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## DISPATCHES FROM THE TRENCHES

### Unfamiliar Judges can Lead to Poor Decisions

By Kenneth P. Weinberg

Many lawyers and businessmen alike spend significant time and effort tracking proposed bills that may affect our industry and watching various trends which may be of import. In this column, I hope to add case law to this "due diligence" effort, since cases are an excellent way to highlight various legal and practical issues encountered by people in the business. If you would like more cases or articles on leasing or have any questions or comments about these dispatches from the trenches, please visit [leaselawyer.com](http://leaselawyer.com) or contact Ken Weinberg (205.250.8344) or Barry Marks (205.250.8333).

*Winthrop Resources Corp. v. B. Dalton Booksellers, Inc.*, 2002 WL 76374 (Minn. App. 2002)

In addition to containing an interesting discussion of the legal doctrine of anticipatory repudiation, this case provides a few nice examples of problems that can arise when aggrieved parties try to ride out disputed leases.

B. Dalton Booksellers, Inc. ("Lessee") leased computer equipment from Winthrop Resources Corporation ("Lessor") under multiple schedules. When a dispute arose as to the existence of a purchase option, Lessee and Lessor settled the resulting lawsuit by having Lessee purchase some

of the equipment and continue leasing the rest. When Lessee notified Lessor of its intention to return the equipment, Lessor claimed that all returned equipment would have to be identified by serial number, that it would not accept return of equipment without such identification and that the lease would continue to renew until Lessee complied with the foregoing requirements.

In a second suit, the Court found for Lessee, holding that the lease did not require serial number identification and that Lessor breached its obligations under the terms of the lease by failing to accept return of the equipment. After this holding, Lessee retained the equipment and made several more payments under the leases before stopping payments altogether (without giving a termination notice).

Lessee argued that Lessor's previous refusal to accept return of equipment without serial-number-identification constituted an anticipatory repudiation which relieved Lessee of its obligations under the lease until receipt from Lessor of adequate assurances that Lessor would accept the equipment. The Court rejected this argument, holding that there was already a binding judicial determination that serial number identification was not required and that Lessee therefore had no legal basis to be concerned with whether Lessor would accept return. In other words, the Court's earlier ruling regarding serial number identification and the Lessee's ability to enforce that ruling through judicial process severely outweighed any uncertainty that would result if Lessor still refused to accept return. Under similar reasoning, the Court held that Lessee did not have reasonable grounds for insecurity about Lessor's accepting return of the equipment and therefore was not entitled to adequate assurances from Lessor.

Moreover, the Court held that Lessee's payment of rent, after Lessor was found to be in breach for failing to accept return of the equipment, resulted in its waiving that breach. The Court therefore held Lessee liable for rent until it gave the proper end of term notice and returned the equipment. The court also held that Lessor was not liable for any failure to mitigate Lessee's damages since both parties had equal control over damages and since "there is authority that Lessor need not repossess goods to satisfy the duty to mitigate."

*In re Nygaard*, 2001 WL 1740003 (U.S. Bankr. D. Wyo.)

This case analyzes which default notices must be given to debtors under the prior version of Article 9 of the Uniform Commercial Code ("Old Article 9") and provides a nice framework for understanding the wording changes under the revised version of Article 9 ("Revised Article 9"). The key point to remember is that *guarantors are entitled to the same notices as a lessee when it comes to disposing of collateral.*

In re Nygaard involves Old Article Nine (Section 9-504) and its requirement that "debtor" receive notice prior to disposition of collateral. General Electric Capital Corporation ("GECC") had entered into a lease agreement with N.A. Corporation (the "Lessee") and the credit package included an individual guaranty. When the Lessee defaulted, GECC sent, only to the Lessee, a "Notice of Private sale of Collateral Under Section 9-504 of the Uniform Commercial Code." GECC subsequently disposed of the collateral. When GECC proceeded against the Guarantor for a deficiency judgment, the guarantor successfully argued that the deficiency claim was barred since GECC failed to provide Notice of Private Sale to the Guarantor.

As noted in this case, there was a split amongst the courts interpreting Old Article 9 as to whether guarantors and other secondary obligors were entitled to such notices. Revised Article Nine (Section 9-611(c)(2)) eliminates this split by taking the majority approach expressed by the court in Nygaard.

*First Union Commercial Corporation v. Medical Management Services*, 2000 WL 33711037 (D. Ct. Pa.)

This case involves the enforcement of a forum selection clause contained in a guaranty. When the lessee stopped making payments, the lessor brought suit in the State of Pennsylvania against a guarantor of lessee's obligations. The guarantor argued that the Pennsylvania court lacked personal jurisdiction despite the fact that the guaranty had a forum selection clause which read: "Guarantor agrees that any actions or proceeding to which Lessor is a party [can be brought in] any state or federal court having situs within the commonwealth of Pennsylvania and that said court shall have jurisdiction thereof."

The court noted that the general rule was that, if a guarantor or lessee objects to personal jurisdiction, the lessor must demonstrate contacts sufficient with the forum state to justify the assertion of personal jurisdiction. However, when a guaranty or lease contains a forum selection clause, the burden imposed by the general rule shifts, and the guarantor or lessee must show that (1) the parties did not freely agree to the forum selection clause, or (2) the enforcement of the clause would be unreasonable. The court explains that the shift in burden stems from the fact that one's right to object to personal jurisdiction is waivable.

The court further noted that a forum selection clause would be considered "unreasonable" *only if* its enforcement would, under the circumstances existing at the time of the litigation, "seriously impair" the litigant's ability to pursue his claims or defenses. Mere inconvenience or additional expense would not constitute unreasonableness. The court also noted that federal courts have applied similar standards in this type of situation.

In finding that it had personal jurisdiction over the guarantor, the court rejected the guarantor's claim that agreeing to jurisdiction did not necessarily mean agreeing to "personal jurisdiction" unless those words were specifically mentioned. The court reasoned that a forum selection clause was meaningless without an implied consent to personal jurisdiction because individuals have no right to confer subject matter jurisdiction to courts by consent.

***Winthrop Resources Corporation v. North American Lighting***, 2002 WL 334410 (Minn. Dist. Ct. Minn.)

This case highlights the importance of understanding the commencement date of your lease and the importance of being careful with interim or revised acceptance certificates. This case also provides a valuable lesson to lessors relying on renewal provisions when engaged in disputes with lessees.

North America Lighting ("Lessee") leased equipment from Winthrop Resources Corporation ("Lessor") under multiple schedules. The term of the leases commenced on the first of the month

immediately following the installation date of all the equipment in the Schedule. As is common in the industry, the installation date is the date that the Lessee accepts the equipment by execution of an Acceptance Certificate. Tying the commencement date to the acceptance of the equipment strengthens lessors' position in court in the event a lessee later claims the equipment is defective.

When equipment was originally delivered to Lessee on May 21, 1997, Lessee noted that some of the equipment was missing and signed an Acceptance Certificate showing only that equipment which was delivered rather than all equipment on the schedule. The remainder of the equipment was never delivered, and Lessor and Lessee subsequently reissued a revised Schedule covering the equipment that was actually delivered. The date of the revised Schedule was June 19, 1997. A new Acceptance Certificate was never executed, but Lessor put an "R" on the one which was executed with the earlier schedule.

A dispute later arose as to whether Lessee's end-of-term notice to Lessor was given at the right time. It was provided on February 17, 2000, and was supposed to be not less than 120 days prior to the termination of the Lease Term. Lessor claimed that the lease commenced on June 1 (i.e., the first day of the month following execution of the Acceptance Certificate). Lessee claimed that the lease commenced on July 1 (i.e., the first day of the month following the date the Revised Schedule was executed).

The court found for Lessor. It noted that the express terms of the lease clearly tied the commencement date to the date that the Acceptance Certificate was executed. The court viewed the date that the revised Schedule was executed to be irrelevant. It also rejected Lessee's argument that Lessor should not have tampered with the Acceptance Certificate by placing an "R" on it, stating "[t]he certificate's authenticity is not at issue. [Lessee] does not dispute that it sent the certificate . . . and [Lessor] admits that it added the letter 'R' to the certificate.

Nevertheless, the case was not a complete victory for Lessor. After the dispute broke out between Lessor and Lessee, Lessor failed to designate a time for the return of the equipment. Lessor obviously intended to collect renewal rent until the dispute was settled and Lessee returned the equipment. The court held that since Lessor did not designate a return place and

time, as required by the Lease, Lessor was not entitled to a complete windfall of payment for the entire time Lessee was in possession.

*Amba-An v. Arias-Turecious,*

Under Florida's dangerous instrumentality doctrine, a true lessor of a motor vehicle can be held strictly liable for the negligent operation of the vehicle by the lessee. There is a statutory exemption which protects true lessors from the dangerous instrumentality doctrine if liability insurance is in place. Lessors who have entered into a conditional sales contract with a lessee (instead of a true lease) are not subject to the dangerous instrumentality doctrine.

Plaintiff in this case was injured in an automobile accident and brought a personal injury action against the driver of the other vehicle (Bernardo Arias-Turecious), the lessee of the vehicle (ACM Equipment & Landscaping, Inc.) and the lessor of the vehicle (LTI Vehicle Leasing Corporation). The lease contained a one-dollar purchase option and, although the lessee was required to maintain liability insurance, the lessee breached its obligations and no such insurance was in effect.

The District Court of Appeals held, as a matter of law and despite the nominal purchase option, that the lease was a "true-lease" and that the lessor could be held liable under Florida's dangerous instrumentality doctrine. In support of its findings, the court noted that the agreement was entitled "Commercial Vehicle Lease Agreement" and that the lessor retained title to the truck. Additional facts leading to the court's conclusion included the fact that: (1) interest was not specifically mentioned in connection with monthly payments; (2) the lessee could not assign its interest in the lease without the lessor's written permission, but the lessor could assign its interest at will; (3) the lease required the lessee to carry liability insurance in the amount required by statute to exempt the lessor from financial responsibility; (4) the lessee was required to display signs, if asked, indicating that the lessor owned the truck; and (5) the lessee was required to return the truck in good operating condition.

Many of those familiar with the leasing industry consider this case to be an extremely poor decision. Fortunately, it has not subsequently been cited by other courts. Unfortunately, it has not been explicitly overruled and is technically applicable law in the state of Florida. Regardless, the case serves as a strong warning to equipment lessors that there are still plenty of judges who are not familiar with the leasing industry and this unfamiliarity can lead to unfortunate results.

Kenneth P. Weinberg is a founding partner of Marks & Weinberg, PC. He and co-founder, Barry Marks, 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. Weinberg has written *Dispatches from the Trenches* since 2002, routinely writes articles in a variety of equipment leasing and financing journals, and has participated in numerous seminars on equipment leasing issues. If you would like more cases or articles on leasing, or have any questions or comments about this column or other leasing issues, please visit [www.leaseawyer.com](http://www.leaseawyer.com) or contact Weinberg at 205-251-8307.



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