

(20) "State of the Equipment Finance Industry" page 12 Equipment Leasing & Finance Foundation (2010).

(21) Commercial Money Center, Inc. v. Illinois Union Ins. Co., 508 F.3d 327, 332 (6th Cir. 2007). This decision details how one leasing company financed over \$300 million in assets between dozens of banks, investment pools, and sureties. Another securitization case was Windy City Metal Fabricators & Supply, Inc. v. CIT Technology, 536 F.3d 663, 666 (7th Cir. 2008) which details the leasing industry's appetite for one particular product through securitization.

(22) State of the Equipment Finance Industry" page 12 Equipment Leasing & Finance Foundation (2010).

(23) Program Agreements generally provide that the equipment lessor will have the exclusive right or right of first refusal to finance the equipment vendor's equipment sold to the vendor's customers. The vendor will provide these leads to the lessor with the expectation that the lessor will finance the qualified lessees. See C & J Vantage Leasing Co. v. Wolfe, 795 N.W.2d 65 (Iowa 2011).

(24) The brokers may tell misrepresent the nature of the transaction. Colonial Pacific Leasing Corp. v. McNatt, 268 Ga. 265, 486 S.E.2d 804 (1997). The broker may also misrepresent the quality or nature of the equipment. C & J Vantage Leasing Co. v. Wolfe, 795 N.W.2d 65 (Iowa 2011). Using an unscrupulous broker may present agency issues for the lessor, although proper lease documents and disclaimers may obviate those concerns. See Colonial Pacific Leasing Corp. v. McNatt, 268 Ga. 265, 486 S.E.2d 804 (1997).

(25) Commercial Money Center, Inc. v. Illinois Union Ins. Co., 508 F.3d 327, 332 (6th Cir. 2007).

(26) Barry A. Dubin and Jeffrey J. Wong Equipment Leasing ¶ 13.01 at 13-3(2011).

(27) The securitization of lease pools and the resulting document suite is complicated and has a multitude of moving parts, often involving the lessor, a special purpose bankruptcy remote entity, a surety, the institutional lender, and servicer. It is not entirely relevant to the subject of bank leasing, since it is unlikely that a bank would have to obtain third party financing for its leases when it enjoys cheap Federal funds. However, for the curious, a good example of a securitization arrangement is detailed

in the case of Commercial Money Center, Inc. v. Illinois Union Ins. Co., 508 F.3d 327 (6th Circuit 2007).

(28) Commercial Money Center, Inc. v. Illinois Union Ins. Co., 508 F.3d 327 (6th Cir. 2007); Windy City Metal Fabricators & Supply, Inc. v. CIT Technology, 536 F.3d 663, 666 (7th Cir. 2008).

(29) NorVergence was a vendor which sold a magic box which theoretically reduced telephone and internet cost. The box cost less than a \$100 to manufacture but was sold for \$15-30,000. Ultimately, it was established that the box was worthless. Hundreds of leasing companies wrote leases for the magic box, financed through securitized pools. See Byron Saintsing and Thomas A. Gray, NorVergence: Isolated Incident or Growing Trend ELA Legal Forum Miami, Florida (May 16, 2005).

(30) Charles Swartz a principal of Allied Health Care sold pools of leases to more than a hundred investment pools for non-existent equipment. See FBI Press Release, Newark Office September 2, 2010 at <http://www.fbi.gov/newark/press-releases/2010/nk090210.htm>

(31) Commercial Money Center, Inc. v. Illinois Union Ins. Co., 508 F.3d 327 (6th Circuit 2007).

(32) See James E. Coston, "The Use of Equipment Finance Agreements in Lieu of Equipment Leases" *Leasing News* January 15, 2010. [http://leasingnews.org/archives/Jan2010/1\\_15.htm#special\\_report1](http://leasingnews.org/archives/Jan2010/1_15.htm#special_report1). Mr. Coston argues that simple Equipment Finance Agreements, long forsaken by equipment lessor, have a place in equipment financing and indeed have advantages in certain situations.

(33) "State of the Equipment Finance Industry" page 10 Equipment Leasing & Finance Foundation (2010)

(34) Amanda Gutshall *Monitor Daily* Equipment Leasing Brokers Stay Focused Despite Fractured Funding Environment Annual Funding Source Issue March-(April 2010).

(35) "State of the Equipment Finance Industry" page 12 Equipment Leasing & Finance Foundation (2010). The list includes ABCO Leasing Inc., ACC Capital, AMC Funding, American Equipment Finance, C and J Leasing Corp., Carlton Financial Corporation, Chase Industries, Inc., Chesterfield Financial, Heritage Pacific Leasing, Greystone Leasing, Mericap Credit, Pioneer Capital Corporation, and TCF Equipment Finance. See

Leasing News (2011) <http://www.leasingnews.org/Pages/Out-of-broker-bus.htm>.

(36) State of the Equipment Finance Industry" page 12 Equipment Leasing & Finance Foundation (2010).

(37) State of the Equipment Finance Industry" page 12 Equipment Leasing & Finance Foundation (2010) quoting one lessor as saying ""Our standards did not change, the quality of our customers did" making increased volume difficult.

(38) 12 USC §§ 24 and 84; M & M Leasing Corp v. Seattle First Nat'l Bank, 563 F.2d 1377 (9<sup>th</sup> Cir. 1977).

(39) Memorandum from James J. Saxton, Comptroller of the Currency (March 18, 1963).

(40) 12 CFR § 7.7400 (1977).

(41) M & M Leasing v. Seattle First Nat'l Bank, 563 F.2d 1377 (9<sup>th</sup> Cir. 1977)

(42) M & M Leasing v. Seattle First Nat'l Bank, 563 F.2d 1377 (9<sup>th</sup> Cir. 1977).

(43) 12 CFR § 7.3400.

(44) 12 U.S.C. § 24. Subsequently, the OCC wrote regulations detailing the new authority. 12 CFR § 23.

(45) 12 CFR § 5.34.

(46) 12 CFR § 7.7380.

(47) OCC Letter from Peter Liebesman June 15, 1981.

(48) 12 CFR § 7.3400 (1979).

(49) OCC Letter to Peter Nevitt November 1, 1984.

(50)12 USC § 24.

(51) 12 CFR § 23.21. A non-CEBA lease must rely upon the credit worthiness of the lessee and guarantor, not the value of the equipment,

and the residual must be less than 25%. The 25% residual cap does not include situations where there is recourse to a third party or the lessee, if the recourse guaranty is creditworthy. See 12 CFR §23.21(b) There is no limit to the number or size of the non-CEBA leases the bank may enter into, subject the bank's overall lending limit as proscribed by 12 CFR Part 32.

(52) 12 CFR §§ 23.20, 23.21. CEBA leases can have any residual value, including true leases where the equipment is returned to the bank, but the total value of such leases is limited to 10% of the bank's consolidated assets. By using the term "consolidated" the intent to insure that all the assets of the bank, including subsidiaries are included in this definition. See 56 Fed. Reg. 28,314 §23.8. It should be noted that in the event of a true lease where the equipment is returned, the bank has a maximum of five years to dispose of the property. See 12 CFR 23.4(c). Such retained property may not exceed 15% of the bank's capital. 12 CFR § 23.

(53) 12 CFR § 23.2(f).

(54) 12 CFR § 23.3(a)(3).

(55) A. Dubin and Jeffrey J. Wong Equipment Leasing ¶23.02[3][b] at p. 23-11 (2011)

(56) 12 CFR §23.4.

(57) 12 CFR § 23.4(b)(1) and (2).

(58) 12 CFR § 201.3.

(59) State of the Equipment Finance Industry" page 31 Equipment Leasing & Finance Foundation (2010).

(60) See 2011 10Q of Leaf Financial (August 9, 2011) where late fee income was about 9% of total income.

(61) Retail Banking Strategies, Peak Performance Consulting Group (March 11, 2011) at <http://ppcgroup.com/blog>.

(62) State of the Equipment Finance Industry" page 13 Equipment Leasing & Finance Foundation (2010).

(63) Such leasing software includes Litehous360 and Leasewave.

(64) American Association of Equipment Lessors, Equipment Leasing Today p. 10 (March 1991). When AT&T reorganized in 1990 it increased to 425,000 customer accounts and processed lease applications in 24 hours or less.

(65) The idea is that a lessee which is pleased with its vendor will be more apt to pay the lessor. Typical approval criteria include 2 years in business, business license, bank and trade references, and phone numbers and addresses which can be verified.

(66) Many program agreements contain specific criteria for mandatory approval of the vendor's customers. Because the volume of the customers is not known (unless specified), the bank runs the risk of agreeing to an unspecified open-ended credit commitment. See *Generally* Barry A. Dubin and Jeffrey J. Wong Equipment Leasing ¶12.17 at 12-58 (2011). Any such program agreement should be scrutinized carefully.

(67) See North Carolina Stats Annot. §66-106 *et seq* [Applies to loans or leases]; California Financial Code § 22000 [Applies to only loans].

(68) Waterview Resolution Corp. v. L&F Credit Corp., 2002 WL 31304280 (Conn.Super 2002).

(69) The Back Office, Leasing News \_\_\_\_\_.  
[http://www.leasingnews.org/Ag\\_leasing/backoffice.htm](http://www.leasingnews.org/Ag_leasing/backoffice.htm).

(70) An exhaustive list developed by Terry Winders, CLP may be found in Leasing News December 21, 2009  
<http://leasingnews.org/archives/December%202009/12-21-09.htm#start>.

(71) GreatAmerica Leasing Corp. v. Star Photo Lab, Inc., 672 N.W.2d 502, 504 (Iowa Ct. App. 2003); California Commercial Code § 10407

(72) See Byron Saintsing and Thomas A. Gray, NorVergence: Isolated Incident or Growing Trend ELA Legal Forum Miami, Florida (May 16, 2005). James E. Coston, "The Use of Equipment Finance Agreements in Lieu of Equipment Leases" Leasing News January 15, 2010.  
[http://leasingnews.org/archives/Jan2010/1\\_15.htm#special\\_report1](http://leasingnews.org/archives/Jan2010/1_15.htm#special_report1). Mr. Coston argues that simple Equipment Finance Agreements, long forsaken by equipment lessors, have a place in equipment financing and indeed have advantages in certain situations

(73) UCC 2A § 103(a)(7).

(74) 15 U.S.C. §1602 and 12 C.F.R. §226.

(75) National Banks are exempt from state usury laws. Smiley v. Citibank, 11 Cal. 4th 138 (1995), *aff'd* 517 U.S. 735 (1996). 12 CFR § 560(b) preempts State law on a variety of lending issues, including usury.

(76) First Nat. Leasing and Financial Corp. v. Indiana Dept. of State, 598 N.E.2d 640, 644 (Ind.Tax,1992).

(77) Tucker Leasing Capital Corp. v. Marin Medical Management, Inc., 833 F.Supp. 948 (E.D.N.Y. 1993) [Lessee is liable for State personal property taxes].

(78) The statutory definition is contained in the Uniform Commercial Code § -203.

(79) In re Celeryvale Transport, Inc., 822 F.2d 16, 18 (6th Cir. 1987) [FMV lease is true lease].

(80) In re Sankey 307 B.R. 674, (D.Alaska 2004) [10% purchase option was true lease].

(81) In re Pillowtex, Inc., 349 F.3d 711, (3rd Cir. 2003) [\$1 purchase option is lease intended as security].

(82) Matter of Fashion Optical, Ltd., 653 F.2d 1385, 1390 (10th Cir. 1981) [Held that lease for the greater of FMV or 10% might be true lease depending on value].

(83) Starwood Corp. v. Raytheon Corp., 2006 WL 864226 (Cal.App. 2 Dist. 2006).

(84) Hunt v. Superior Court, 81 Cal.App.4th 901, 908 (2000).

(85) JAZ, Inc. v. Foley, 104 Hawai'i 148, 154, 85 P.3d 1099,1105 (Hawaii App. 2004); Ace Leasing, Inc. v. Boustead, 311 Mont. 285, 55 P.3d 371 (Mont. 2002) [Failure to abide by Purchase Order exonerated guarantor].

(86) California Civil Code § 2819; Apache Lanes, Inc. v. National Educators Life Ins. Co., 529 P.2d 984 (Okl. 1974).

(87) Interchange State Bank v. Rinaldi, 303 N.J.Super. 239, 696 A.2d 744 (N.J.Super.A.D. 1997); Civil Code § 2850.

(88) Keene v. Newark Watch Case Material Co., 39 Misc. 6, 78 N.Y.S. 753 (1902), Bloom v. Bender, 48 Cal.2d 793, 801 (1957).