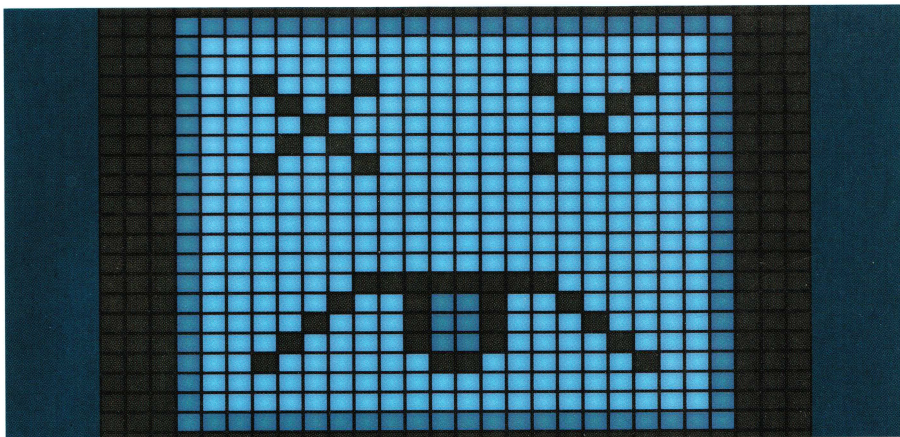


# Liability Lurking in the Leasing of Digital Devices

BY RICHARD FELDMAN



Today's commercial copiers are generally multifunction devices that are used to copy, print, scan, fax and email documents. To accomplish this they contain hard disk drives similar to those contained in computers. Although lessors and lessees of computer equipment have long been sensitive to end of lease considerations, transactions involving these "smart machines" are often documented on traditional "copier" leases which make no reference to data storage and destruction. Lessors should be well advised to ensure that information is presented to their customers either by the vendor or by language incorporated in the lease.

A large supplier of office equipment recently dodged a class action bullet when it was sued by a bank to which it leased office equipment. Although the plaintiffs attempt to bring a class action was thwarted, the case represents the tip of the legal iceberg and lessors must take notice of their potential liability when leasing equipment containing digital storage devices.

Putnam Bank leased fax, printing and scanning devices (presumably all in one) from Ikon Office Solutions, Inc. The equipment was used to fax, print and scan documents containing financial and other information relating to its customers, including social security numbers, birth dates and financial data. Putnam brought

a class action against Ikon on behalf of all persons who purchased or leased similar office equipment claiming that Ikon misrepresented, or failed to disclose, that the equipment contained automatic data storage devices and that Ikon does not destroy the saved information when the equipment is returned and then sold or leased to another customer. The bank alleged that Ikon should have known that the equipment would be used to record confidential information and that the bank, and Ikon's other customers, had placed their customers at risk of identity theft. The bank claimed it would incur expenses to monitor their customer's credit and to destroy the saved images on the devices currently in their possession. The bank claimed Ikon had a duty to advise them of the data storage capabilities of the leased equipment and a further duty to advise them how and when it should be destroyed.

The court found that the allegations of the complaint were not sufficient to justify a class action and dismissed the case. Nevertheless, the liability theories upon which the case is based remain viable and present a potential cause of action against other lessors. *Putnam Bank v Ikon Office Solutions, Inc., United States District, District of Connecticut, July 5, 2011.*

## End of Lease Considerations

Leases for equipment that store data, particularly multifunction devices, should

contain provisions disclosing that electronic data will be stored in the device. Lessees should be advised to protect their data through encryption and that data security kits are available.

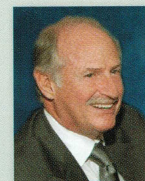
To protect itself against liability lessor should, at a minimum, address data storage and destruction issues in its lease. The lease should specify what happens to the hard drive at the end of the lease. If a purchase option is exercised that problem is passed along to the lessee who will continue to retain the equipment and become responsible for its disposal. However, if the leased equipment is to be returned the lease should describe and allocate the duty to scrub the hard drive and when that cleaning is to be performed.

If its clients typically handle sensitive documents, such as financial and medical records, the lessor may wish to consider data destruction technology and purchase currently available scrubbing devices. These devices will overwrite and destroy the data on a hard disk and provide printed confirmation logs confirming the document sanitization.

A more economical approach might be to require lessees to provide proof that they have "sanitized" the equipment before returning it.

Until all data storage resides in the ethereal cloud, lessors will need to take a down to earth approach to data destruction. ■

## ABOUT THE AUTHOR



Richard Feldman is a principal of Evans, Feldman & Ainsworth LLC in New Haven CT. He practices in the areas of commercial litigation and transactions, acquisitions and sales of privately held

businesses and commercial and residential real estate. Richard is a longstanding member of the NEFA and a member and former chairman of the Association's Legal Committee. He can be reached at [rcfeldman@snet.net](mailto:rcfeldman@snet.net)