

MARKS & WEINBERG, P.C.

Ace Leasing, Inc. v. Boustead

55 P.3d 371 (Mt., 2002)

Ace Leasing, Inc. (Lessor) entered into an equipment lease with Advantage Group, Inc. (Lessee). The lease contained a fixed-price-purchase option that was equal to an amount that exceeded ten percent of the cost of the equipment at the inception of the lease. Lessee's obligations under the lease were guaranteed by Mary Boustead (Guarantor). Lessor did not file a financing statement covering the leased equipment. When Lessee defaulted, Lessor tried to recover from Guarantor but Guarantor claimed that the original obligation of Lessee had been materially altered in a manner that increased her risk and that she was therefore exonerated from liability pursuant to §28-11-211 of the Montana Code.

The Court agreed, holding: (a) that the lease constituted a loan, rather than a true lease, and (b) that Lessor's failure to properly perfect a security interest in the leased equipment materially altered the risk born by Guarantor. The unusual part of the opinion is the Court's analysis of whether the lease was a true lease or a loan. The Court noted that, contrary to the terms of the lease, Lessor sent money directly to Lessee and allowed Lessee to pay the vendor. The Court also noted that none of the purchase orders mentioned Lessor or had been assigned to Lessor. The Court relied on provisions in the Uniform Commercial Code (the UCC) which govern the passage of title and which define the term lease. According to §2-401 of the UCC, title to goods passes to the



buyer at the time and place at which the seller completes performance with reference to physical delivery of the goods.ö As such, the Court held that title passed directly to Lessee. The UCC definition of "lease" is a "transfer of the right to possession of goods for a term in return for consideration.ö According to the court, "[a] lessor cannot transfer the right of possession of property unless the lessor first has title to the property [and as] a consequent of [Lessor] failing to obtain title by acting in conformance with the [lease (which specified that Lessor would pay the vendor directly),] the transaction effectively became a loan agreement between the parties.ö

This case serves as a reminder that lessors should pay vendors directly for equipment. It is also advisable to have the vendor invoice the lessor directly. If an inexperienced vendor is wary of invoicing the lessor for equipment delivered pursuant to a purchase order between it and the lessee, lessors can ease the vendor's objection by making use of a purchase order assignment. However, lessors should be careful that the purchase order assignment does not impose any inappropriate obligations upon the lessor.

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