

From the Subcommittee on Article 2A - Leasing.

The High & High Water Clause of a Finance Lease – Enforced in a Non-Fraud Case.

Several decisions arising from the *Norvergence* fraud have prevented an assignee of a lessor from enforcing the “hell & high water” provision of a finance lease. In January 2008 the Tennessee Court of Appeals rejected a lessee’s argument that a lease was unenforceable due to the hell and high water clause in [*Wells Fargo Financial Leasing v. Mountain Rentals*](#), 2008 WL 199855 (Tenn Ct. App.), 64 UCC Rep.Serv.2d 1004, in a straight forward application of Article 2A.

Mountain Rentals entered into a finance lease in June 2000 for the rental of telecom equipment. The original lessor assigned its rights and Wells Fargo acquired the lease in the transferee’s bankruptcy. The lease contained the standard finance lease provisions: the parties agreed that the lease was a “finance lease” governed by Article 2A; the lessor made no warranties regarding the equipment; the lessee waived all rights and remedies; and the lessor could assign the lease to an assignee who had all of the rights and benefits, but none of the obligations of the lessor. The lessee also signed an acceptance certificate.

Mountain Rentals became unhappy with the service and maintenance of the equipment. Mountain Rentals stopped making payments in Wells Fargo’s collection action against Mountain Rentals, the trial court granted summary judgment to Wells Fargo. The lessee’s arguments on appeal were similar to those asserted in the *Norvergence* cases – the lease was “ambiguous, unconscionable, contrary to public policy, a contract of adhesion, and not the result of a meeting of the minds between the parties.”

In rejecting the lessee’s appeal as “without merit” the Court made a detailed application of Article 2A to the lease and facts – stating that the lease was not an “ordinary lease” but instead a “finance lease” which made the lessee’s obligations “irrevocable and independent” upon acceptance of the equipment; the parties did not dispute that the equipment was “non-consumer goods”; and the equipment was accepted by the lessee.

The Court’s reasoning should be especially heartening for finance lessors in commercial transactions. After citing a number of cases discussing hell and high water provisions the court found:

The result we reach is not inequitable. A finance lease is a method to finance the acquisition of goods. 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 goods are not what the buyer expected. Similarly a finance lessee cannot refuse to pay a lessor an agreed upon payment. [cites omitted] . . . The statutory scheme of finance leases benefits both parties. The lessor gains certainty and security for its extension of credit. The lessee forgoes its 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. Thus, the lessee has a right of action against the supplier and the manufacturer and is not without remedy. [cites omitted] The remedy is simply not a warranty remedy against the lessor. It is important to note that only commercial financial leases, not consumer leases, qualify for the imposition and protection of the “hell or high water” obligation . . . [cites omitted]

The Court also reject the argument that that the lease was “ambiguous” finding that “[t]here is nothing unclear about the terms It is a finance lease and the [lessee’s] promise to pay is irrevocable and independent upon its acceptance” The argument that the

assignment clause providing that the lessor's assignee obtained all of the rights but none of the obligations made the lease a "contract of adhesion, unconscionable, and contrary to public policy" was also rejected. The Court stated that "[a]s a finance lease, the agreement is sanctioned by statutory authority" and "nothing about this agreement is oppressive or beyond the reasonable expectations of an ordinary person."

The lessee's argument that it did not understand the "effect, force, and consequence" of the lease terms was summarily rejected. The Court held that "[t]he terms of the contract were clear. A party is presumed to know the contents of a contract he or she signed and, in the absence of fraud, is then bound by that contract" and that the lessee could not "after receiving the benefit of the financing, seek to avoid the lease agreement." Wells Fargo was awarded the attorneys' fees and costs incurred on appeal.

An increase in litigation and credit defaults is unfortunately a product of the current economy. Since there is not a wide body of Article 2A cases it becomes even more important that the best arguments are presented in any lease enforcement action. The decision by the Tennessee Court of Appeals in ***Mountain Rentals*** provides a succinct road path for a lessor's response to a challenge of a hell and high water provision in a non-fraud case.

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