MARKS & WEINBERG, P.C.

In re Triplex Marine Maintenance, Inc.

45 UCC Rep. Serv.2d 977 (Bankruptcy Ct., Texas, 2000)

Triplex Marine Maintenance ("Lessee") was in need of immediate cash and entered into two sale-lease back transactions in which it sold substantially all of its assets to CMC ("Lessor") and then immediately leased the property back from Lessor. The purchase option in the lease was for the greater of fair market value or 10% of the equipment cost. Lessor perfected its security interest in five vehicles in accordance with the applicable certificate of title law but did not file UCC Financing Statements with respect to the rest of the equipment subject to the lease.

Lessee filed for bankruptcy and Lessor sought relief from the automatic stay so it could repossess the property. The Trustee in bankruptcy objected with respect to all equipment other than the five vehicles, arguing that the lease was a financing arrangement instead of a true lease and that Lessor, who merely held an unperfected security interest that was subordinated to the Trustee, had no interest that was entitled to adequate protection.

This case serves as a valuable reminder as to why precautionary UCC Financing Statements should be filed even when lessors reasonably believe the leases in question are true leases. The Trustee, who notably refrained from objecting to any relief from the stay with respect to the vehicles in which Lessor had perfected its security interest, would almost certainly not have raised any objection at all with respect to the remainder of the assets had Lessor properly perfected its interest.

In analyzing whether the lease was a true lease or a disguised security interest, the Court utilized the objective standard expressed in Section 1-201(37) of the Uniform Commercial Code (the ñUCCò) to determine whether the parties anticipated that any significant value would remain in the leased property for return to Lessor at the end of the lease term. The Court first noted that it would consider a 10% purchase option to be nominal. It then undermined a long-standing belief by many in the equipment leasing industry that the inclusion of language that allowed for the purchase option to be the *greater of fair market value* and 10% alleviates the problem. The Court noted: "such a mechanical application of [the UCC definition of "security interest"] without recognition of the economic realities of the transaction belies the very standard that [the UCC] seeks to impose."

The Court applied what it referred to as a "sensible person" test. Under that test "if only a fool would fail to exercise the purchase option, the option is generally considered nominal and the transaction characterized as a disguised security agreement." In the case at bar, Lessee has leased substantially all of its business assets. The Court determined that Lesseeõs only meaningful option was to purchase the equipment. It only other options were to: (1) renew the lease (at substantial fees), (2) pack up and return all equipment and engage in a comprehensive program to locate and purchase replacements for its entire asset portfolio; or (3) return the equipment and cease its business activities entirely, since it would have no assets with which to operate its equipment. Since the only sensible choice was to purchase the equipment, the Court held the lease to be a disguised security interest.

Marks & Weinberg, PC is a law firm with significant experience in dealing with virtually every type of equipment and facility lease financing. The lawyers of the firm 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 leaselawyer.com or contact Barry Marks at 205.251.8303 or Ken Weinberg at 205.251.8307.