

Fall  
2017

# CLFP CIRCULAR

News for Leasing and Finance Professionals

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## Message from the President



**Amy Spragg, CLFP**  
*Managing Director*  
**Pacifica Capital**

It is officially Fall! Kids are back in school, the weather is cooling and we are heading into the last quarter of the year. There has been so much that we have already accomplished as a Foundation in 2017 and the momentum just seems to be increasing. We have already added 98 additional members this year and expect to reach over 500 before we enter into 2018. 500!! Can you believe that? For those of us who have been CLFPs for many years, imagining a member of 500 seems like a dream. I am proud to be a part of the team of board members and volunteers over the past several years that helped make that dream a reality.

And now, look forward to watching that number continue to grow as we are able to reach more and more individuals within our industry looking to add the CLFP credential to their name.

The vast majority of those who will be joining the Foundation this next quarter will be attending one of the last two Academy for Lease & Finance Professionals (ALFPs) that are planned in October and November. The Academy in Philadelphia hosted by BB&T Commercial Equipment Capital Corporation is already sold out and now so is the Southern California ALFP hosted by First National Capital! Based on additional demand for the classes, we are already planning the ALFPs for 2018 in several regions across the country and have a lineup of extraordinary instructors ready and willing to share their expertise with our future membership.

In addition to rapidly increasing our membership, the Foundation has been hard at work completing the various initiatives that were outlined at our onsite board meeting last January. All committees worked tirelessly to further develop and perfect the Body of Knowledge, Exam, ALFP, Marketing and Recertification processes and procedures for the Foundation. As we enter into 2018, all of those efforts will be focused to again update the CLFP Handbook to better reflect our current Body of Knowledge so that it continues to adapt to changes in our industry.

As I enter into my sixth and final year on the Board, I can't help but be excited about the future of the Foundation. I have no doubt that our new board members will be a fantastic addition to the group and will be able to continue to steer us on a path of growth and opportunity for our membership. It has been a pleasure to serve as your President and be on the Board of Directors for the past five years alongside the very best of our industry. I have learned so much from every CLFP member and look forward to working with each and every one of you in the near future.

A handwritten signature in blue ink that reads "Amy M. Spragg". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

**Amy Spragg, CLFP**  
**2017 CLFP Board of Directors President**

## 2017 CLFP Celebration Day

On August 24, 2017, Certified Lease & Finance Professionals (CLFPs) across the country gathered to celebrate their designation. The celebration kicked off earlier in the month when First American Equipment Finance prepared and served a meal at the American Cancer Society's Hope Lodge. Other events were held in Fort Smith, Houston, Bend, Milwaukee, Los Angeles, Minneapolis, Portland, Seattle, and Walnut Creek on August 24th and one more celebration is scheduled for next month in Chicago, IL.

Joe Schmitz, CLFP, President at F.I.T. Leasing and Director of the CLFP Board of Directors stated, "We had an exciting CLFP Day in Southern California! A mixed group of individuals from big and small companies came together to share stories, information and just plain have fun. Amy Spragg, CLFP President, gave some great information on the growth of the Foundation and the plans for the future. It was a wonderful time spent with some great people."

Added Lisa Genereux, CLFP, Account Executive for Dell Financial Services, "It was a wonderful gathering with Portland-area CLFPs. It's a great event that I look forward to every year."



*Ascentium Capital CLFPs pre-golf*



*Arvest EF CLFPs enjoying lunch*



*Bend, OR CLFPs after the Escape Room*



*BMO Harris CLFPs grabbing coffee*



*First American EF CLFPs volunteering*



*Northland Capital CLFPs celebrating*



*Portland CLFPs at dinner*



*Seattle-Area CLFPs post drinks*



*Southern California CLFPs at dinner*



*Walnut Creek CLFPs bowling*

# Legal Quickies From/For Busy People

*By Barry Marks, Esq., CLFP*

## **More on Converting Leases to EFAs**

Way back in 2014 we did a couple of articles about drafting and operational pitfalls in switching between Lease and EFA forms. Here is more to think about before you pick up a pencil:

Especially those of you in the high-risk, micro-ticket or motor vehicle finance sectors: Usury and Licensing can be an issue for lenders as opposed to lessors. There have been courts that refuse to allow lessees under \$1-out leases to claim a usury violation because no "interest" as such is charged. Others look to substance over form and treat a buck-out lease as a loan. There is not much argument that an EFA is anything other than a loan.

Then again, it can be argued that an EFA is more of a retail installment sale than a loan. This can be good as it gives weight to citing the time price differential exception to usury laws in some states (Tennessee). On the other hand, we worry that any reference to that doctrine brings up the question of whether the lender should be charged with responsibility for damage caused by the equipment and whether the EFA is truly a hell-or-high-water document, like most promissory notes. Also, retail installment sales are subject to licensing in some states (see below).

## **Retail Installment Sales (RIS)**

RIS agreements are a little like equipment finance's weird siblings. Basically, as the name seems to say, a retail installment sale of equipment is simply a sale of equipment over time. Before the UCC was adopted, the term "conditional sale contract" (as opposed to "loan" or "chattel mortgage") was often used.

What gets confusing (at least for some state regulators) is:

1. the same terminology is used for sales to consumers; and
2. there has long been an active after market for sales, which is regulated by many states.

This means that state usury, licensing and other laws might apply to EFAs, while they do not generally regulate leases. In most cases, the only regulated parties are those who purchase RIS agreements from vendors; neither the vendors nor third party lenders who simply finance equipment with loans or leases are subject to licensing requirements. Usury issues are harder to distinguish.

Then there is Pennsylvania, which we recently learned changed its laws in 2014. The law apparently requires ALL parties who finance equipment over time (EFAs, loans, probably \$1-out leases) to register with state officials. The first person we asked said it was only buyers of RIS agreements; his boss emailed back and reversed the position.

Bottom line: vendor captives and those who buy retail installment sale agreements from vendors should look into state regulation. The rules for lessors and other lenders may not apply. This is a big and complex area of law in our industry.

## **A Few Words from Atlanta**

In connection with the opening of our Atlanta office, we have taken a look at Georgia law. (Ian and Barry are Ga. Bar members). A couple of interesting notes:

***Jury trial waivers are unenforceable.*** Like California, Georgia law prohibits most pre-litigation jury trial waivers, meaning a lender or lessor will almost certainly be facing a jury if there is a default or other dispute. By all means, your contract should dictate choice of law, jurisdiction and venue in your home state or another state where the selection can be justified. We usually recommend this anyway, as may aid in the enforceability of other provisions and avoiding usury limitations.



**Keep litigation out of small counties.** Like Merry Old England, Georgia is divided into many small fiefdoms, each historically ruled by some often colorful family (think Cat on a Hot Tin Roof) but sometimes also plagued with judges and aggressive counsel who engage in home cookin' - punishing carpet -baggin' Yankees and such a every turn. We are not saying that justice will not be done outside the major cities, but, as with Alabama, there are places where angels and lessors fear to tread. Again, check the consent to jurisdiction clause in your documents.

**Sales/Use tax.** Georgia collects use tax on true leases and sales tax on leases intended as security.

**Usury.** Georgia law provides that a lender lending more than \$3000 but less than \$250,000 can charge, through a written contract with the borrower, "any rate of interest, expressed in simple interest terms...". The written contract "expressed in simple interest terms" requirement does not mean a specific interest rate necessarily. It can be satisfied by reference to a prime rate or other methodology so long as it is "easily computable" by the borrower. Loans over \$250,000 may be "any rate of interest, expressed in simple interest terms or otherwise" (presumably including compound interest). That is true for civil law purposes only. Georgia law provides that charging interest in excess of 5% per month (60% per year) is a criminal violation.

### **Original Chattel Paper in UCC Terms**

1. Leases and EFAs are chattel paper as defined by the UCC.
2. With respect to chattel paper, the person holding the original of the document has a perfected security interest. That possessory security interest has priority over anyone who files a financing statement.
3. Obviously, there can be trouble where more than one copy of a Lease or EFA is signed by the parties. Which one is the "original"? Trouble can also arise where the no single copy will be signed by both parties or where one party transmits the partially-executed document to the other by fax or email for the second signature.
4. The parties to chattel paper can specify what constitutes an "original." This means that a Lease or EFA can state that the copy that "matters" for UCC perfection purposes is one with copies of signatures instead of wet signatures, special designations, etc.
5. The key issue is what the lender will accept as assurance that only it holds the "original." Some will insist that it have two wet signatures, but the UCC provides alternatives if the lender is willing to consider them. Often, the question will hinge on the creditworthiness of the lessor/lender who is assigning its rights to the bank or other lender: can the lender rely on the assignor's representation that only the delivered copy is the original and all others have been designated duplicates or otherwise are not eligible to be the original.

**Speaking of signatures.** One of the basic issues we see people ignoring is being certain that the title (office) of the person signing is on the signature block, and that the officer is authorized. As per our last issue, resolutions, incumbency certificates and other evidence of authority should be taken seriously. Why? Because there are fraud issues (see below) and questions of whether a lease or loan is binding on the lessee or borrower. We don't see a lot of those issues, but as business becomes more active (we hope and expect) and customers look to expand, we are going to see someone get burned. Soon.

**Fraud.** In 2009 and 2010, many businesses that took a hit in or after the Great Recession went under. That was when a lot of folks who looked like geniuses found themselves wearing dunce caps. It seems that the go-go years resulted in a lax attitude toward fraud prevention. The result: some lessors and lenders found out that they were making unsecured loans because the equipment collateral never existed.

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Now is the time to take this issue seriously. Beware last minute deals with lessees and/or vendors you don't know - anything that creates an excuse why you cannot do normal due diligence. Don't fund on blank/copied/unclear invoices. Be suspicious if the vendor and lessee have the same zip code, area code and exchange (they may be one and the same person!). Check secretaries of state. Get evidence of authority. There is lots more to do and to avoid.

Want to hear war stories about famous frauds? The lessee who had multiple phones on his desk and was vendor, bank and lessee on deals? The guys who "bought" the government records on defunct banks and other companies by curing delinquent annual report fees and then had ready-made proof of a long existence? The multi-million-dollar fraud by a former vice president of a Fortune 500 company who kept his business cards and letterhead? The fake RVI company that hit a bank for millions? The longtime customer who kept signing for equipment that didn't exist because his son had a drug problem? We got plenty of 'em.

### **Can I have a "second" security interest in collateral?**

Of course you can, BUT bear in mind that it might not be worth very much. If the first secured party (senior lender) forecloses, your interest is cut off. This is true even if the foreclosure does not follow the UCC's rules protecting the debtor (commercially reasonable sale, etc.). 9-621.

What the UCC does for holders of subordinated security interests is to provide that they receive notice if the senior lender wants to foreclose and take collateral in full or partial satisfaction of the borrower's debt. 9-620. This is also true if the senior lender proposes to sell the collateral to a third party without first foreclosing. 9-611-613.



*Barry S. Marks, founding shareholder at Marks & Associates, P.C., concentrates his practice in the areas of equipment leasing, commercial lending and finance and general business law. When he is not working, Barry finds time to write poetry and the occasional short story. He is a past president of the Alabama State Poetry Society and was Alabama's Poet of the Year in 1999. His first book, Possible Crocodiles, was named Alabama Poetry, Book of the Year for 2010 and his second, Sounding was a finalist for the Eric Hoffer Award for small press publications. Barry was also the 2017 recipient of the Edward A. Groobert Award for Legal Excellence from the ELFA.*

## **Academy for Lease & Finance Professionals 2017 Update; Looking ahead to 2018**

The CLFP Foundation along with support from the following sponsor companies: International Decision Systems, KLC Financial, Patriot Capital, BMO Harris, ECS Financial Services, AP Equipment Financing, Ivory Consulting Corporation, Orion First Financial, and Ascentium Capital have successfully put on six Academies for Lease & Finance Professionals (ALFP) in 2017. There are only two more ALFPs scheduled for the year and both have sold out!

The Foundation is currently working on the schedule for 2018 to determine where to hold the events and who the hosts will be. If your company is interested in hosting and you're at a location with a large airport nearby, let [Reid](#) know and we can explore the possibility of your company hosting an Academy. Not only is it a great way to promote your brand and support the industry, but you also receive a discount of at least 10% for any employee that attends.

### **Southern CA**

October 12 - 14, 2017

Hosted by First National Capital

Registration and  
general information [here](#)

### **Philadelphia, PA**

November 16 - 18, 2017

Hosted by BB&T Commercial Equipment Capital

Registration and  
general information [here](#)

## Spotlight on Scott Thacker, CLFP

*This quarter's spotlight is on Scott Thacker, CLFP; CEO at Ivory Consulting Corporation*

***At which store would you like to max-out your credit card?***

The Canali shops. Their clothing fits me like “hand in glove.”

***What was your favorite TV show when growing up?***

The Ed Sullivan Show

***Choose a movie title for the story of your life.***

Goodfellas

***What was your favorite toy as a kid?***

Model trains – my father, brother and I took up half our basement when we created our train layout. Mountains, tunnels, lakes, and several trains traveling at the same time...all lots of fun.



*Scott modeling a new hat*



*Christmas dinner with friends*

***Can you play any instruments?***

I couldn't even find middle C on the piano.

***What was your childhood nickname?***

My mom's maiden name is Mack. So “Thack the Mack” became my nickname.

***Do you have any strange phobias?***

The MRI machine

***What, or who, are you a “closet” fan of?***

Interior design, my hobby

***What are three things still left on your bucket list?***

Taking a ride on the Orient Express train  
Taking a train ride through western Canada  
Being a philanthropist

***What is the worst pet you have ever had?***

Tropical fish – they were lots of work and died too often!

***What was the best concert you ever went to?***

Yo Yo Ma



*Stomping grapes, but not drinking the wine*



*Where's your favorite place in the world?*

Hong Kong

*What's the last book you read?*

*The Whistler*, John Grisham (at least one of his books every summer vacation). Now I'm looking forward to reading Hillary's new book.

*What are you passionate about?*

Professionally - solving problems using software.  
Personally - residential interior design and architecture

*What are you currently watching on Netflix?*

House of Cards



*At the George W. Bush Presidential Library*



*Cruise through the Norwegian fjords*

*If you could visit anywhere in the world you've never been, where would you go?*

The Galapagos Islands

*What's your secret talent that no one knows about?*

It's a secret!

*If you were a crayon, what color would you be?*

Yellow

*Who is your least favorite superhero?*

The Terminator



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*ELFA Guest Lecture Program with Chris Enbom, CLFP  
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## New CLFPs



**Katherine Adams, CLFP**  
*BancorpSouth EF*



**Todd Benson, CLFP**  
*First American EF*



**Michael Brant, CLFP**  
*Ivory Consulting Corp.*



**Stephen Brown, CLFP Assoc.**  
*Orion First Financial*



**Quentin Cote, CLFP**  
*Orion First Financial*



**Rachel Chesley, CLFP Assoc.**  
*Western Equipment Finance*



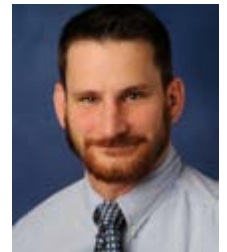
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*Ivory Consulting Corp.*



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*Tristate Machinery EF*



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**Chris Ivory, CLFP**  
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**David Jueschke, CLFP**  
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**Misty Johnston, CLFP**  
*Financial Pacific Leasing*



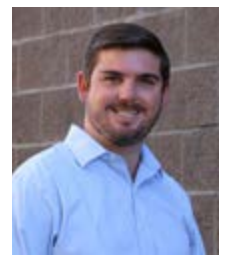
**Sara Leung, CLFP**  
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**Will Mennesson, CLFP**  
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**Christine Nelson, CLFP**  
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**Ben Nikbakht, CLFP**  
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**Mike Pulito, CLFP**  
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**John Rawding, CLFP Assoc.**  
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**Janice Schawillie, CLFP**  
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**Taryn Schawillie, CLFP Assoc.**  
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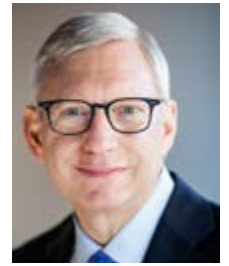
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**\*Not pictured:**

**George Muhoray, CLFP - Customers Bank Comm. Fin.**

**Sam Smith IV, CLFP - Customers Bank Comm. Fin.**

**Mike Van Ryen, CLFP - Thermo Fisher Fin. Services**

## Save the Date

### *NEFA Funding Symposium*

October 4 - 6; Atlanta, GA

### *Academy for Lease & Finance Professionals*

October 12 - 14; Foothill Ranch, CA

### *CLFP Exam*

October 14; Foothill Ranch, CA

### *ELFA Annual Convention*

October 22 - 24; Orlando, FL

### *Academy for Lease & Finance Professionals*

November 16 - 18; Philadelphia, PA

### *CLFP Exam*

November 18; Philadelphia, PA

### *NAELB Western Regional*

November 17 - 18; Orange County, CA

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