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New York Career Guidance Serv. v. Wells Fargo Fin. Lease 2005 WL 1252315 (N.J. Super. Ct. Law Div., May 2, 2005)

This is a scary case in many respects. It involves a lease by a New York not-for-profit corporation (öLesseeö) of computer equipment for its office. The lease was assigned by the Vendor-Lessor to Wells Fargo.

One provision of the lease stated, "[i]f any payment is not made when due, you agree to pay a late charge at the rate of ten percent (10%) of such late payment or up to \$50.00, at lessor's discretion." The monthly payments under the particular lease in question were only \$53.64, but when Lessee was late on several payments Wells Fargo, seeking to maximize profit, charged Lessee a \$50 late fee on each late payment. Lessee stopped making payments and commenced an action under the New Jersey Consumer Fraud Act (NJCFA), which makes it unlawful to use "any unconscionable commercial practice, deception, fraud, false pretense, false promise, [or] misrepresentation í in connection with the sale or advertisement of any merchandise í ." Lessee also sought class action certification.

One of the most conceptually disturbing aspects of the court's decision that should trouble lessors and funders is that the court doesn't discuss anywhere in the case why a consumer protection act should apply to a commercial transaction. This sort of öcreeping consumerismö can also be seen in other cases too where New Jersey courts have applied



consumer protection laws in some business transactions as well, depending on the facts of the case and such factors as the sophistication and the bargaining power of the purchaser. For more, see *Bradstreet Personnel Group, Inc. v. Wells Fargo Financial Leasing, Inc.*, No. BER-L-3212-03, 2005 WL 1252333 (N.J. Super. Ct. Law Div., May 2, 2005).

A less disturbing, but still noteworthy, aspect of the case was that the court rebuffed Wells Fargo's argument that it was not liable since assignment language in the lease stated that the Lessee would "not assert against the [Assignee of this Lease] any claims, defenses or set-off that you may have against the supplier." The court held that Lessee's claims were made against Wells Fargo for Wells Fargo's decision to charge the \$50 late fee, not for the supplying company's activities, and as such Wells Fargo was not immune to the action. Although there is a reasonable basis for the court's decision on this issue, funders are never happy to see courts so easily push aside language of this sort in the assignment provisions of a lease.

Wells Fargo also received bad news on the outcome of the case. Although Wells Fargo prevailed on one argument, it lost on the other. On the positive side, the court noted that the test for a deception violation of the NJCFA is whether the defendant's conduct has the capacity to mislead the average consumer. The court held that Wells Fargo's conduct did not have the capacity to mislead the average consumer as the contract terms were explicit and clear, and as such, summary judgment for Wells Fargo was granted on these counts.

However, on the negative side, the court noted that test for the conscionability of late fees under the NJCFA is whether the late fee provision is reasonable under the totality of the circumstances. Even though Lessee introduced zero evidence that the late fees were unreasonable, the court stated that "the math does not lie: the equivalent interest rate of a \$50 late fee on a \$53.64 installment is greater than 90% [and that] is enough to survive summary judgment by strongly suggesting that the presumption of reasonable is likely to be overcome at trial."



To make matters worse, the court certified a class (although a more limited one) for a class action lawsuit against Wells Fargo for this practice.

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