

MARKS & WEINBERG, P.C.

**WHEN THE GOING GETS TOUGH...
THE TOUGH GET LAWYERS**

It IS time to talk to your lawyer

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With the much-discussed slow down in the leasing business, this might seem the wrong time to spend money on upgrading lease forms. Quite the contrary, it may be the perfect time to re-think and double check documents and procedures in order to be ready for the next wave of industry growth, minimize fraud losses and take advantage of the current competitive market.

Into the 21st Century

Currently, somewhere between two-thirds and three-fourths of all leases closed in this country are buck-outs (whatever your favorite term). This hoary-headed hybrid is sliding toward extinction with the increased popularity of the equipment finance agreement.

While there is probably always going to be a place for leases with \$1 or bargain purchase options, we recommend lessors (1) consider whether an EFA offers additional benefits for motor vehicles and other dangerous equipment financings, make more sense from a legal perspective and are better understood by customers and (2) if they are going to retain buck-out leases, devise language so that it is clear to the increasingly-aggressive (and no better educated) state tax auditors and judges looking for a way to benefit lessees and third party claimants understand what is really intended. We have had success with state auditors by inserting language in a buck-out lease to the effect that a financing, and not a true lease is intended. Remedies, property tax provisions and other lease language should also be adjusted for fit in an EFA.

Master Leases

This, too will seem like heresy, but sooner or later we are all going to re-think the Master Lease/Schedule format we have been using for years. We have created a couple of new form-types for clients that will accommodate not only true leases and buck-out leases but EFAs and various progress-payment variations.

In fact, it is time for lessors and their lawyers to consider whether signing a "master lease" really makes any sense. With careful drafting, it should be possible to have the parties incorporate by reference summary terms applicable to all transactions that could be posted on a website, handed to the customer in a printed, small-type form or simply appended to the first schedule.

Terms incorporated by reference into most Schedules should be as standardized (and non-negotiable) as the terms of use of credit cards. A new format would be more attractive to most customers, cut down on unnecessary and unproductive negotiation and ultimately give a competitive and financial advantage to those willing to spend a little time and money up front to create new forms and push the envelope in favor of better procedures.

And while we are on the subject, anyone using a lease with multiple addenda to address various structure options might want to consider investing in one of the many lease production programs out there that can insert proper language and offer the parties a simplified document package.

Lease Review/Audit

Many lessors are audited every year by their accountants. It goes without saying that very few ever invite their lawyers to look through their files and follow up with concrete recommendations or training. Many of us have been saying "we are too busy" for years. If that is no longer true, now is the time to select randomly 10-20 files and have at it.

A good legal audit will check for things like:

- Proper execution (which includes authorized officers signing);
- UCC filings to create PMSI protection;
- Proper insurance certificates;
- Full packages of documents including good equipment description;
- Original Vendor Invoices.

The last of these brings about an important point: Many portfolios include fraudulent deals that have been carried by customers who arranged unsecured financings with every intention of paying off their "loans". Some of these will fail, revealing the fraud. Moreover, bad times breed bad deals and fraud is definitely on the upswing. If ever there were a time to institute procedures to protect against fraud and to educate staff in fraud prevention it is 2009.

There is much more to be written on this topic, such as circulating a checklist of "must-have" and "should-have" lease provisions, making sure the documents cover not only Article 2A but revised Article 9 (and there is no excuse for this not being the case (after

all this time) and generally upgrading the language. Money is short and the temptation strong to minimize legal costs, but Santayana's famous quote "Those who cannot learn from history are doomed to repeat it" is as true now as it was in the last century. While many of us coast along with sub-standard documentation and procedures in good times, that is not the case when things get tough. Like it or not, that is when smart lessors call in their lawyers.

Barry Marks and Kenneth P. Weinberg are founding partners of Marks & Weinberg, PC. They have significant experience in dealing with virtually every type of equipment and facility lease financing, have participated in leasing financings for more than a billion dollars of equipment and are recognized throughout the industry. If you would like more cases or articles on leasing, or have any questions or comments about this Article or other leasing issues, please visit www.lease lawyer.com or contact Barry at 205-251-8303 or Ken at 205-251-8307.

