

# Leases

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## CASE LAW DEVELOPMENTS

### TRUE LEASE V. DISGUISED SECURITY INTEREST

The “true” lease/disguised secured transaction determination impacts significant rights of the putative lessor and lessee.<sup>1</sup> Courts making this determination are called upon to interpret U.C.C. section 1-203, which generally provides that the distinction between a true lease and a disguised security interest be “determined by the facts of each case.”<sup>2</sup> As stated in the Official Comment to section 1-203, the primary focus is on the economics of the transaction, and the intent of the parties is not a factor in determining whether a transaction is a

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1. “If one is a lessor as opposed to a secured seller, one has different rights on default, on lessee bankruptcy, in regard to federal, state and local taxes, and under state usury laws, and the difference even extends to the lessor’s and lessee’s balance sheet.” 2 JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 13-2, at 4 (5th ed. 2008). Among the more notable differences between the rights of a lessor, as compared to the rights of a secured creditor, is the requirement that a lessee in bankruptcy must decide whether to cure its lease default and abide by the terms of the lease or return the leased goods to the lessor. *See* 11 U.S.C. § 365 (2006). Among the other significant implications of this distinction is that, if a lease is deemed to be a disguised security interest and the lessor fails to file a U.C.C. financing statement with respect to the leased goods, the lessor may end up with an unperfected security interest in those goods. *See, e.g.,* Am. Bank of the North v. Jelinski, No. A09-740, 2010 WL 1753245, at \*3 (Minn. Ct. App. May 4, 2010).

2. U.C.C. § 1-203(a) (2011). U.C.C. section 1-203 sets forth certain criteria that distinguish a true lease from a security interest as well as other factors that do not distinguish between the two. *See id.* § 1-203(b) (setting forth criteria for the creation of a security interest); *id.* § 1-203(c) (setting forth factors that do not create a security interest). In those states that have not adopted the current version of Article 1 and still have in place the 2000 version of Article 1, these criteria and factors are found in section 1-201(37). U.C.C. § 1-201(37) (2000). The current version of section 1-203 “is substantively identical to those portions of former Section 1-201(37) that distinguished ‘true’ leases from security interests.” U.C.C. § 1-203 cmt. (2011) (“Changes from former law”). Courts and commentators have exhaustively examined these criteria, their relationship to each other, and the appropriateness of certain of the criteria. *See, e.g.,* Robert W. Ihne, *Nominal Additional Consideration: Only Nominally Helpful in Making the True Lease/Security Interest Distinction*, 29 J. EQUIP. LEASE FIN. 1, 2–7 (2011).

lease or security interest.<sup>3</sup> Courts apply two tests under section 1-203 to distinguish a true lease from a security interest. The first test is often referred to as the “bright line” test and is set forth in section 1-203(b).<sup>4</sup> To meet this test, the lessee cannot have the right to terminate the lease agreement,<sup>5</sup> and the transaction has to meet at least one of the four criteria in section 1-203(b).<sup>6</sup> If the lessee cannot terminate the agreement and any of the four criteria is met, the transaction creates a security interest.<sup>7</sup> If the “bright line” test is not met, the lease may still be deemed a secured transaction under the “economic realities” test, which requires an examination of the totality of the economics of the transaction to determine whether the lessor has a meaningful reversionary interest in the leased goods.<sup>8</sup> This determination is made as of the time that the parties entered into the transaction.<sup>9</sup>

Since last year’s survey, each of two bankruptcy courts interpreting North Carolina law applied the “bright line” test to hold that the contract was a disguised security interest, not a true lease, because the contract was not cancelable by the lessee and contained a nominal purchase amount of one dollar.<sup>10</sup> In *Brenner Financial, Inc. v. Cinemacar Leasing*,<sup>11</sup> a New Jersey court concluded that the lease was not terminable by the lessee and the lessee could purchase the leased goods at lease termination for an amount that was less than 1 percent of the total lease payments, an amount that the court deemed nominal.<sup>12</sup> The requirement under the “bright line” test that the lessee cannot have the right to terminate the lease prior to the end of the original term was addressed in *In re Cherry*.<sup>13</sup> Pursuant to a motor vehicle lease, the lessee “could terminate the lease before the end of the lease term if ‘you agree to pay an early termination fee and all outstanding payments due.’”<sup>14</sup> The lease amplified this obligation by

3. See U.C.C. § 1-203 cmt. 2.

4. See *In re Cherry*, No. 12-81454-JAC-13, 2012 WL 3252231, at \*2 (Bankr. N.D. Ala. Aug. 7, 2012) (describing the “bright line” test).

5. U.C.C. § 1-203(b). An early termination for these purposes means the lessee can walk away from the lease without incurring continuing financial obligations to the lessor. See *Cherry*, 2012 WL 3252231, at \*3 (finding that debtor could not “effectively terminate” her obligations under lease agreement because, although she could terminate lease agreement early, she could do so only by making a substantial payment).

6. U.C.C. § 1-203(b)(1)–(4); Robert Downey, Barry A. Graynor & Stephen T. Whelan, *Leases*, 67 *BUS. LAW.* 1245, 1246–49 (2012) (discussing recent cases involving those four criteria).

7. U.C.C. § 1-203(b).

8. See *In re Ladieu*, No. 07-10868, 2011 WL 748566, at \*15 (Bankr. D. Vt. Feb. 24, 2011).

9. U.C.C. § 1-203(e) (2011).

10. *In re Lichtin/Wade, LLC*, No. 12-00845-8-RDD, 2012 WL 3260315, at \*3–4 (Bankr. E.D.N.C. Aug. 8, 2012) (requiring, under the contract, the purchase of the goods for nominal consideration); *In re Miller Bros. Lumber Co.*, No. B-11-51405, 2012 WL 1601316, at \*2 (Bankr. M.D.N.C. May 8, 2012) (permitting, under the contract, the purchase of the goods for nominal consideration); see also U.C.C. § 1-203(b)(2) (“[T]he lessee is bound to . . . become the owner of the goods.”); *id.* § 1-203(b)(4) (“[T]he lessee has an option to become the owner of the goods for . . . nominal additional consideration . . .”).

11. No. A-4393-10T3, 2012 WL 1448048 (N.J. Super. Ct. App. Div. Apr. 27, 2012).

12. *Id.* at \*4. The aggregate lease payments were over \$160,000 and the purchase option price was \$106.05, an administrative fee of \$495, and other non-quantified charges. *Id.*

13. No. 12-81454-JAC-13, 2012 WL 3252231 (Bankr. N.D. Ala. Aug. 7, 2012).

14. *Id.* at \*1.

stating that “You may have to pay a substantial charge if you end this lease early. *The charge may be up to several thousand dollars.* The actual charge will depend on when the lease is terminated. The earlier you end the lease, the greater this charge is likely to be.”<sup>15</sup> The lessor argued that this early termination right meant that the lease did not qualify as a secured transaction under the “bright line” test, but the court cited to precedent that found that a lease with a similar early termination provision was “not subject to termination by the lessee”<sup>16</sup> because such termination would not relieve the lessee of its financial obligations under the lease.<sup>17</sup>

In *In re Waltman*,<sup>18</sup> the analysis of the agreement turned not on U.C.C. section 1-203, but on Tennessee’s rent-to-own statute.<sup>19</sup> The lessee entered into a month-to-month rent-to-own agreement that provided that, after thirty-six monthly payments, the lessee would become owner of the leased goods, without any additional payment or action by the lessee. “Under Tennessee law, a ‘Rental-purchase agreement’ is legally distinct from a lease or a simple purchase agreement,”<sup>20</sup> and the rent-to-own statute specifies that a “‘Rental-purchase agreement’ shall not be construed to be, nor governed by . . . [a] ‘security interest’ as defined in [U.C.C. section 1-201].”<sup>21</sup>

#### “HELL OR HIGH WATER” CLAUSES

In a finance lease, where the lessor is providing the financing that allows the lessee to acquire the goods from the supplier, the lessor expects the lessee to seek recourse from the supplier if there are any problems with the goods.<sup>22</sup> A corollary to this is that the lessor expects the lessee to pay under the lease regardless of any problems with the goods.<sup>23</sup> In other words, the lessee is to pay come “hell or

15. *Id.*

16. U.C.C. § 1-203(b) (2011).

17. *Cherry*, 2012 WL 3252231, at \*3 (citing *Auto. Leasing Specialists, L.L.C. v. Little (In re Little)*, 392 B.R. 222 (W.D. La. 2008)). *Compare Midwest Media Grp., Inc. v. Fusion Entm’t, Inc.*, No. 12-0189, 2012 WL 5541613 (Iowa Ct. App. Nov. 15, 2012). In *Midwest Media Group*, the lessee’s early termination right was subject to an early termination fee equal to 30 percent of the aggregate remaining lease payments. *Id.* at \*3. The district court concluded that the lease did not satisfy the “bright line” test because the lessee could terminate the lease early. *See id.* The appellate court affirmed because the lessee failed to argue before the district court that the 30 percent fee effectively prohibited an early termination under the economic realities test, and the appellate court refused to consider the issue for the first time on appeal. *Id.*

18. No. 12-03316-MAM, 2012 WL 5828717 (Bankr. S.D. Ala. Nov. 16, 2012).

19. TENN. CODE ANN. §§ 47-18-601 to -614 (2001) (“Tennessee Rental-Purchase Agreement Act”).

20. *Waltman*, 2012 WL 5828717, at \*2. The statute defines a “Rental-purchase agreement” as “an agreement for the use of personal property by a natural person primarily for personal, family, or household purposes, for an initial period of four (4) months or less (whether or not there is any obligation beyond the initial period) that is automatically renewable with each payment and that permits the consumer to become the owner of the property.” TENN. CODE ANN. § 47-18-603(7).

21. TENN. CODE ANN. § 47-18-603(7)(F). U.C.C. section 1-201(35) defines “security interest,” but specifies that “[w]hether a transaction in the form of a lease creates a ‘security interest’ is determined pursuant to Section 1-203.” U.C.C. § 1-201(35) (2011); TENN. CODE ANN. § 47-1-201 (2001) (paralleling the U.C.C.).

22. *See* U.C.C. § 2A-209 cmt. 1 (2011).

23. *Id.* § 2A-407 cmt. 2.

high water.”<sup>24</sup> U.C.C. section 2A-407 codifies this result by making irrevocable and independent the lessee’s obligation to pay in a finance lease that is not a consumer lease upon the lessee’s acceptance of the goods.<sup>25</sup> However, leases commonly include a contractual “hell or high water” clause to accomplish the same result, whether or not the contract is a U.C.C. finance lease.

*Financial Pacific Leasing, LLC v. Law Offices of David A. Sharp, P.A.*<sup>26</sup> involved a finance lease arrangement entered into among the lessor (whose rights under the lease were assigned to Financial Pacific Leasing, LLC (“FPL”)), lessees David Sharp and the Law Offices of David A. Sharp, P.A. (collectively, “Sharp”), and supplier ImageSource Inc. (“supplier”), whereby the lessor financed the acquisition of a photocopier and leased it to Sharp. The contract was a U.C.C. Article 2A “finance lease,” and thus Sharp’s promise to pay was irrevocable upon his acceptance of the goods.<sup>27</sup> Under FPL’s standard procedure, an FPL employee would phone the lessee to confirm acceptance and would subsequently issue a verification certificate; when phoned, Sharp stated that he saw a truck delivering a large box, so, according to FPL’s verification certificate, Sharp confirmed delivery and authorized FPL to make payment to the supplier. In fact, the photocopier was never delivered. When Sharp was unsuccessful in obtaining delivery, he stopped making rental payments. FPL sued and was granted summary judgment by the trial court on its breach of contract claim.<sup>28</sup>

On appeal, Sharp argued that (1) there was no consideration and (2) he had the right to cancel the lease because there was no acceptance of the photocopier. The court held that, because this was a statutory finance lease agreement, consideration took the form of mutual promises—the lessor’s promise to acquire the goods from the supplier and lease them to the lessee, and the lessee’s promise to pay rent—and thus there was consideration.<sup>29</sup> On the issue of acceptance, however, the court remanded for trial; Sharp’s statement to FPL that “the copier . . . was *just being delivered*” was insufficient to establish uncontroverted evidence of acceptance.<sup>30</sup> An issue of fact thus existed as to whether Sharp had accepted the copier.<sup>31</sup> The clear lesson of this controversy is that a signed, written certificate of delivery and acceptance continues to be a best practice for lessors and lenders. Practitioners should note that the court rejected Sharp’s argument that his purported acceptance did not comport with the definition thereof in U.C.C. section 2A-515 because, in the lease, he had expressly waived “all rights and remedies conferred by U.C.C. [sections] 2A-508 through 2A-522.”<sup>32</sup> This kind of waiver is increasingly common in commercial lease contracts.

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24. *Id.* § 2A-407 cmt. 1.

25. *Id.* § 2A-407.

26. No. 67539-7-I, 2012 WL 4857214 (Wash. Ct. App. Oct. 15, 2012).

27. *See id.* at \*2.

28. *Id.*

29. *Id.* at \*3.

30. *Id.* at \*3–4.

31. *Id.* at \*4.

32. *Id.* at \*3.

In *ACG Acquisition XX LLC v. Olympic Airlines SA*,<sup>33</sup> decided by the English High Court, lessor ACG Acquisition XX LLC (“ACG”) entered into an operating lease with lessee Olympic Airlines SA (“Olympic”) for the lease of a Boeing 737. Olympic signed a certificate of acceptance, the aircraft subsequently went into service, and soon thereafter, was grounded. During repair, Olympic found extensive damage leading to the suspension of the aircraft’s airworthiness certificate, so it ceased paying rent. ACG sued for payment of all unpaid and remaining rent, citing the “hell or high water” clause that made Olympic’s obligations after acceptance “absolute and unconditional.”<sup>34</sup> The court found for ACG.<sup>35</sup> Although the court accepted that the aircraft was not delivered in an airworthy condition,<sup>36</sup> Olympic had irrevocably and unconditionally accepted delivery by signing the certificate of acceptance, which satisfied the lease condition for the lessee’s unconditional obligations.<sup>37</sup> The High Court also held that Olympic was estopped by the language of the certificate of acceptance, which included a representation that the aircraft “complied in all respects with the condition required at delivery,”<sup>38</sup> from claiming that the delivery had not taken place in accordance with the lease’s terms.<sup>39</sup> Although this decision related to a lease governed by English law, the contract’s “hell or high water” clause, and the English High Court’s interpretation thereof, are consistent with customary U.S. clauses and “hell or high water” jurisprudence under the U.C.C. This decision further emphasizes the importance of obtaining the lessee’s signed certificate of delivery and acceptance.

#### VICARIOUS LIABILITY OF MOTOR VEHICLE LESSORS

In 2005, Congress enacted the Graves Amendment to preempt state laws that hold motor vehicle lessors vicariously liable for damages caused by their lessees, so long as the lessor is engaged in the business of leasing or renting motor vehicles, the vehicle was under lease at the time of the accident, and the lessor was neither negligent nor engaged in criminal wrongdoing.<sup>40</sup> The Graves Amend-

33. [2012] EWHC (Comm) 1070 (Eng.).

34. *Id.* at [4], [110].

35. *Id.* at [212].

36. *Id.* at [113]–[126].

37. *Id.* at [166].

38. *Id.* at [137].

39. *Id.* at [137]–[163].

40. Sponsored by Representative Sam Graves of Missouri, the amendment was enacted as part of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), Pub. L. No. 109-59, § 10208(a), 119 Stat. 1144, 1935–36 (2005) (codified at 49 U.S.C. § 30106 (2006)); Barry A. Graynor, Teresa Davidson, Edwin E. Huddleson, III & Stephen T. Whelan, *Leases of Goods*, 61 BUS. LAW. 1561, 1562 n.7 (2006). Very few states actually impose vicarious liability upon motor vehicle lessors. Among the more notable states that do impose such liability are New York and Connecticut, which explains the preponderance of Graves Amendment cases arising from those states. See CONN. GEN. STAT. ANN. § 14-154a (West, Westlaw through Public Acts approved on or before July 8, 2013 and effective on or before July 1, 2013); N.Y. VEH. & TRAF. LAW § 388 (Consol. 1992 & Supp. 2013). Courts have noted the preemptive impact of the Graves Amendment on those states’ statutes. See *Garcia v. Plaza Oldsmobile Ltd.*, 421 F.3d 216, 218 n.3 (3d Cir. 2005) (noting prospective preemption of N.Y. statute); *Rodriguez v. Testa*, 993 A.2d 955, 957–58 (Conn. 2010) (holding that, under the facts of the case, the Connecticut statute was preempted by the Graves Amendment).

ment does not apply to actions commenced prior to its effective date of August 10, 2005.<sup>41</sup> In *Yosi Trans, Inc. v. Toyota Motor Credit Corp.*,<sup>42</sup> the court addressed whether the putative lessor was in the business of leasing or renting motor vehicles and whether the vehicle in question was leased at the time the damages were alleged to have occurred. The court held that, where the lessor's lease collection manager had the "responsibility of reviewing files, car leases and managing account[s] for collection purposes,"<sup>43</sup> the lease collections manager's affidavit was sufficient to show that the lessor was engaged in the business of leasing or renting motor vehicles and that the motor vehicle was subject to a lease at the time of the accident.<sup>44</sup>

The Graves Amendment does not preempt a lessor's liability based upon its own negligence,<sup>45</sup> and several decisions since last year's survey have addressed this negligence exception within the context of summary judgment motions. Two decisions addressed claims that the lessor was negligent in its maintenance of the motor vehicle. The court in *Khan v. MMCA Lease, Ltd.*<sup>46</sup> dismissed the plaintiff's complaint regarding negligent maintenance of the vehicle, where the defendant did not engage in any vehicle maintenance and where the lease provided that lessee was solely responsible for all vehicle maintenance.<sup>47</sup> Plaintiff survived a motion to dismiss in *Aubry v. U-Haul Co.*,<sup>48</sup> where the lessor apparently failed to reply to plaintiff's claims of negligent maintenance, and the court rejected the lessor's argument that it was not the owner of the vehicle because the lessor was listed as a co-owner on the vehicle registration and the title owner was the lessor's title nominee.<sup>49</sup>

Two recent cases address negligent entrustment claims. The plaintiffs in *Whitmore v. American Dream Logistics, Inc.*<sup>50</sup> based their negligent entrustment claim on the lessor's failure to enforce the lease provision requiring drivers to submit trip records, which can be used to determine compliance with federal regulations limiting how long a driver can drive over specified time periods. Plaintiffs argued that, if the lessor had done so, the lessor would have known that the lessee's driver exceeded the maximum daily hours permitted by federal regulations. The district court granted the lessor's motion for summary judgment and noted

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41. 49 U.S.C. § 30106(c) (2006); see *Windmill Distrib. Co. v. Hartford Fire Ins. Co.*, 449 F. App'x 81, 82 (2d Cir. 2012) (noting effective date of Graves Amendment).

42. No. 66575/11, 2012 WL 5373477 (N.Y. Civ. Ct. Oct. 9, 2012).

43. *Id.* at \*7.

44. *Id.* The failure to offer such an affidavit is grounds to deny the lessor's summary judgment motion that the lessor's liability is barred by the Graves Amendment. See *Kao v. Alvarez*, No. 28960/08, 2011 WL 2811480, at \*2 (N.Y. Sup. Ct. July 6, 2011).

45. 49 U.S.C. § 30106(a)(2) (2006) ("negligence or criminal wrongdoing").

46. 954 N.Y.S.2d 595 (App. Div. 2012).

47. *Id.* at 596-97; see also *Zwibel v. Midway Auto. Grp.*, No. 14754/2010, 2011 WL 815698, at \*3 (N.Y. Sup. Ct. Mar. 7, 2011) (noting that, in the absence of some evidence of lessor's failure to maintain vehicle properly pursuant to a lease provision requiring lessor to maintain the vehicle or some active negligence on lessor's part, the negligent maintenance exception to the Graves Amendment should be cautiously applied).

48. No. 6113/2012, 2012 WL 5290270 (N.Y. Sup. Ct. Oct. 23, 2012).

49. *Id.* at \*1-2.

50. No. 4:11CV1170 RWS, 2012 WL 3872022 (E.D. Mo. Sept. 6, 2012).

that, under Missouri law, a “breach of contract alone does not give rise to a tort.”<sup>51</sup> The court also observed that the plaintiffs had “failed to point to any legal authority imposing a duty on [the lessor] to collect and/or monitor” the driver’s trip records.<sup>52</sup> The court also noted that, while the lease required the submission of trip records to the lessor, the lease did not require the lessor to inspect those records.<sup>53</sup> In fact, the lease stated that these records were being collected to address tax issues.<sup>54</sup>

In *Yosi Trans, Inc. v. Toyota Motor Credit Corp.*,<sup>55</sup> the plaintiff’s negligent entrustment claims also failed to survive a summary judgment challenge. Under New York law, a claim for negligent entrustment requires that “the defendant must either have some special knowledge concerning a characteristic or condition peculiar to the [person to whom a particular chattel is given] which renders [that person’s] use of the chattel unreasonably dangerous . . . or some special knowledge as to a characteristic or defect peculiar to the chattel which renders it unreasonably dangerous.”<sup>56</sup> The court found that the plaintiff offered no evidence that the lessor knew anything about the operator of the vehicle.<sup>57</sup> An affidavit from lessor’s lease collection manager offered uncontradicted evidence that the lessor “does not repair, maintain, service, operate, manage, supervise, control or inspect in any manner the vehicles that are leased through its authorized dealerships,”<sup>58</sup> so the lessor was not in a position to have special knowledge as to any characteristic or defect peculiar to the vehicle that would render it unreasonably dangerous.<sup>59</sup>

The Graves Amendment does not supersede state financial responsibility laws or statutes imposing insurance requirements on motor vehicle owners as a condition of registering and operating a motor vehicle.<sup>60</sup> In *Enterprise Rent-A-Car Co. v. Maynard*,<sup>61</sup> a vehicle rental company paid for the damages caused by the driver of a vehicle and sought reimbursement from the lessee.<sup>62</sup> The lessee had allowed another individual not in his employ to use the vehicle and this individual was involved in an accident while driving the vehicle. The injured party

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51. *Id.* at \*2 (quoting *Pippin v. Hill-Rom Co.*, 615 F.3d 886, 889 (8th Cir. 2010)).

52. *Id.*

53. *Id.*

54. *Id.*

55. No. 66575/11, 2012 WL 5373477 (N.Y. Civ. Ct. Oct. 9, 2012).

56. *Id.* at \*4 (quoting *Cook v. Schapiro*, 871 N.Y.S.2d 714, 716 (App. Div. 2009)).

57. *Id.* at \*6.

58. *Id.*

59. *Id.* According to the court, “the Plaintiff . . . asserted mere conclusory, and apparently, unsupported allegations of negligent entrustment. Not one scintilla of evidence [had] been alleged in the complaint or in the opposition papers, for that matter, to substantiate that [lessor] was negligent in any manner. It appear[ed] that [plaintiff had] no viable cause of action and merely attempt[ed] to create a cause of action. Even if [the] court were to accept as true the claims in the complaint, the Plaintiff must set forth some material facts to support negligent entrustment and not speculative claims that it hopes to uncover by disclosure.” *Id.*

60. 49 U.S.C. § 30106(b)(1) (2006). “Financial responsibility laws” is not defined in the Graves Amendment.

61. No. 2:11-cv-00047-JAW, 2012 WL 1681970 (D. Me. May 14, 2012).

62. *Id.* at \*1–3.

sued the driver and the lessor (but not the lessee). The lessor settled the case and paid the damages, which it argued it was required to do pursuant to a Maine statute. The lessor claimed that it was entitled to indemnification under the rental agreement. The lessee countered that the lessor had no legal obligation to pay the injured party's claim and that its payment had been the act of a volunteer. The Maine statute in question provides that a vehicle intended to be rented or leased cannot be registered or operated unless the lessor insures the vehicle or posts an indemnity bond in an amount at least equal to the minimum amount required under Maine law.<sup>63</sup> Although the court agreed with the lessor that the Maine statute was a financial responsibility law not preempted by the Graves Amendment,<sup>64</sup> it upheld the lessee's argument that this provision "does not create liability; it only mandates that a rental car company assure the state of Maine—by purchasing insurance or by filing a bond—that it has the wherewithal to pay claims for which it is liable."<sup>65</sup>

In *Lancer Insurance Co. v. Malco Enterprises of Nevada, Inc.*,<sup>66</sup> the district court considered the impact of the Graves Amendment on a Nevada statute. Defendant-lessor rented a truck to a moving company, and the truck was involved in an accident. The injured parties sought recovery from the plaintiff insurance company under its uninsured motorist coverage; the insurer settled and sought reimbursement from the lessor. The lessor argued that the Graves Amendment protected it from liability, but the plaintiff argued that the Graves Amendment did not apply as it was seeking recovery under a financial responsibility law that enabled a "short-term lessor"<sup>67</sup> of a motor vehicle to avoid joint and several liability for the damages caused by its lessee's negligent operation of the motor vehicle only if the lessor had met the minimum insurance requirements. Although the court did not provide much discussion of the Graves Amendment, it denied the defendant's motion for summary judgment, apparently indicating that the legislature's efforts to ensure the lessor provide the required coverage were not precluded by the Graves Amendment.<sup>68</sup> The court also initially denied the insurer's motion for summary judgment without any analysis with respect to the applicability of the Graves Amendment.<sup>69</sup> On rehearing, however, the court reversed itself, sustained the insurer's motion, and held that the lessor was liable up to the minimum coverage amounts under Nevada law.<sup>70</sup> While the court failed to address the Graves Amendment on rehearing as well, this decision

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63. *Id.* at \*10 (citing ME. REV. STAT. tit. 29-A, § 1611).

64. *Id.*

65. *Id.* The court also denied the lessor's claim for reimbursement from the lessee under the equitable subrogation doctrine. *Id.* at \*11–12.

66. No. 2:10-CV-588 TS, 2012 WL 830485 (D. Utah Mar. 9, 2012). Malco Enterprises of Nevada, Inc. did business as Budget Rent A Car. *Id.* at \*1.

67. A short-term lessor is "a person who has leased a vehicle to another person for a period of 31 days or less, or by the day, or by the trip." NEV. REV. STAT. ANN. § 482.053 (West 2012).

68. See *Lancer Ins. Co.*, 2012 WL 830485, at \*3.

69. *Id.* at \*3–4.

70. See *Lancer Ins. Co. v. Malco Enters., Inc.*, No 2:10-CV-588 TS, 2012 WL 2886708, at \*1–2 (D. Utah July 13, 2012).

indicates the court's view that the Nevada minimum insurance requirements statute is not preempted by the Graves Amendment.

### RIGHTS OF ASSIGNEES

In *Wells Fargo Equipment Finance, Inc. v. Titan Leasing, Inc.*,<sup>71</sup> defendant-lessor leased a locomotive to GerdaU Ameristeel U.S. Inc. ("GerdaU"). The locomotive was damaged in transit. Although the locomotive was delivered, GerdaU never used it or made any payments under the lease. Prior to the arrival of the locomotive at GerdaU's facility, the lessor entered into a nonrecourse note with Wells Fargo Equipment Finance, Inc. ("Wells Fargo") and granted to Wells Fargo a security interest in the lease and the locomotive. In the security agreement, lessor represented that, at the time of execution, there was no lease default and that the locomotive had been delivered and accepted by the lessee.<sup>72</sup> Wells Fargo subsequently learned of the contested delivery and that the lessee had not made any lease payments. Wells Fargo claimed breach of warranty and accelerated its note payments.

In granting summary judgment for the lessor, the court cited the lease, which stated that "Shipment of Locomotive to Lessee shall constitute Lessee's formal acceptance of the Locomotive and Lessee's acknowledgment that the Locomotive meets the Delivery Specifications."<sup>73</sup> Lessee GerdaU in essence accepted the locomotive when it was shipped prior to the execution of the security agreement.<sup>74</sup> Wells Fargo pointed to the U.C.C.'s definition of "Acceptance of Goods,"<sup>75</sup> but the court ruled that such extrinsic evidence was not to be considered, because the contract language was not ambiguous, expressly providing that shipment constituted formal acceptance and that any failure of the lessee to inspect prior to shipment would not invalidate that stipulation.<sup>76</sup> The court further opined that, at the time the lessor made its representations in the security agreement, there were no lease payments due, and hence the lessor did not breach the "No Lease Default" warranty.<sup>77</sup> Although this decision is comforting in its reliance upon the clear language of the lease contract, it underscores the wisdom of a lender requiring that a lessee (1) certify its receipt and acceptance of the goods, its performance of any existing obligations, and its lack of knowledge of any default by the lessor, and (2) consent to assignment of the lease.

### WARRANTIES

A lessor may choose to make express warranties in a lease to a lessee with respect to the various attributes of the leased equipment. However, without

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71. No. 10 CV 4804, 2012 WL 6184896 (N.D. Ill. Dec. 7, 2012).

72. *Id.* at \*1–2.

73. *Id.* at \*5.

74. *See id.*

75. *See* U.C.C. § 2A-515 (2011).

76. *Wells Fargo Equip. Fin.*, 2012 WL 6184896, at \*5–6.

77. *Id.* at \*6.

intending to do so, a lessor may be deemed, pursuant to certain provisions of U.C.C. Article 2A,<sup>78</sup> to have extended to a lessee certain implied warranties regarding the equipment. A lessor's implied warranties are similar to those extended by a seller to a purchaser of goods under U.C.C. Article 2.<sup>79</sup>

Lessors may effectively disclaim the implied warranties of merchantability and fitness for a particular purpose by written, conspicuous disclaimers, specifically referencing those warranties as being excluded,<sup>80</sup> and may disclaim a warranty against interference or infringement by a conspicuous, written disclaimer with sufficiently specific language.<sup>81</sup> Lessors may also exclude all implied warranties (but not the warranty against interference or infringement) by using expressions like "as is" or "with all faults."<sup>82</sup>

*Barcelona Equipment, Inc. v. Target Construction, Inc.*<sup>83</sup> considered the effectiveness of a lessor's disclaimer of warranties in connection with a lease of cranes.<sup>84</sup> The lessee asserted that it encountered various problems with the cranes after delivery, and that the lessor should be held accountable for breach of warranty. The lessor moved for summary judgment contending that the lease's "as is" language validly disclaimed all implied warranties regarding the cranes, including as to their merchantability and fitness for a particular purpose. The lessor was in the business of leasing cranes, and there was no assertion that the subject lease was an Article 2A finance lease.

The court described the disclaimer as having been "written in the same font used in the document and [without] a description concerning its contents . . . . Furthermore, unlike other provisions, there [was] nothing bolded or in capital letters as found in [other sections of the lease]."<sup>85</sup> The court, applying Article 2 instead of Article 2A,<sup>86</sup> noted that a disclaimer of implied warranties of fitness for a particular purpose must be "by a writing and conspicuous,"<sup>87</sup> and, in the case of the implied warranty of merchantability, must mention merchantability and, if in writing, be conspicuous.<sup>88</sup> The court questioned the enforceability of the lessor's disclaimer of implied warranties, noting there was nothing "conspicuous" about the disclaimer and observing it was "only one of two sections that [was] not preceded by a specific topic header and there [was] nothing to

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78. See U.C.C. § 2A-211(2) (2011) (warranty against infringement); *id.* § 2A-212(1) (implied warranty of merchantability); *id.* § 2A-213 (implied warranty of fitness for particular purpose).

79. See U.C.C. § 2-312(1) (2011) (warranty against infringement); *id.* § 2-314 (implied warranty of merchantability); *id.* § 2-315 (implied warranty of fitness for particular purpose).

80. See U.C.C. § 2A-214(2) (2011) (permitting exclusion or modification of the warranties of merchantability and fitness for particular purpose).

81. See *id.* § 2A-214(4) (permitting exclusion or modification of a warranty against interference or infringement).

82. See *id.* § 2A-214(3)(a).

83. Nos. 11-2183, 11-2295, 11-2983, 12-0496, 12-0787, 12-0838, 2012 WL 5866048 (E.D. La. Nov. 19, 2012).

84. *Id.* at \*1.

85. *Id.* at \*2.

86. For unknown reasons, the court referenced Article 2 (Sales), not Article 2A (Leases). See *id.* at \*4.

87. *Id.* (quoting U.C.C. § 2-316).

88. *Id.* (citing U.C.C. § 2-316).

set it apart.”<sup>89</sup> Because the court found there were material questions of fact at issue, it denied the lessor’s motion for summary judgment.<sup>90</sup>

#### END-OF-LEASE OPTIONS

In *Graphic Pallet & Transport, Inc. v Balboa Capital Corp.*,<sup>91</sup> the court applied the parol evidence rule to resolve a dispute about the end-of-lease option in a lease for a nailing machine and semi-truck. The lessee and the guarantors claimed that the lessor had stated that, at the end of the lease, they would be able to purchase the equipment for one dollar. The leases, however, provided for a fair market value purchase option. The court held that the leases were integrated documents, and that the alleged oral representation contradicted the writing, so it was excluded by the parol evidence rule.<sup>92</sup> The court also determined that no exceptions to the parol evidence rule applied.<sup>93</sup>

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89. *Id.*

90. *Id.*

91. No. 11 C 9101, 2012 WL 1952745 (N.D. Ill. May 30, 2012).

92. *Id.* at \*3–4.

93. *Id.* at \*5.

