, and definiteness of terms) that can be found in Article 2A to determine whether agreement to renew leases for rail cars had been reached. Notwithstanding the facts that (i) proposal letters and riders sent by the lessor to the lessee refer to a requirement for entry into "appropriate lease documentation" and (ii) such documentation was never signed, this court finds that the combination of documents such as the original master lease agreement, certain unsigned riders and related proposal letters, and the actions of the parties, served to create a binding lease agreement.

G.E. Capital Information Technology Solutions, Inc. v. Oklahoma City Public Schools, 173 P.3d 114 (Okla.Civ.App. 2007)

This case illustrates some of the special issues that can arise in the municipal leasing context. After the lessor of copy machines to public schools in Oklahoma City sued the school district with respect to leases that had not been paid and equipment that had not been returned (all evidently due to financial hardships suffered by the district), the school district attempted to defend by claiming that those who signed the leases did not have the requisite authority to do so. Both the trial court and this appellate court rule that the actions of the district in approving the payments made to the lessor served to ratify the lease contracts – at least to some extent. However, this court also distinguishes between ratification of certain renewal terms on the one hand and limits imposed by non-appropriation requirements that would restrict the extension of leases past the end of a fiscal year. The court also highlights the difference between ratification of renewal terms and the consequences of default (resulting from the district's not returning certain copiers).

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.

Wells Fargo Financial Leasing, Inc. v. Executive Landscaping, Inc., 2006 WL 1738420 (Conn.Super. June 9, 2006)

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.

Fairbrook Leasing, Inc. v. Mesaba Aviation, Inc., 408 F.3d 460 (8th Cir. 2005)

This Circuit Court panel (with one dissent) finds in favor of a group of lessors that, notwithstanding the title "Term Sheet Proposal" regarding the acquisition and lease of certain aircraft, such document evidenced a binding preliminary agreement according to a series of factors established under New York law. Both the majority and dissenting opinions are instructive regarding the elements that can turn a non-binding proposal into a binding agreement.

Banc One Leasing Corp. v. Scat Recycling, L.L.C., 892 So.2d 98 (La.App. 2004)

Summary judgment in favor of a lessor is reversed by an appellate court finding material issues of fact regarding the actual and/or apparent authority of the lessee's accountant to sign a lease on behalf of the lessee. The lessee's operating agreement, a copy of which had been given to the lessor, indicated that only its two members (a husband and wife) were authorized to incur such obligations. Evidence indicating that the accountant had forged documents stating that he was one of the owners of the lessee was one example of a number of contested issues of fact held to preclude summary judgment.

<u>IOS Capital, LLC v. Allied Home Mortgage Capital Corporation, 150 S.W.3d 148 (Mo.App. 2004)</u>

After the branch manager of an office of the purported lessee signed a lease (presented by the equipment vendor, but with an unaffiliated lessor) for a photocopy machine (and presumably after the lessor paid the equipment vendor for the machine), that particular office was closed by the lessee and the branch manager was terminated – a few days before the equipment was delivered to the office. In this action for breach of lease and for conversion (the whereabouts of the machine was unknown to both parties), the purported lessee successfully argues that the lessor was not justified in relying upon either actual or apparent authority of the employee to enter into the lease. The case does not indicate whether the lease contemplated the signing of a delivery and acceptance certificate before the lease was to commence.

Hybrid Transactions

<u>C9 Ventures v. SVC-West, L.P., 136 Cal.Rptr.3d 550 (Cal.App. 2012)</u>

One company ordered helium-filled tanks and balloons from a second company in connection with an event planned by the first company. The tanks and balloons were delivered with a standard form invoice on the reverse side of which was an indemnification provision. After a boy was injured by one of the tanks, both companies were sued and both paid the same amount to settle the case. However, the supplier of the tanks had cross-claimed for indemnity against the other company based on the unsigned indemnity provision, and the trial court decided this issue in favor of the supplier after construing the transaction as a sale (of helium) governed by Article 2. This appellate decision reverses the trial court, holding that the essence of the transaction was a lease of the tanks, rather than a sale of helium, and therefore should be analyzed under Article 2A. Noting that Article 2A's rules are different than those of Article 2 with regard to what terms are enforceable in the context of an oral agreement, the court holds that the indemnity provision was not enforceable in the context of the facts of this case. Interestingly, this court goes on to comment that the trial court was incorrect even if Article 2 were held to govern – which means that under the facts of this case which UCC Article governed did not matter. One lesson of this case is that, to the extent the rules of Article 2 and Article 2A would lead to different outcomes, how a "hybrid" transaction is characterized – as a sale or as a lease – can be of considerable importance.

<u>Sovereign Immunity from Suit</u>

<u>Dallas County Hospital District v. Hospira Worldwide, Inc., 2013 WL 1803572 (Tex.App. April 30, 2013)</u>

When a lessor of hospital equipment brought suit for breach of contract and quantum meruit to collect unpaid lease payments from a county hospital district, the lessee defended by claiming sovereign immunity. The trial court rejected the hospital district's argument that it was not a local governmental entity for purposes of a Texas statute waiving sovereign immunity for breach of contract claims against local governmental entities that had been given the statutory authority to enter into contracts. This appellate court agrees – but only with regard to the lessor's breach of contract claim. The court reverses the trial court in part by also holding that the statutory waiver of immunity does not extend to claims in quantum meruit – dismissing that part of the lessor's claim with prejudice.