

**Winthrop Resources Goes to Evergreen Clause,
But History Catches Up to Them and They Settle**

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The Disclosure is an Abuse of the Evergreen Clause. Again.

Winthrop Res. Corp. v. Apollo Educ. Grp. Inc., No. 17-1448 2017 U.S. Dist. LEXIS 130825, at *1 (D. Minn. Aug. 16, 2017).

Fair Market Value (FMV) leases usually call for the lessee to return the equipment or pay the FMV. But what happens when there is a minor dispute as to some insignificant equipment? Today's case raises the question of how a lessor took advantage of when most of the equipment is properly returned and a minor portion could not be found. Should the lessor accommodate the lessee? Should the lessor try to negotiate the proper value of the equipment? Or should the lessor act aggressively and sue the customer to realize continued lease payments via the Evergreen Clause? And is there a history behind this maneuver?

Winthrop Resources is a Minnesota equipment lessor, located in Minnetonka; acquired by TCF Financial in 1997, a subsidiary of TCF Bank. Apollo Education Group is an Arizona corporation, and one of the largest for profit schools in the United States, University of Phoenix is just one of the schools it operates.

Between March and September, 2011, the Lessee signed three FMV lease schedules for Proliant server equipment with sixty month maturities, with options to return the equipment or pay FMV. There were over 1,000 computers and related equipment. The aggregate lease stream was \$10 million dollars and change. Apollo paid the three schedules according to terms, and returned the equipment, almost all of it, except a few minor pieces which could not be located.

When it couldn't find 2.6% of the equipment, it had the equipment appraised and tendered a \$58,000 check. Winthrop apparently disputed the amount of the value of the equipment and returned the check. Rather than negotiate this relatively trivial amount, the Winthrop continued the leases via the Evergreen Clause. When Apollo didn't pay the additional lease payments (nearly \$100,000 a month), Winthrop sued.

Apollo counterclaimed, basing the counterclaim on breach of contract, breach of the implied covenant of good faith and fair dealing, and unjust enrichment. What is fascinating about the counterclaim is that a Minneapolis attorney sued Winthrop three times, alleging that Winthrop had a practice of disputing the FMV and renewing the lease to continue the lease payments.

Probably believing that if you can't lick them, join them, Winthrop hired the same law firm for this suit against Apollo.

Apollo jumped all over Winthrop, attaching a video deposition of a former employee who testified that this was Winthrop's practice. In addition, Apollo attached the three lawsuits making the same allegations, believe it or not, filed by Winthrop's new attorneys. How embarrassing. Where did Apollo's lawyer uncover this goldmine?

Apollo then argued that the allegations of blowing off lessees to increase lease payments must be true, because (1) Winthrop's former employee said so; and (2) Winthrop's current counsel successfully alleged this to be true. Three times! I mean, after all, would attorneys lie?

Winthrop, in the present case, predictably filed a motion to dismiss. Winthrop went to great lengths to argue for pages upon pages that the lawsuits filed by its present counsel were irrelevant and constituted an improper, indeed scandalous allegation. This served to emphasize those prior lawsuits and the video deposition even more which were publically filed for all to read. I would have thought that Winthrop would have wanted to wish these suits into the cornfield instead of emphasizing them.

Predictably the court denied the motion, except for one insignificant claim, and let the case proceed. The case plows no new legal ground, but is a lesson in customer service.

What are the takeaways here?

- **First**, Recognize a Good Customer—They are hard to come By. Perhaps AAA credit lessees are so easy to come by for Winthrop that it could afford to blow off this type of customer. I would think that if the

customer paid the lessor over ten million dollars, a lessor might want to cut the customer some slack in the hopes of getting some repeat business. Nope, Winthrop sued. When Apollo wants to lease more equipment, do you think it will seek out Winthrop again? I don't think so. The fraction of the \$58,000 that Winthrop disputed was probably less than a few thousand dollars of its residual.

- **Second**, Negotiate in Good Faith. Winthrop was dealing with one of the largest for profit schools in the United States and the school just paid ten million dollars. The school did the right thing by returning the equipment and making a tender of what it considered to be the value of some fairly insignificant equipment. What did Winthrop do? It returned the money, renewed the lease citing the Evergreen Clause, and sued the customer. This is a head scratcher.

- **Third**, Be Mindful of Your Corporate Reputation. Allegations of poor business activity are highly publicized and make their way across media outlets quickly. The allegation that it did not negotiate the FMV to generate more residual fees was supported by their former employee and by hiring the law firm that made the allegations in the first place. All this suit did was un-bury the three lawsuits and the disastrous testimony of its former employee which was publically filed.

Winthrop v. Apollo Educ. Grp. (5 pages)

<http://leasingnews.org/PDF/WinthropvApollo2018.pdf>

Winthrop Answer and CC Exhibits (247 pages)

<http://leasingnews.org/PDF/WinthropAnswer2018.pdf>

Apollo Education Answer, Affirmative Defence, Counterclaims (26 pages)

<http://leasingnews.org/PDF/WinthropAnswer2018.pdf>

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