



Equipment Leasing Association

Work Out and Restructuring Agreements

How to get the most out of a bad situation

Pamela Corrie
GE CAPITAL SOLUTIONS
44 Old Ridgebury Road
Danbury, CT 06810
pamela.corrie@ge.com
203-431-6221

Anthony L. Lamm
LAMM, RUBENSTONE,
& DAVID, LLC
3600 Horizon Boulevard,
Suite 200
Trevose, PA 19053-4900
alamm@lrtd.com
(215) 638-9330

Susan G. Rosenthal
SHEPPARD, MULLIN, RICHTER
& HAMPTON, LLP
30 Rockefeller Plaza, Suite 2400
New York, NY 10112
srosenthal@sheppardmullin.com
(212) 332-3818

Equipping Lease Professionals for Success

L. Litigation or Involuntary Bankruptcy

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Look before you leap! Weigh the costs/benefits of litigation/involuntary bankruptcy filing and evaluate the collectability of any judgment and the value of any collateral before making the investment.

- Evaluate likelihood of success.
- Question foreseeable impact of external events:
 - Service vendor status;
 - Industry strikes or seasonality.
- Determine potential claims that could be asserted against Lessor.
- Analyze strength of defenses and enforceability of documents/liens.
- Uncover outrageous facts or conduct (Eureka Broadband Corporation v. Wentworth Leasing Corporation).
- Evaluate the law and temperament of the jurisdiction in which litigation will go forward.
- Evaluate relative speed of litigation inside and outside of bankruptcy system.



Equipment Leasing Association

III. Financial Due Diligence

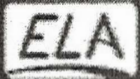
Performing preliminary financial evaluation of whether lessee is capable of repaying lease balance subsequent to restructure or payment forbearance is essential prerequisite to entering into Restructuring or Workout.

- Review current financial statements and cash-flow projections.
- Engage outside consultants if necessary to test accuracy of financial data.
- Perform liquidation analysis of equipment and collectability of any deficiency.
- Scheduled audits and inspections provide additional check.
- Assess potential Lender Liability or Deepening Insolvency claims. Deepening Insolvency may be found if (1) existing lender/lessor extends additional credit in exchange for additional security, despite borrower being financially troubled with little chance of recovery, and (2) lender/lessor causes borrower to remain in business for benefit of lender/lessor, while lender/lessor extracts value to detriment of unsecured creditors. If additional lease/financing is offered, ensure lessee's insolvency is not increased to detriment of other unsecured creditors.
 - In re Exide Technologies, Inc., 2003 WL 22079513 (Bankr. D. Del. Aug. 21, 2003); Official Committee of Unsecured Creditors v. R.F. Lafferty & Co. Inc., 267 F.3d 340 (3d Cir. 2001).
- Obtain names of lessee's customers and location of lessee's job sites where equipment may be used.



III. Legal Due Diligence

- **Review company resolutions and by-laws to ensure officers signing have requisite authority to commit lessee to terms being negotiated, including granting additional collateral, or agreeing to stand-still or subordination of other liens.**
- **Perfection of existing liens: Make sure you have continuous lien perfection!!**
- **Other creditors with rights – collateral or proceeds.**
- **Examining existing financing of lessee to determine whether Inter-creditor Agreement is necessary.**



IV. Maximizing the Value of Restructuring Agreement

A. Financial Restructuring. An opportunity to shore up existing debts and avoid future challenges.

- **Declare lease in default and accelerate lease balance: declaring the entire balance of the lease immediately due and payable.**
- **Confirmation of the existence and validity of debt.**
- **Procure waiver of all previously asserted as well as potential defenses, counterclaims and offsets.**
- **Require lessee to waive mitigation of damages.**
- **Be aware that duty to mitigate may exist in some jurisdictions regardless of contractual waiver.**
- **Require lessee to set up segregated account for ACH payments.**



SAMPLE WAIVER OF DEFENSE PROVISION

- Debtors have agreed to waive, relinquish, release, forbear, drop, not assert or otherwise not raise (hereinafter collectively referred to as the “Waiver” or “Waiver of Defenses”) any and all defenses, affirmative defenses, setoffs, claims, challenges, petitions to open and/or strike judgments, counterclaims, cross-claims, new matter, subrogation claims, indemnification actions (hereinafter referred to collectively as “Defenses”) including, but not limited to, Defenses against any party and/or any third party defendant, that could or must be raised in connection with any and all of the litigation set forth herein and any of the Indebtedness set forth herein or initiated in connection with any obligation of debtors herein to Lessor/Secured Party, that Debtors now have, did have, or may at any time in the future have, against Lessor/Secured Party in connection with or arising out of any claim, obligation, loan, indebtedness, advance set forth in the various loan agreements and documents by and among Lessor/Secured Party, Lessee and Guarantor which Waiver is and, shall be, absolute, unconditional and irrevocable.



IV. Maximizing the Value of Restructuring Agreement... ctd.

B. Financial Reporting Requirements. Integrate financial reporting and performance covenants into Restructuring Agreement to ensure lessee can service obligations and provide exit strategy if lessee's business is not performing adequately.

- Impose weekly, monthly or quarterly financial reporting requirements.
- Cash-flow
- Receivables
- Profitability
- Structure financial Covenants that measure.
- EBIDA
- Net Worth
- Provide for periodic audits and examinations of lessee's books and records.



SAMPLE FINANCIAL COVENANT AND REPORTING PROVISIONS

- Measured as of October 31, 2004, the sum of the Corporation's Eligible Accounts plus Eligible Inventory divided by the Indebtedness shall be equal to or greater than 1.5. For purposes of this paragraph, the term "Eligible Accounts" means accounts created by the Corporation in the ordinary course of its business meeting the following qualifications: (1) such accounts arise from bona fide completed transactions and have not remained unpaid for more than ninety (90) days after the invoice date; (2) the amounts of the accounts are absolutely owing to the Corporation and do not arise from sales on consignment or other terms under which payment by the account debtors may be conditional or contingent; (3) each account debtor's chief executive office or principal place of business is located in the United States; (4) there are no setoffs, counterclaims or disputes existing with respect to the accounts; and, (5) such accounts are not accounts with respect to which the account debtor or any officer or employee thereof is an officer, employee or agent of or is affiliated with the Corporation, directly or indirectly, whether it by virtue of family membership, ownership, control, management or otherwise. The term "Eligible Inventory" means Inventory owned by the Corporation meeting the following qualifications: (1) such inventory is not stale; (2) such inventory is not held on consignment; (3) such inventory is not defective; (4) such inventory is located at the Corporation's address as set forth herein; (5) the Corporation is the sole owner of such inventory; (6) such inventory is not subject to any claim, lien, security interest or encumbrance except for the security interest of Lessor/Secured Party; (7) such inventory has not been returned to the vendor thereof; and, (8) such inventory has not been revalued upward due to any change in accounting methods.
- During each of the calendar quarters ending June 30, 2004 and September 30, 2004, the Corporation shall have generated a Net Profit. The term "Net Profit" means the income and gains of the Corporation determined in accordance with Generally Accepted Accounting Principles consistently applied.
- Borrowers shall during the Forbearance Period provide to Lessor/Secured Party the following financial documentation:
 - Monthly Schedules of the Corporation's Accounts Receivable, Accounts Receivable Aging, Accounts Payable, Work in Progress, Balance Sheet and Income Statement. Such monthly reports shall be provided to Lessor/Secured Party on or before the 20th day of the immediately succeeding month;
 - Simultaneously with the execution of this Agreement, copies of the 2002 Federal and State Tax Returns for the Corporation and each of the Guarantors; and,
 - Simultaneously with the execution of this Agreement, Quarterly financial statements for the Corporation and each of the Guarantors (if applicable) for the First, Second and Third Quarters of 2003, and all subsequent Quarters within 20 days after the end of each Quarter.



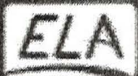
IV. Maximizing the Value of Restructuring Agreement... c'td.

- C. Confessions of Judgment and Writs of Seizure: Obviate the need to litigate issues of default and liability as partial consideration for agreeing to restructuring and forbearance. Be aware that confessions of judgment are not allowed in all jurisdictions.**
- **Resolve in advance lessor's damages and remedy for breach, including automatic acceleration.**
 - **May still need Exemplifications of Judgments or to actually begin litigation before enforcing in other jurisdictions: rules differ state to state.**
 - **Some states have imposed further notice requirements before executing and waivers may not always be affective. (2958.3 Waivers)**
 - **Disclosures and Conspicuous Appearance rule apply.**
 - **Some counsel favor filing the entire Restructuring Agreement with the Court as a form of Settlement Stipulation whose terms and remedies can be accessed by Affidavit of Default.**



SAMPLE PROVISIONS FOR CONFESSIONS OF JUDGMENT

- **Without waiving Lessor/Secured Party's right to self-help repossession, Borrower hereby authorizes and empowers any attorney of any Court of record in the Commonwealth of Pennsylvania, as attorney for Borrower and all persons claiming under or through borrower to appear for an confess judgment against Borrower in an action or replevin or otherwise for possession of the collateral in any competent Court for recovery by Lessor/Secured Party of possession of the collateral in the event of any default hereunder. This Agreement or a copy thereof verified by affidavit shall be a sufficient warrant therefore, and thereupon a Writ of Possession may be used immediately for possession of any of the collateral, without any prior Writ or proceeding and without any stay of execution. Borrower further waives the posting of a Waiver Bond by Lessor/Secured Party and authorizes Lessor/Secured Party to sell the collateral on the premises where any of the collateral is located. Lessor/Secured Party may bring an action in replevin or otherwise and confess judgment therein before or after the institution of proceedings to foreclose its security interests hereunder or to enforce this Agreement, or after entry of Judgment therein or on this Agreement, or after Sheriff's Sale of any of the collateral in which Lessor/Secured Party is the successful bidder.**
- **Borrower and Lessor/Secured Party agree that this authorization to pursue such proceedings for obtaining possession of any of the collateral and Confession of Judgment against Borrower is an essential part of the remedies for enforcement of the Agreement and that such authorization shall survive any execution or sale to Lessor/Secured Party.**



IV. Maximizing the Value of Restructuring Agreement... ctd.

- D. Standstill Provisions and Negative Pledges: Protect the ability of the lessor to get paid.**
- **Require principals or majority shareholders not to accept loan repayments or distributions during certain periods: ideally for term of Restructuring Agreement.**
 - **Ensure first dollars after essential operation expenses go to lease payments and post-restructure indebtedness on leases.**
 - **Forbid lessee from hypothecating collateral to another Lessor/Secured Party which might create priority dispute or dispute over proceeds upon sale (if not a true lease).**



SAMPLE STANDSTILL PROVISIONS

- Debtor shall not create any indebtedness for borrowed money except for purchase money or lease indebtedness for new [] equipment approved by Lessor/Secured Party, which approval shall not be unreasonably withheld or delayed. Notwithstanding the foregoing, provided no Event of Default has occurred and is continuing, Lessor/Secured Party will consent to the acquisition of Debtor of new equipment at a cost not to exceed \$[] (and such additional amount as Lessor/Secured Party in its sole, but reasonable judgment deems appropriate), provided (A) the total cost of such equipment is 100% financed by the equipment manufacturer, (B) the proceeds of the existing Equipment being replaced or sold for the fair market value of such Collateral (based upon an independent appraisal) is paid to Lessor/Secured Party in cash and applied against last payments of the note; (C) the Debtor continues to pay the Note in accordance with its terms; and (D) unless objected to by the financier of the equipment, the Lessor/Secured Party will be granted a subordinate security interest in the new equipment.
- The Debtor shall not guaranty the indebtedness of any other borrower.
- The Debtor shall not make any distributions to any shareholders/members of the Debtor.



IV. Maximizing the Value of Restructuring Agreement...c'dl

- E. **Opportunities for Exit Financing.** Requiring a lessee to procure outside financing (or sell equipment) may improve lessee's cash flow and enhance probability of timely lease payments.

SAMPLE FINANCING REQUIREMENT PROVISIONS

- The Corporation shall have in good faith made application to at least three (3) Lenders acceptable to Lessor/Secured Party for a loan or loans in an amount sufficient to pay the Indebtedness in full. Within thirty (30) days of the date of the execution of this Agreement, the Corporation shall have made at least two such applications, and the Corporation shall have diligently pursued such applications, together with a third application made during the Forbearance Period, in good faith. The Corporation shall provide Lessor/Secured Party with copies of all such applications and shall provide Lessor/Secured Party with a written report delivered to Lessor/Secured Party on or before the tenth (10th) day of each month during the Forbearance Period, summarizing the Corporation's good faith efforts to refinance the Indebtedness during the immediately preceding calendar month.



IV. Maximizing the Value of Restructuring Agreement... c'td.

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- F. Sale of Assets.** If Restructuring Agreement permits lessee to sell business assets, including all or part of leased equipment, it must specify (i) that adequate security and insurance be maintained on the equipment prior to sale, (ii) how sale will be conducted and (iii) how proceeds will be distributed and used.
- **Application of proceeds to debt.**
 - **Sales process: auction vs. private sale.**
 - **Waivers or acknowledgements of Article 9 Notice**
 - **Waiver or acknowledgement of Commercially Reasonably Sale: recognize such waivers may be subject to attack and may not be enforced in all jurisdictions.**
 - **Access for inspection and to conduct sale or auction.**
 - **Lessee's and Landlord's consent**
 - **§9-611 and §9-612 (Sale on Premises).**



SAMPLE ASSET SALE PROVISIONS

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- Borrower and Guarantors stipulate and agree to surrender possession of the Business Assets to Lessor/Secured Party upon the execution of this Agreement and that thereafter Lessor/Secured Party shall have the unfettered right to possess and liquidate the Business Assets of Borrower as more particularly described in the UCC-1 Financing Statements and Asset List attached hereto and made a part hereof as Attachment 2. Borrower and Guarantors hereby release any and all of their right, title or interest in and to any and all of said Business Assets and stipulate and agree that this Agreement shall serve as a stipulation for a voluntary repossession and seizure of said Business Assets to be used if necessary in any Judicial proceeding or against any third (3rd) parties. The net proceeds from the sale of said Business Assets are agreed to be the property of Lessor/Secured Party.
- Borrower agrees to cooperate in recovering and assembling all of the Business Assets and to maintain same with appropriate security and insurance at the Business Premises for a sale to be held at said Premises on October 5, 2002 pursuant to the terms of an Auction contract, a true and correct copy of which is attached hereto and made part hereof as Attachment 1.
- Borrower agrees to allow the Auctioneer or its agents access to the Business Premises at all reasonable times and upon reasonable notice and to assist such Auctioneer in identifying and describing said Business Assets and providing any information available to or known by Borrower to Auctioneer to facilitate and effectuate the scheduled sale of these Business Assets.
- Borrower agrees to deliver to Lessor/Secured Party upon the execution of this Agreement, true and correct copies of any and all records it maintained or has in its possession, custody or control related to or pertaining to the Accounts Receivable, including but not limited to payment, records, invoices, rental vouchers, receipts, copies of cancelled checks and correspondence and shall provide Lessor/Secured Party prior to the execution of this Agreement with an updated list of all said Account Receivable, including the names, address, phone numbers and balances of said payoff.
- Borrower voluntarily surrenders physical possession of the Business Assets to Lessor/Secured Party for the purpose of a sale for the benefit of Borrower and Guarantors' account, in accordance with Article 9 of the Uniform Commercial Code, as adopted in the Commonwealth of Pennsylvania, as revised, July 2001. Borrower and Guarantors, hereby consent to such possession and sale without defense, setoff, counterclaim, deficiency or recoupment, the same as if a Judicial Order granting Lessor/Secured Party the right to seize the Business Assets had been obtained at a Hearing on the merits.



SAMPLE ASSET SALE PROVISIONS...c'dl

- Lessor/Secured Party agrees to provide Notice, in the form attached hereto as Attachment 3, to any and all parties in interest, as required by Revised sections 9-611 and 9-613 of the Uniform Commercial Code, as adopted in the Commonwealth of Pennsylvania, July 2001.
- Pursuant to Revised Article 9 Section 611 and 613 of the Uniform Commercial Code, Borrower and Guarantors renounce and waive any right to notice of any disposition of collateral by Lessor/Secured Party upon termination of the Forbearance Period or default under the terms of this Agreement, whether such disposition is by public or private sale under the Uniform Commercial Code or otherwise. Borrower and Guarantors also acknowledge and agree that any such disposition shall constitute a "commercially reasonable manner" as defined by the Uniform Commercial Code.
- The risk of loss for the Business Assets shall not pass to Lessor/Secured Party, and, moreover, the Borrower and Guarantors' liability for claims, causes of action and losses arising out of any personal injury liability occurring on their premises shall not be discharged and liability for property loss to the Business Assets shall remain undischarged until the said Business Assets are sold pursuant to this Agreement
- The parties agree that Lessor/Secured Party has the absolute, immediate right to exercise its ownership interest in all of Borrowers accounts receivables ("Accounts Receivable") and that Borrower and Guarantors have and shall deliver to Lessor/Secured Party a true and accurate list of all of Borrowers Accounts Receivable, including the name, address, telephone, entire file and any other supporting documentation of any kind with respect to each Accounts Receivable so that Lessor/Secured Party may immediately proceed with collection thereof. Borrower and Guarantors agree to cooperate with Lessor/Secured Party in collection of said Accounts Receivable, including by testimony if required. The net proceeds received from collection of said Accounts Receivable are agreed to be the property of Lessor/Secured Party and Lessor/Secured Party is entitled to require payment of each such Accounts Receivable directly to it.



SAMPLE ASSET SALE PROVISIONS...c'dl

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- Lessor/Secured Party shall pay and disburse to Borrower or Guarantors or their designated payee until October 15, 2002 only, the expense items required for payment as set forth on Borrower's Budget, attached hereto and made a part hereof as Attachment 5 from the proceeds of the sale of the Business Assets and/or the collection of the Accounts Receivable provided there are sufficient funds. Lessor/Secured Party shall have no obligation to pay or be liable for any expense item not contained in said Budget unless Lessor/Secured Party and Borrower or Guarantors agree to any amendment of the Budget in writing first.
- Borrower and Guarantors agree that this Agreement constitutes a Stipulation and Consent Order, granting Lessor/Secured Party the right to immediate possession of the Business Assets and Accounts Receivable. Borrower and Guarantors agree that to the best of their ability they will provide the Lessor/Secured Party with access to the Business Premises for the purpose of remarketing and reselling the Business Assets and conducting a Public Auction thereof and collecting the Accounts Receivable, solely as Lessor/Secured Party deems appropriate. Further, Lessor/Secured Party has the option to remove any and/or all of the Business Assets at any time upon reasonable notice to Borrower and Guarantors. Notwithstanding any representation herein to the contrary, Borrower has informed Lessor/Secured Party that rent payments remain unpaid for the Business Premises for the month of July, August and September, 2002. Nevertheless, Borrower has also informed Lessor/Secured Party that borrower anticipates providing Lessor/Secured Party with a Landlord's Waiver executed by the Landlord for the Business Assets located at the Business Premises in the form attached hereto, made a part hereof and marked as Attachment 4, prior to the execution of this Agreement.
- Borrower may not use the Business Assets at the Business Premises or elsewhere, and Borrower shall maintain the Business Assets in the condition as required by the Loan/Lease Documents. Borrower and Guarantors shall assist the Auctioneer or its agents in selling the Business Assets by showing the Business Assets to potential customers.
- Any net proceeds from the sale of the Business Assets and collections of the Accounts Receivable shall be applied directly to the Accelerated Balance, plus per diem interest and actual attorney's fees.



Equipment Leasing Association

IV. Maximizing the Value of Restructuring Agreement... c'td

G. Assignment and Waiver of Defenses. A quid pro quo to enter into a workout or forbearance should be waiver of typical lessee defenses such as equipment malfunction or inoperatibility, and representations of vendor or third parties.

- **Article 2A Waivers of Defenses.**
- **Issue:** when original lessor assigns lease, holder in due course rule and § 9-403 (b) is triggered.
- **Assignment pursuant to § 9-403 (b) protects assignee against any claim or defense that account debtor (lessee) may have against assignee except for defense based on infancy, duress, lack of legal capacity, illegality of transaction, fraud in inducement, and discharge in insolvency proceedings. U.C.C. § 9-403 (b), (c); § 3-305 (a)(1).**
- **Holder in due course protections may vanish if default judgment order entered in favor of FTC dated June 29, 2005 (2005 U.S. Dist. Lexis 36139) is followed and Consumer Trade Commission Regulation Title 16, Chapter 1, Section 433.2 is held to apply to equipment lease contracts:**
 - **“NOTICE. ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICE SO OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. . . .”**



SAMPLE WAIVER PROVISIONS

- Lessor and lessee agree, *inter alia*, that the Lease was and is intended by both parties of the Lease to be and is, in fact, a “Finance Lease” as defined under Article 2A of the Uniform Commercial Code (“UCC”), and that the provisions of Article 2A of the UCC with respect to enforceability and finality of all Lease terms and conditions, including, *inter alia*, the Disclaimer of Warranties and Claims and Limitation of Remedies provision of the Lease, remain fully applicable under this Agreement.
- If LESSEE is relying upon the furnishing of a thing or service by a manufacturer, supplier or vendor as part of the underlying lease transaction, then LESSEE understands, agrees and concedes that LESSOR has no legal, contractual, equitable or moral obligation to furnish said thing or service, even if the failure to receive such thing or service frustrates the central purpose of the contract for LESSEE, or anyone else, and that, notwithstanding the failure to receive said thing or service, LESSEE’s obligation to remit any and all payments in a timely manner under the LEASE shall continue unabated and without defense by LESSEE to complete payment under, and as required by, the LEASE. LESSEE understands and agrees that, in the event any manufacturer, supplier or vendor should cease furnishing the thing or service relied upon by LESSEE in connection with the underlying lease transaction, the LESSEE will be solely responsible for procuring and financing such thing or service, at LESSEE’S own expense, at whatever price or other term is necessary or required to continue the furnishing of the thing or service uninterrupted to LESSEE, without set-off, deduction, recoupment or counterclaim. Failure to obtain said substituted thing or service, for whatever reason, is not a defense to payment in full to LESSOR.



IV. Maximizing the Value of Restructuring Agreement...

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H. Forum Selection and Choice of Law: Inclusion of a Choice of Forum clause in loan and lease documents is necessary to avoid unfriendly jurisdictions where courts award large verdicts against big out of town companies.

- Parties must contract as to court that will hear lawsuits filed in connection with transaction.
- To promote appearance of fairness, chosen forum does not have to be home state of either party.
- Must retain Lessor/Secured Party's right to foreclose on collateral.
- Must be mandatory: some courts won't enforce provisions that retain for secured party right to litigate in alternative forum (Bentley v. Mutual Benefits Corp., 237 F.Supp 2d, 600, 701 (S.D. Miss. 2002)).



Sample Choice of Forum Provision

- EACH PARTY AGREES THAT THE STATE OR FEDERAL COURTS LOCATED IN [NEW YORK COUNTY, CITY OF NEW YORK, NEW YORK] SHALL HAVE EXCLUSIVE JURISDICTION TO HEAR AND DETERMINE ANY CLAIMS OR DISPUTES BETWEEN THE PARTIES TO THIS AGREEMENT OR ANY MATTER ARISING OUT OF THIS AGREEMENT; PROVIDED, NOTHING IN THIS AGREEMENT SHALL PRECLUDE LESSOR/SECURED PARTY [LESSOR] FROM BRINGING SUIT OR TAKING OTHER LEGAL ACTION IN ANY OTHER JURISDICTION TO RECOVER OR REALIZE ON THE COLLATERAL OR ANY OTHER SECURITY FOR THE OBLIGATIONS, OR TO ENFORCE A JUDGMENT OR OTHER COURT ORDER. EACH PARTY EXPRESSLY CONSENTS IN ADVANCE TO SUCH JURISDICTION, AND WAIVES ANY OBJECTION WHICH SUCH PARTY MAY HAVE BASED UPON IMPROPER OR INCONVENIENT VENUE.



IV. Maximizing the Value of Restructuring Agreement... c'td.

I. Bankruptcy. Lessors have some ability to protect against bankruptcy events.

- **Indemnification against funds disgorged in connection with avoidance actions.**
- **Protection of Cash Collateral.**
- **Plan Exclusivity.**
- **Perfection.**
- **Relief from Automatic Stay.**



SAMPLE BANKRUPTCY PROVISIONS

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- **Indemnity.** Debtors covenant and agree to indemnify and hold Lessor/Secured Party harmless for any loss, costs, claim, controversy, suit, cause of action, and other exposure or expense which Lessor/Secured Party may sustain as a result of any action brought against the Lessor/Secured Party under Sections 544(b), 547, 548 or 549 of the United States Bankruptcy Code, as amended, on the grounds that any consideration exchanged by the Lessor/Secured Party with Debtors was not "reasonably of equivalent value", within the contemplation of Section 548 of the United States Bankruptcy Code, as amended, or Section 544(b) of the United States Bankruptcy Code, as amended, or not "fair consideration" under any applicable State Fraudulent Conveyance Statute or a preference, by an insider or otherwise.

- **Cash Collateral.** Debtors covenant and agree that, in the event that any Debtor files a Petition for Relief with any Bankruptcy Court, or is subjected to any Petition under the Bankruptcy Code which results in any Order for Relief under the Bankruptcy Code, and the Debtor in that proceeding wishes to use Cash Collateral as defined in the Bankruptcy Code and/or this Agreement, then this Agreement shall without modification be deemed to be a Stipulation between Lessor/Secured Party and such Debtor as applicable, for a Cash Collateral Order pursuant to Section 363 of the Bankruptcy Code. Debtors and Lessor/Secured Party agree that they shall cooperate in and shall not in any way resist having this Agreement become and be fully incorporated in, without change or modification, a Cash Collateral Order immediately entered, subject to Court approval, by a Bankruptcy Court under Section 363 of the Bankruptcy Code and/or this Agreement, and that Cash Collateral shall only be used as provided in this Agreement. Such Order shall permit the use of Cash Collateral only until the end of the 120 day exclusive period under Section 1121(b) of the Bankruptcy Code, and no longer, and shall incorporate all of the other terms provided by this Agreement. Debtors also agree and acknowledge that the Collateral and proceeds of Collateral are and shall be deemed to be in any such proceeding "Cash Collateral" as that term is defined in Section 363 of the Bankruptcy Code.



SAMPLE BANKRUPTCY PROVISIONS... c'td

- **Cash Collateral:** All accounts receivable are Cash Collateral, and to the extent they are used and consumed after filing or entry of any Cash Collateral Order, Debtors specifically agree that they are collateral for a secured claim under Section 506 of the Bankruptcy Code in the amount so used. To the extent the collateral securing Lessor/Secured Party's claim in the Bankruptcy proceeding is thereafter deemed or proves to be insufficient to pay Lessor/Secured Party's claim in full, Lessor/Secured Party's secured claim shall be deemed to have been inadequately protected by the provisions of the Cash Collateral Order, and Lessor/Secured Party shall therefore have an administrative expense claim in the proceeding with super priority over any and all administrative expenses of any kind specified in Sections 503(b) and 507(b) of the Bankruptcy Code, which super priority shall be equal to the priority provided under the provisions of Section 364(c)(1) of the Bankruptcy Code over all other costs and administrative expenses incurred in the case of the kind specified in, or ordered pursuant to, Sections 105, 326, 330, 331, 503(b), 506(c), 507(a), 507(b) or 726 of the Bankruptcy Code and shall at all times be senior to the rights of Debtors or any successor trustee in the resulting Bankruptcy proceeding or any subsequent proceeding under the Bankruptcy Code except that such administrative expense claim shall be subordinate to professional fees and reimbursement of expenses that may be awarded to professionals retained by Debtors pursuant to Sections 330 and/or 331 of the Bankruptcy Code and fees of the United States Trustee.



SAMPLE BANKRUPTCY PROVISIONS... *etd*

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- **Plan Exclusivity.** Debtors agree that if any Debtor is a Debtor in a Chapter 11 proceeding under the Bankruptcy Code, and the Bankruptcy Court enters a Cash Collateral Order, then, subject to Court approval, that Order shall provide that if such Debtor does not file a Plan within the 120 day exclusive period provided by Section 1121(b) of the Bankruptcy Code, Lessor/Secured Party shall, without the necessity of any additional notice to the Debtor or to other Creditors, any hearing or any further Order of the Court, have immediate relief from the stay under Bankruptcy Code Section 362 to recover and collect all Collateral and to take any other action permitted under the Note, Mortgage, Guaranty, this Agreement and applicable non-bankruptcy law, including but not limited to, selling the Collateral.

- **Perfection.** If any Debtor is a Debtor in a case under the Bankruptcy Code and if it is determined that any of the rights granted under this Agreement or under the Loan Agreement are security interests or liens, they shall be deemed perfected and fully enforceable without the necessity of the filing of any documents or the commencement of proceedings otherwise required under non-bankruptcy law for the perfection or enforcement of security interests, with such perfection and enforcement being binding upon such Debtor, and any subsequently appointed trustee, either in Chapter 11 or under any other Chapter of the Bankruptcy Code, and upon other Creditors of such Debtor who have or who may after the date of this Agreement extend secured or unsecured credit to such Debtor.



SAMPLE BANKRUPTCY PROVISIONS... e'td

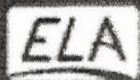
- **Relief from Automatic Stay.** Debtors hereby consent to Relief from the Automatic Stay of the United States Bankruptcy Code in the event of any Bankruptcy filing under any State or Federal Bankruptcy Act or State Court Action for Receivership and further agree not to contest any application for an Order by Consent for Relief from the Automatic Stay to take possession and act as deemed applicable to collect the outstanding Indebtedness and enforce the rights of Lessor/Secured Party against Debtors. In the event that Lessor/Secured Party is not granted Relief from the Automatic Stay by a Consent Order pursuant to the provisions of this Paragraph, Debtors agree that Lessor/Secured Party shall be entitled to collect interest at the rate as provided in this Agreement on arrearages, in addition to any interest which may already be included in the Loan/Lease Documents, for the life of a Plan which proposes to cure any default or pay any arrearages through the Plan Payments.



VI Jury Trial Waivers in California in the Wake of Grafton Partners

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- California Supreme Court decision in Grafton Partners v. Superior Court (PricewaterhouseCoopers) (36 Cal. 4th 944, August 5, 2005).
- Keep jury trial waivers in place pending passage of new legislation making such waivers enforceable (as invited by court of Grafton Partners: RISKY).
- Use arbitration provision. . . . OR
- Use a "judicial reference" clause (see below) rather than jury trial waiver provision.
- California Code of Civil Procedure Section 638 provides: A referee may be appointed upon the agreement of the parties filed with the clerk, or judge, or entered in the minutes, or upon the motion of a party to a written contract or lease that provides that any controversy arising therefrom shall be heard by a referee if the court finds a reference agreement exists between the parties: (a) To hear and determine any or all of the issues in an action or proceeding, whether of fact or of law, and to report a statement of decision. (b) To ascertain a fact necessary to enable the court to determine an action or proceeding. (c) In any matter in which a referee is appointed pursuant to this section, a copy of the order shall be forwarded to the office of the presiding judge. The Judicial Council shall, by rule, collect information on the use of these referees. The Judicial Council shall also collect information on fees paid by the parties for the use of referees to the extent that information regarding those fees is reported to the court. The Judicial Council shall report thereon to the Legislature by July 1, 2003. This subdivision shall become inoperative on January 1, 2004.



Sample Reference Provisions

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- **DISPUTES.** All claims, causes of action or other disputes concerning the loan/lease documents (each a "Claim"), including any and all questions of law or fact relating thereto, shall, at the written request of any party, be determined by judicial reference pursuant to the California code of civil procedure ("Reference"). The parties shall select a single neutral referee, who shall be a retired State or Federal judge. In the event that the parties cannot agree upon a referee, the referee shall be appointed by the Court. The referee shall report a statement of decision to the Court. Nothing in this paragraph shall limit the right of any party at any time to exercise self-help remedies, foreclose against collateral or obtain provisional remedies. The parties shall bear the fees and expenses of the referee equally unless the referee orders otherwise. The referee shall also determine all issues relating to the applicability, interpretation, and enforceability of this paragraph. The parties acknowledge that the claims will not be adjudicated by a jury.

➤ **OR**

- If any action or proceeding is filed in a court of the State of California by or against any party hereto in connection with any of the transactions contemplated by this Agreement, any other Loan/Lease Document or any transaction contemplated hereby or thereby, the parties hereto hereby agree that (a) the court shall, and is hereby directed to, make a general reference pursuant to California Code of Civil Procedure Section 638 ("Section 638") to a referee or referees to hear and determine all of the issues in such action or proceeding (whether of fact or of law) and to report a statement of decision, provided that at the option of Lessor/Secured Party, any such issues pertaining to a "provisional remedy" as defined in California Code of Civil Procedure Section 1281.8 shall be heard and determined by the court, and (b) Borrower and each Credit Party executing this Agreement shall be solely responsible to pay all fees and expenses of any referee appointed in such action or proceeding. The parties hereto intend that this paragraph create a reference agreement within the meaning of Section 638.



Equipment Leasing Association