In re: Brican America, LLC, Equipment Lease Litigation

This case proves two idioms—a leopard never changes its spots, and there is no such thing as a free lunch, and proves that an ostrich is not to be emulated in times of trouble.

The leopard in this case is Jean Francois "Jeff" Vincens, a French and Canadian citizen who operated a Ponzi scheme from Tampa, Florida, in the early 1990s. The Ponzi scheme involved the sale of advertising kiosks combined with a contract to pay the purchaser advertising fees for advertising on the kiosk. The purchase price was financed through equipment leasing companies. The fees to be paid for advertising just about covered the cost of the kiosk, making the kiosk essentially free. The advertising contracts promised the purchaser that if the advertising fees were not paid to them, they could stop making payments on the kiosks. The trouble was that there were no real advertisers. Advertising fees were paid to earlier purchasers from money provided to Vincens' company from the sale of more recent kiosks. All was good until the money ran out.

Before the money ran out, Vincens and his partner sold their interests in the numerous companies to employees, and pocketed millions of dollars. The new employees rode the business into bankruptcy. By the time of the bankruptcy filing, over $200 million in advertising fees were owed to customers.

Vincens left the United States for a while. He sold advertising kiosks in France, apparently without a corresponding advertising contract. He then returned to Canada where he joined with others in forming Brican Corporation whose business was selling advertising equipment (by this time, plasma display televisions had replaced the LED kiosks, and computer graphics were used for the advertising) which consisted of a computer with monitor, a 42" plasma television, and computer graphics. Vincens ultimately wanted to return to Florida, this time, Miami, so he created Brican America, Inc., with one or more of his Brican Corporation partners, and opened for business in Miami.

An equipment leasing company (NCMIC Finance Corp.) owned by a mutual insurance company which principally insured chiropractors (NCMIC Group, Inc.) encountered a display of the Brican America, Inc., advertising system while attending a trade show. Early in 2005, the business development manager for NCMIC fostered a business relationship with Brican America, Inc., whereby NCMIC would finance the acquisition by optometrists of the advertising system. NCMIC committed its first error–it failed to do any due diligence on Brican America, Inc., or its owners. Had it done due diligence (as simply as Googling the name of the owners), it would have discovered information about the Ponzi scheme operated by Vincens. For instance, the United States Court of Appeals, Eleventh Circuit published an opinion in 2005 which included the following facts:

> This case involves a scheme to use electronic billboards and kiosks (collectively "kiosks") for advertising. The promoters of the scheme[FN1] executed it in the following way. First, they organized Optical Technologies, Inc., and a group of affiliated companies, Recomm International Display Corp., Recomm Operations, Inc., and Recomm Enterprises, Inc. (hereafter referred to collectively with Optical Technologies, Inc., as "Recomm").[FN2] Recomm, in turn, (1) convinced several advertising agencies of the merits of advertising via kiosks,

and (2) convinced pharmacists, veterinarians, optometrists, and others of the profits they would earn by locating the kiosks at their places of business. Having accomplished this, Recomm (3) acquired the necessary kiosks, leased them to the pharmacists and others (the "Lessees"), assigned the leases to finance companies (the "Lessors"),[FN3] and (4) entered into advertising contracts with the Lessees. These contracts provided that the Lessees would receive a stated percentage of the fees Recomm received from the advertising agencies. Recomm, the Lessees, and the Lessors contemplated that the Lessees' share of the advertising fees would more than cover the Lessees' lease payments.

FN1. Jean Francois Vincens and Raymond Manklow.

FN2. The promoters formed other Recomm corporations as well. Although it is unnecessary to refer to them by name, all ultimately became part of the Chapter 11 bankruptcy case involved in this appeal.

FN3. As far as we can tell from the record, the lease assignments were without recourse.

The scheme worked for the benefit of all parties for a few years, until mid-1995, when Recomm began to experience cash-flow problems and ceased remitting to the Lessees their portions of the advertising fees. The Lessees responded in two ways. First, they quit paying the Lessors the rent due on the kiosk leases; then, they sued Recomm. As the law suits multiplied, Recomm turned to the bankruptcy court for relief. In January 1996, Recomm filed a Chapter 11 petition[FN4] in the Bankruptcy Court for the Middle District of Florida.[FN5]

In re: Optical Technologies, Inc., 425 F.3d 1294, 1296-97 (11th Cir. 2005).

Through his sales, Vincens met an optometrist, Salvatore DeCanio, who had run a lasik center for a group of ophthalmologists whose life-long goal was to open his own lasik center. Early in 2006, Vincens and his partner (his wife's nephew, also a French and Canadian citizen) decided that they wanted to be a part of the development of a group of lasik centers which would offer additional medical spa-like services. They estimated that the opening of each center would cost more than $1 million, and decided to raise the money by increasing the sales of their advertising systems (which they ultimately called the Exhibeo system).

The trouble with their plan, as they saw it, was that increasing sales was difficult. To overcome the hesitancy of the targeted group of customers (who were optometrists), Vincens resorted to his "advertising system for free" Ponzi scheme—they would offer the doctors the Exhibeo System with an advertising agreement which would pay them substantially the entirety of the cost of the Exhibeo System, making the system essentially free.

Vincens approached NCMIC to gain its approval of his plan. Vincens told Scott that Brican America, Inc., needed to have a system where Brican America, Inc., could take back the equipment so that customers would be more likely to sign on the spot. NCMIC committed its next error—it agreed. In June 2006, Scott sent Vincens a letter to which he referred as the Brican Return Policy Agreement, which provided:

> Professional Solutions Financial Services [which was a trade name for NCMIC] is pleased to provide these terms to support *Brican America's return policy.* This letter represents the understanding that the payoff Professional Solutions will give Brican in the event of a cancellation by their customer. This program may be cancelled or suspended at any time.
>
> *If the Lease Agreement is terminated by the customer due to Brican's return policy,* we will credit all amounts collected toward our funded amount. . . .

Brican America, Inc., began using a Marketing Agreement which contractually committed Brican America, Inc., to purchase advertising space on the Exhibeo Systems for a minimum of $5,800 per year (the lease payments totaled $6,096 per year), and which contained a "Cancellation" provision whereby the customer could cancel all related agreements should the customer not receive the advertising fees. NCMIC committed its next error—although it had the contractual right to receive for review all documents used by Brican America, Inc., in making its sales of the Exhibeo System, NCMIC never asked for a copy of the Marketing Agreement.

After October 2006, Brican America, LLC, replaced Brican America, Inc., as vendor in the lease transactions. NCMIC committed its next error—although NCMIC had a written contract governing the relationship between Brican America, Inc., and NCMIC (which was not assignable by Brican America, Inc.,) when NCMIC learned that Brican America, LLC, was replacing Brican America, Inc., as the vendor, NCMIC did not require a new vendor agreement be signed by Brican America, LLC, or perform any due diligence on Brican America, LLC, or its members; it simply continued with business as usual only treating Brican America, LLC, as though it were Brican America, Inc.

By July 2008, NCMIC had received in error many copies of Marketing Agreements. NCMIC committed its next error—it never inquired of Brican America where and how frequently the Marketing Agreements were being used, nor did it ask for a copy of every Marketing Agreement entered into be sent to NCMIC to update its customer files.

Also in July 2008, a customer who had been alerted to the Ponzi scheme previously operated by Vincens, called NCMIC to see if NCMIC was aware, and to seek to be relieved from his obligations under the lease with NCMIC. He described to NCMIC the material sent to him by another person in the advertising business (which consisted of three newspaper articles and a cover sheet warning of a scam operated by Vincens and his partner in the 1990s). NCMIC asked the customer to send them whatever he had, but amazingly (the next error by NCMIC) never asked him if he had a Marketing Agreement with Brican America, and if so, to send the Marketing Agreement to NCMIC. The customer left contact information (phone number and email) with NCMIC, which

promised to get back to him, but NCMIC never attempted to make contact with him again.

The customer sent the three newspaper articles and cover sheet to NCMIC as promised, and the employee who received them sent them onward to the vice-president and general manager of the equipment leasing division of NCMIC, who advised his boss, the president, of their receipt. Although the articles and cover sheet identified more people who might inform NCMIC of the previous actions of Vincens, NCMIC made no effort to contact any of those people (yet, another mistake by NCMIC). Instead, it in essence asked Vincens and his partner if they were defrauding NCMIC. The answer was, not surprisingly, no.

Vincens and his partner included in their response to NCMIC a PowerPoint presentation which NCMIC acknowledged receiving. The PowerPoint presentation included a slide which informed the customers that they could get the Exhibeo System virtually free:

1. A FREE MARKETING TOOL
Give up a little bit of freedom on your 42" plasma display (a small 10% of your screen time), in order to be able to advertise its LASIK center, and VISO LASIK MEDSPAS ...
WILL PAY YOU ENOUGH
PER YEAR
TO OFFSET
THE COST OF YOUR LEASE!

Vincens invited NCMIC to meet with Brican America at its offices in Miami so NCMIC could see the legitimacy of the business of Viso Lasik Medspas.

Because NCMIC was concerned about the percentage of investment it was making in Brican America contracts compared to its total investment portfolio (a concern of over-concentration), and because Brican America, for its part, wanted another avenue of financing transactions in the event NCMIC rejected a proposed contract, NCMIC and Brican America agreed that they would change the method of doing business. Rather than the customers entering into leases directly with NCMIC, with NCMIC paying Brican America, LLC, for the equipment, the customers would now enter into a lease with a Brican America related entity which would then assign the lease to NCMIC. Because Brican America, Inc., was already in existence, although not being used (and perhaps out of a concern about the viability of the work visas for Vincens and his nephew which required them to be paid by Brican America, Inc.), Brican America informed NCMIC that it would use Brican America, Inc., to be the lessor, and Brican America, LLC, would continue to be the vendor, on all future transactions.

NCMIC committed its next error. It was supposed to be the purchaser of already created leases—leases in which Brican America, Inc., was the lessor. Under the normal circumstance, Brican America, Inc., as the lessor, would pay Brican America, LLC, for the equipment sold to the customer, and NCMIC would pay Brican America, Inc., when it purchased tranches of leases. Instead, business continued as though there had been no change. When Brican America, LLC, would make a sale to be financed by Brican America, Inc., Brican America, LLC, would invoice NCMIC for the equipment, and NCMIC would pay Brican America, LLC, the amount of the invoice. Brican

GOSSETT & GOSSETT, P.A. 4700 Sheridan Street, Building I, Hollywood, Florida 33021 • (954) 983-2828 • Fax (954) 983-2850

America, Inc., was never involved in these lease transactions.

Sales exploded (which was not surprising as word spread throughout the target markets, which by now included dentists, that one could get a nice 42" plasma television displaying educational slides to use in the waiting room for virtually free).

Ultimately in April 2009, a California salesperson had a twinge of conscience when he figured out that he had been participating in a Ponzi scheme. He contacted the president of NCMIC Finance Corp., and spilled the beans—the same beans which had been spilled in July 2008, adding that the Marketing Agreements were being used in connection with virtually every sale. After using the salesperson as a mole, NCMIC pulled the plug on the program in mid-April 2009, refusing to fund any more sales. NCMIC sued Brican America, Inc., demanding that Brican America, Inc., buy back each and every lease. The case was settled in February 2010 with Brican America, Inc., paying NCMIC a relatively paltry sum as attorneys' fees.

By the end of 2009, Brican America was out of money and notified its customers that there would be no payment of advertising fees starting in 2010. For its part, NCMIC demanded payment of each and every lease payment, and when lease payments were missed, NCMIC began suing customers in Iowa (even though the majority of the leases contained a choice of Florida as the situs for litigation).

The customers began communicating with each other, principally over the internet and at trade association meetings. They began coalescing into a group which was intent on fighting the attempts by NCMIC to enforce the lease agreements. Unknown to them, NCMIC had instructed one of its employees to eavesdrop on the communication among the customers.

Eventually, the leasing customers turned to The Leasing News for assistance. The Leasing News referred to customers to two attorneys. For those in Florida, or who would be litigating in Florida, the customers were referred to Ronald P. Gossett; for those in Iowa, or who would be litigating in Iowa, the customers were referred to Michael Witt.

Eventually, 1040 customers were represented by Gossett, and about 160 additional customers were represented by another Florida lawyer, David Charlip. Charlip filed suit in Florida state court, and that suit was eventually removed by NCMIC to federal court. Gossett filed suit in March 2010, in federal district court in Miami. Several more federal actions were filed by groups around the country, but those groups were transferred by the Judicial Panel on Multi-District Litigation to the federal district court in Miami. NCMIC had financed 1672 leases, so most of the leases issued by NCMIC were involved in the litigation.

The court found for NCMIC without a trial for those customers who had entered into a lease directly with NCMIC (finding that the Marketing Agreements did not modify the hell or high water provisions of the leases). That covered about 300 of the total group. The rest went to trial, and the court found for all of those customers, except 9, finding that Brican America had fraudulently induced the customers to enter into the lease agreements, and that NCMIC was not a holder-in-due-course of those leases because NCMIC had knowledge of the fraud—it did not benefit by sticking

GOSSETT & GOSSETT, P.A. 4700 Sheridan Street, Building I, Hollywood, Florida 33021 • (954) 983-2828 • Fax (954) 983-2850

its head in the sand.

The 300 customers customers who lost without a trial intend on appealing the final judgment when it is entered.

Gossett & Gossett, P.A. 4700 Sheridan Street, Building I, Hollywood, Florida 33021 • (954) 983-2828 • Fax (954) 983-2850