

Northern Leasing's Attorney Responds

By Arnold N. Bressler, Esq.

Recently Leasing News Legal Editor, Tom McCurnin, wrote a piece entitled "Finally! New York Attorney General Goes After Northern Leasing." Typically Northern Leasing ("Northern") does not respond to such articles, having learned from experience that responding merely provides another opportunity for repetition of false statements. Nonetheless, Mr. McCurnin's statements are so far over the line they seem to require a response. As Daniel Patrick Moynihan famously remarked "Everyone is entitled to his own opinion, but not to his own facts."

Here are some facts. Northern has been in the equipment lease finance business for nearly 30 years. Northern's leases are marketed nationwide and structured as equipment finance leases under Article 2-A of the NY Uniform Commercial Code. As such they are non-cancellable "come hell or high water." They are personally guaranteed, typically by a principal of the lessee. Issues relating to the operation and performance of the equipment are to be resolved directly between the lessee and the equipment supplier who is identified in the lease. Marketing of the leases is undertaken by independent sales organizations ("ISO's"), which are not affiliated with Northern. The lease and personal guarantee are governed by New York law, regardless of where the ISO or lessee is located. Exclusive venue for litigation regarding enforcement of the lease is the State of New York, often New York County.

The terms of Northern's leases are typical of equipment finance leases in general and will be familiar to most readers of Leasing News. The hell or high water clause, as well as provisions relating to forum selection, acceptance of service by certified mail, and a personal guarantee, are commonplace in Article 2A equipment finance leases. Each of those provisions has repeatedly been upheld by the courts of New York at every level, including in many cases involving Northern. If Northern's leases are unconscionable, so too are those of virtually every Article 2A equipment finance lessor in the country.

To a great extent the claims of the New York Attorney General rest on alleged misrepresentations or other improper conduct by ISO's. In order to carry its burden of proof the Attorney General must prove the ISO's are Northern's agents. This is a high hurdle in light of the fact agency can only be proven by acts of the principal and not acts of the alleged agent. Furthermore the express provisions of Northern's leases, as well as its Vendor Agreements with the ISO's, clearly state the ISO is not authorized to act as agent for Northern or to make any representations which are not contained in the lease.

The notion that Northern's leases are procured through misrepresentation or other misconduct makes no economic sense. In fact it is in Northern's economic best interest to make sure the lessee and personal guarantor understand the lease because Northern fully funds each lease at its inception, and does not recoup its investment or start to earn a profit until the last few months of the typical 48-month lease term. A lessee who feels aggrieved is more likely to default, producing a loss for Northern. For that reason, Northern utilizes a number of procedures to avoid financing leases that are improperly procured and it believes those procedures are quite effective. According to Northern's records fewer than 1% of its over 1 million customers have expressed any complaint, an enviable record in any industry.

Northern's experience has shown that claims of misrepresentation or other misconduct, are often asserted as a pretext to avoid the lease guarantor's obligations under the lease. They are usually made for the first time in response to collection activities, frequently after months of payments and other conduct that reveals the falsity of the misconduct claim. In case after case where similar allegations have been made in court, those allegations have been shown to be false. For example in one class action New York Supreme Court Justice Martin Shulman recognized the "facts" on which the claim before him was based were not "facts" at all: "[P]laintiffs conceded on the stand that the amended complaint and various affidavits they signed . . . contained inaccurate statements regarding the circumstances under which they each executed the form leases in question. . . . [T]he inconsistencies include whether or not each named plaintiff was pressured to sign the lease in a hurried manner. . . and whether or not plaintiffs were told the leases had more than one page."

Unfortunately, such false and misleading allegations, many of which were repeated by Mr. McCurnin, are hardly isolated occurrences. For example, in a decision affirmed by the US Court of Appeals for the Second Circuit, United States District Judge Katherine Forrest found the "facts proffered by plaintiff on the motions before this Court do not support anything close to the claims alleged. There is, for instance, no record evidence to raise a triable issue as to major aspects of the RICO or common-law fraud claims. Alleging those claims on the true facts was frivolous."

Another example. In November of this year, after deliberating for just 30 minutes following a two week trial, a New York state jury returned a verdict unanimously awarding Northern the full amount it sought plus attorneys' fees and interest, on its claim for breach of contract against a defaulting merchant, and completely rejected the merchant's more than \$50 million forgery counterclaim.

Northern insists on its right to vigorously enforce its contracts. That includes vigorous collection activity up to and including commencing litigation. That does not make it a "scofflaw" as Mr. McCurnin would have it. In fact bringing litigation has been held to be a constitutionally protected right. It does, however, sometimes produce complaints to the Attorney General from merchants seeking to avoid their legitimate obligations.

We are confident that when all of the evidence is presented at an evidentiary hearing, and Northern's side of the story is heard, it will be shown that Northern is a law-abiding business acting in a lawful manner.

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