



EQUIPMENT LEASING AND FINANCE ASSOCIATION

Financing a Growing Economy

# Enforcement and Workout Issues in Private Label Transactions

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# Risk of Defense of Payment

## Where Assignor Services:

- UCC 9-406(a)- Customer may discharge its obligation by paying the assignor until it receives notification of assignment. After receipt of the notification, the account debtor may discharge its obligation by paying the assignee and may not discharge the obligation by paying the assignor.
- Assignee has no direct cause of action against a customer who paid off the contract by payment to the originator/assignor if the Lessee was not given notice of assignment prior to making the payment.
- Cases confirm this risk: e.g. Frankford Trust Company v. Stainless Steel Services, Inc., 327 Pa. Super. 159, 475 A.2d 147 (Pa. Super. Ct. 1984).

# Holder in Due Course and Finance Lease Status

**UCC Art 9** - Assignee takes free of debtor's claims against assignor if agreement between assignor and debtor so provides and assignee takes the assignment: 1) for value; 2) in good faith; 3) without notice of certain claims and defenses.

**UCC Art 2A** - Finance Lease Hell and High Water protections - Lease is effective and enforceable by assignees; and not subject to cancellation, termination, modification, repudiation, excuse or substitution without the consent of the party to whom the promise runs.

•To qualify: Lessor and Supplier must be separate entities

# Risk of Losing HDC or Finance Lessor Status:

## Good Faith/Without Notice? Separate?

Lessee may argue that the relationship between the parties is so close that the knowledge or acts of Assignor is imputed to Assignee or they are not “separate”, shifting burden to prove “HDC” or Finance lease status.

Private Label elements (party acting as agent for the other, use of forms supplied by the other, etc) may support denial of “HDC” or Finance Lease status. E.g. Vasquez v. Superior Court, 484 P.2d 964, 4 Cal.3d 800 (Cal. 1971).

# FORUM SELECTION CLAUSES

- In Non-Notification deal consider where the Assignee can bring suit in the event of a default.
- “floating” forum selection clause?
- Absence of an identifiable forum may subject floating forum to attack and render the clause unenforceable.
- If you know the identity of the Assignee, designate the Assignee’s forum without specifically identifying the Assignee.

# REAL PARTY IN INTEREST

- FRCP Rule 17, and many state laws - “every action shall be prosecuted in the name of the real party in interest.”
- If the Creditor brings suit using the Private Label name Customer may raise Rule 17 as a basis for dismissal.
- The Private Label Agreement should require notice of any actions that may lead to litigation and require the party using the Private Label name to break Private Label and identify itself to the Lessee prior to bringing suit against Lessee.
- Obtain documentary evidence of assignment and attach it to the Complaint to avoid motions based on the failure to provide evidence of assignment.

# JOINDER OF NECESSARY PARTIES

- FRCP Rule 19 and the laws of many states - failure to join all necessary parties is a defense to the continuation of the civil action until such parties are joined.
- Defendants often argue that the Originator/Assignor is a necessary party, and move to dismiss in its absence.
- Dismissal rarely granted, but motion will result in increased fees and require disclosure of details regarding the Private Label relationship.
- Courts are not familiar with these transactions and tend to become suspicious when one party acts in the name of another without revealing their identity.

# ISSUES OF EXPOSURE

- Assignee may be sued by Lessees and other parties harmed by the conduct of the Assignor who services in Assignee's name.
- Vendor may be sued by Lessees and other parties harmed by the conduct of the Lessor who originates using a "vendor-like" d/b/a
- To limit exposure the Private Label Agreement needs to clearly set forth the actions that may be taken on your behalf and expressly prohibit any other actions.
- Need indemnification provision, where party using your name indemnifies, defends and holds you harmless from any suits, judgments, etc. arising out of any actions taken in your name.
- Need to address who has the right to select counsel and who makes decisions as to litigation and defense strategies.
- Perform ongoing due diligence on solvency, background and reputation of the other party to your Private Label Agreement.