

EQUIPMENT LEASING AND FINANCE ASSOCIATION

Financing a Growing Economy

Private Label Programs: Origination, Servicing and Enforcement Issues

ELFA Legal Forum

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Types of Private Label Programs

- **Private Label Origination** – Lessor/Lender originates the transaction using a name approved by the vendor that the customer associates with the vendor
- **Private Label Servicing** (a/k/a “non-notification assignment”) – Originator assigns transaction to financier; Customer is not aware of assignment
 - Assignee Services using Assignor’s name
 - Assignor Services in its own name as agent of Assignee

Why Private Label?

- Vendor/Originator perspective:
 - Protect Customer Relationship
 - Apparent source for all customer needs – Goods and Financing
- Financier/Assignee perspective:
 - Increased volume and market niches (without adding servicing costs if Assignor services

Risks of Private Label

- Hell and High Water Risk – The more intertwined the relationship between the Assignor and Assignee, the greater the risk of customer claims set-offs and defenses etc against the Assignee.
 - Are Assignee's forms used
 - Are documents prepared by Assignee
 - Does Assignee pre-approve credits

How to Mitigate “H&H” Risk

- Know Your Assignor
- Continuing due diligence on Assignor
- Obtain “D&A” certificate
- “Blind” phone audit
- Equipment Inspection
- Maintain Independence between Assignor & Assignee
- Strong & Conspicuous “H&H” f/b/o Assignees

Servicer's Credit and Fraud Risk

If Assignor is servicing

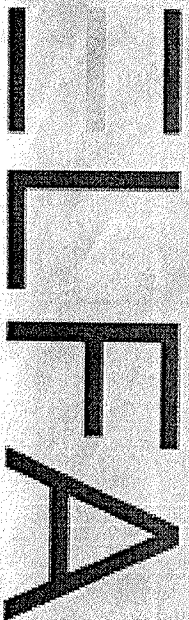
- Early ability to terminate Servicer
- Short remittance time frames
- Required back-up with remittances
- Servicer bills, but does not collect (customers remit to lockbox)

Customer Identification Concerns

- Credit Bureau Reports
 - Does Assignor have consent to share w/Assignee?
 - Can Assignor pull? If so it's name will be disclosed
- Patriot Act CIP and OFAC – Notice to Customer re: opening of account
 - Where Assignee is making the initial funding
 - Where Assignee is a Bank (or affiliate) and Assignor is not – Assignee can't rely

Private Label Origination

- Obtaining the name and authorization
- d/b/a or separate entity?
 - Separate entity costly; state registrations, taxes
- If d/b/a: exclusive or not?
- Termination and usage of name thereafter
- Staffing – dedicated phone lines, lockbox, letterhead – keeping it all straight.



EQUIPMENT LEASING AND FINANCE ASSOCIATION

Financing a Growing Economy

Private Label Servicing Issues

2007 ELFA Legal Forum Miami, Florida

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Servicing the Private Label Transaction

Overview

- Who Services
- Servicing Components and Standards
- Indemnities
- Breaking the Private Label

Servicing the Private Label Transaction

Who Services

- Assignor in its own name, as agent of Assignee
- Assignee under private label name
- Assignee in Assignor's name

Servicing the Private Label Transaction

Who Services

- Assignor as servicer
 - Program agreement must be clear that Assignor is simply a conduit for payments: Payments held “in trust” for Assignee
 - In a perfect world, payments are segregated (i.e. received in and disbursed from separate account)
 - Lockboxes are a good solution, but expensive
 - Remittances to Assignee
 - Time periods
 - So-called perfect pay or “pay as if paid” arrangements
 - Claw backs for lessee non-payment or required return of payments

Servicing the Private Label Transaction

Who Services

- Assignee as servicer
 - Use of Assignor's (or referral source's) Intellectual Property
 - Consent to use of name from Assignor/referral source (if private label name is similar)
 - Consent to use of letterhead, logos, etc. (if Assignee acting in Assignor's name)
 - Pay attention to requirements of underlying lease, particularly if Assignor paper (time periods for invoicing)
 - Is the transaction bundled? If so, segregation and remittance of maintenance payments should be spelled out.

Servicing the Private Label Transaction

Servicing Components and Standards

- Servicing includes more than just billing and collecting rents
 - Collecting property/use taxes and filing returns (usually performed by party holding residual interest if a true lease)
 - Sending and receiving notices
 - Insurance: service as additional insured/loss payee
 - Adjustments for casualty loss
 - In some cases, enforcement against customer
 - In some cases, acting as secured party (holding chattel paper, promissory notes, vehicle titles, filing and continuing UCC financing statements)
 - Keep other party informed
 - Remarketing

- Servicing does not include maintenance obligations

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EQUIPMENT LEASING AND FINANCIAL SERVICES

Servicing the Private Label Transaction

Servicing Components and Standards

- Typical standard of care is commercially reasonable efforts or the same standard of care applicable to transactions handled by service for its own account
- Specialized standards driven by lessee needs
- Restrictions on Service
 - Can't waive or change payments
 - No release of collateral or equipment
 - Can't waive defaults
 - No release of credit parties (lessee, co-lessees, guarantors)
 - Generally prohibited from amending lease documents or modifying lessee obligations.

Servicing the Private Label Transaction

Servicing Components and Standards

- Conflict: Assignee Expectations vs. Lessee Satisfaction
 - Upgrades: typically arises where computer hardware involved and the underlying lease permits termination and/or prepayment in connection with upgrade of equipment
 - Default Waivers/Lease Amendments: Assignor desires to grant waivers or amend lease to protect relationship with lessee
 - Assignee protections
 - Right of first refusal on lease of upgraded equipment
 - Right to “put” the transaction back to Assignor if Assignee objects to waiver or amendment

Servicing the Private Label Transaction

Servicing Components and Standards

- Perfection vs. Convenience
 - If Assignor will hold original chattel paper and promissory notes, program agreement should clarify that Assignor holds for the benefit of Assignee - Risk of non-perfection - UCC 9-313 – Steps to mitigate
 - Assignee will typically want to hold originals: hedge against fraud and potential disputes with other secured parties of Assignor
 - Vehicles titles: Assignor typically remains as owner/lien holder to avoid re-titling costs
 - Program agreement should clarify that Assignor remains on title solely for administrative convenience, as agent for Assignee
 - Assignee typically will hold original titles and a power of attorney from Assignor for retitling, although in large fleet transactions, Assignor may want to retain originals to respond to casualty loss/replacement
- Delegation - generally permitted, but service remains primarily liable and liable for acts/omissions of sub-service

Servicing the Private Label Transaction

- **Enforcement against lessee** (Assuming Servicing has not been terminated or termination not permitted)
 - Assignee usually has ability to direct enforcement efforts, with put right or termination if Assignor fails to follow instructions
 - Assignee may have put right if lessee default not cured within agreed-upon time frames

Servicing the Private Label Transaction

Servicing Components and Standards

- Costs and Expenses
 - Routine administration usually without compensation
 - Enforcement costs usually borne or reimbursed by Assignee, with threshold amount above which Assignee consent is required

Ending the Private Label Transaction

Servicing Components and Standards

- Can Servicer Resign?
 - Assignee generally permitted to resign upon prior written notice, with notice period set to ensure administrative continuity
 - Resignation by Assignor typically breaks private label
 - Rights / obligations following resignation
- Can Assignee/Owner terminate Servicer?
 - Causes for Breaking Private Label
 - Lessee default under leases (private label broken just as to that lessee)
 - Assignor bankruptcy, material adverse change (perhaps evidenced by credit downgrade), or breach of servicing obligations or standards