

# MARKS & WEINBERG, P.C.

## Allco Enterprises, Inc. v. Goldstein Family Living Trust 51 P.3d 1275 (Ct. of Appeals, Oregon, 2002)

When the lessee defaulted under two equipment leases, the lessor took possession of the equipment, had it sold at auction, and then brought an action against the lessee and its guarantor to recover the deficiency—i.e. the difference between the total amount due under the leases less the net proceeds from the auction of the equipment. The lessee and its guarantor claimed that the sale of the equipment was not commercially reasonable and that the lessor therefore lost its rights with respect to any deficiency.

It should be noted that the requirement that any sale of leased assets upon a lessee default be commercially reasonable is part of Article 9 of the Uniform Commercial Code (the “UCC”). That article governs loans—sometimes referred to as “leases intended as security”. True leases are governed by Article 2A of the UCC and are not subject to the same standard. In this particular case, the terms of the leases explicitly required any disposition to be commercially reasonable. Since it was already a contractual requirement, the Court did not need to address whether the lease was a true lease or a loan.

At trial, the lessee and its guarantor produced expert testimony from an auctioneer outlining several actions that caused the expert to opine that the sale was not commercially reasonable. The lessor did not produce any expert testimony but did cross-examine the lessee’s expert. The Trial Court found the sale to be commercially reasonable and the lessee appealed.



The Appellate Court provides a nice description of the UCC's general definition of a commercial reasonable disposition. However, the Court also noted that the issue of commercial reasonableness must be decided on a case-by-case basis. According to the Court, the testimony of the lessee's experts that the disposition of the equipment was commercially unreasonable "was not so clear, convincing, plain and complete that by rational process an intelligent mind could not reject it." As such, the Court upheld the determination of the Trial Court that the sale was commercially reasonable.

This case provides a clear framework that allows the reader to understand the requirement and importance of a commercially reasonable disposition. Equally important, it serves as a warning to all lessor counsel that they should try to avoid any language in leases that may contractually require a commercially reasonable sale or at least limit the language to leases that provide bargain or mandatory purchase options. Since the issue of commercial reasonableness is decided on a case-by-case basis and can lead to costly litigation, lessors should only have to address it in connection with loans. Even then, it is beneficial to place the additional burden on the lessee of convincing the court that the lease is, in fact, a loan covered by Article 9 of the UCC.

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