

## Good News Out of Florida for Lessors

By Charles H. Lichtman

Decisions rendered by different courts in Florida provide good news for equipment lessors doing business in this state. One case supports a lessor's early termination charges challenged in a class action, and another supports the structure of a computer equipment lease as not being subject to documentary stamp taxes.

### CLASS ACTION —

#### CONSUMER LEASING ACT

In *Higginbotham et al. v. Ford Motor Credit Company*, 18 Fla.W. Weekly Fed. D 19, the U.S. District Court for the Middle District of Florida, in late Aug. 2004, ruled in favor of the Ford Motor Credit Company in a suit brought by the lessee of a car (and putative class action plaintiff) who alleged that the early termination provisions of the lessee's automobile finance lease with the defendant violated the terms of the Consumer Leasing Act ("CLA"), 15 U.S.C. §1667(b).

In *Higginbotham*, the plaintiff entered into a 36-month lease that she terminated about half way through the term, and at which time she was behind in her lease payments. The lease calculations provided a residual value of \$8,738; Ford sold the car for \$11,000; and Ford then sought to recover \$6,381 from the plaintiff. She refused to pay the amount in dispute and filed the class action thereafter. The matter came before the court upon summary judgment motion.

The essence of the plaintiff's claim was that the early termination provisions of the lease violated the CLA because the lease entered into with

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Ford improperly shifted the burden that the residual value of the vehicle was inflated to the lessee, and that the residual value was not the best available estimate of the car's value at the end of the lease term. The plaintiff further alleged that when she terminated her lease with Ford early, that its failure to discount the residual value of the vehicle to present value, was unreasonable under the CLA.

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In its ruling, the district court determined that *Higginbotham* was squarely on point with a prior ruling out of the Eleventh Circuit, *Baez v. Bank One Leasing Corp.*, 348 F.3d 972 (11th Cir. 2004), which granted summary judgment to a lessor under facts virtually indistinguishable from those in the instant action. Although the Eleventh Circuit encompasses the Florida district courts, Baez was subject to Georgia state law claims, compared with *Higginbotham*, which was subject to Florida state law claims.

Part of the essence of both lawsuits was the plaintiff's contention, ultimately rejected as presented, that the CLA requires all early termination charges to be specified in the lease. 15 U.S.C. §1667b(b). Additionally, plaintiffs allege that the charges must be reasonable in light of the anticipated or actual harm caused by the early termination, the difficulties of proof of loss, and the inconvenience or non-feasibility of otherwise obtaining an adequate remedy. In both cases the plaintiff contended that the early termination formula violated the

CLA because it makes an early terminating lessee responsible for covering any shortfall in the vehicle's actual realized value as against the projected end of lease residual value.

The court's analysis focused on regulation M, which specifically permits early termination charges based on the difference to residual and realized values in closed end leases. The court concluded that because the plaintiff terminated so early in his lease in the *Bank One* case, and because automobile depreciation is not actually linear, but is treated as such by the terms of the lease, an early termination provision based on the difference in realized and residual value was reasonable. The court noted that the early termination charge in Bank One's lease was designed to recapture the depreciation lost at the beginning of the lease via the lower depreciation payments. It did this by adding the rest of the equal depreciation payments to the residual value of the vehicle. The court added that this also made the plaintiff responsible for the difference in the realized and residual value of the vehicle, and responsible for the depreciation he consumed without payment during the first portion of the lease, where the plaintiff had possession of the vehicle. In *Bank One*, and which the court applied in *Higginbotham*, the court also considered whether a lessor was required to discount the residual value of the vehicle to present value, when determining early termination charges. It was concluded that no such discounting was required. The court said that the residual amount of the vehicle was part of the cost the plaintiff financed with his lease, much like principal on a loan. The plaintiff paid "rent charges," which were deemed equivalent to interest payments, based upon the adjusted capitalized cost of the vehicle, which

*continued on page 6*

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## Florida

continued from page 3

included its residual value. The court added that like principal on a loan, the plaintiff was not entitled to a discount of this amount when he ended his lease with the lender early.

Critically, the court noted that the plaintiff's arguments were based on a fundamental misunderstanding of what the early termination charge was designed to accomplish. The leasing company was not being paid for the residual amount of the vehicle, but rather being paid for the loss of the vehicle in excess of the depreciation payments made by the consumer, prior to early termination. *"The total of the remaining depreciation payments must be added to the residual value to determine the total potential depreciation remaining. From this figure, the realized value is subtracted to get in the proximation of the actual depreciation during the consumer's use of the vehicle for which he has not paid. Thus, the resulting figure closely corresponds to the actual damages suffered by the Lessor due to early termination."*

The plaintiff's final claim under the CLA alleged that the residual value was not the "best available estimate" of the vehicle's value at lease end. In examining the CLA, however, the court said that the plaintiff was unable to point to any requirement in that Act that required the residual value, in fact, be the best available estimate. Thus, the court found that since the fee was not unreasonable, all claims must fail.

This case makes clear that when presented with cogent arguments in plain English form, courts are capable of analyzing the economic data that support the basis for a lease transaction. More important, the court did not find a way to benefit a consumer merely for the sake of it, and to hurt the equipment lease industry. There is no reason why this case, though dealing with automobile residual values, would not be applicable to any other case where the parties are litigating the issue of early termination provisions in leases.

## COMPUTER EQUIPMENT LEASE IS NOT SUBJECT TO DOCUMENTARY STAMP TAXES

In *Florida Department of Revenue v. Winn Dixie Stores, Inc.*, 29 Fla.L. Weekly D. 2360, the Florida Department of Revenue ("DOR") appealed a trial court ruling granting summary judgment when it concluded that a lease for computer equipment was not subject to documentary stamp taxes pursuant to Fla.Stat. §201.08. In this case, the DOR sought an interpretation pursuant to its administrative rules interpreting the statute that taxes were appropriately assessed on the subject lease because it constituted an "unconditional obligation to pay money." The court disagreed.

Transactionally, a few years before the subject lawsuit was filed, computer leasing company in Michigan, a lessor, and Winn Dixie stores, entered into a Master Lease for computer equipment. The Master Lease did not describe the specific equipment or any rental amounts. Instead, as most Master Leases provide, it contemplated that equipment would be leased from time to time and described in schedules which would be part of the lease. The lease document was a relatively standard Master Lease containing at paragraph one, the general normal language that the lessee agrees to lease the equipment from the lessor as described in each schedule. Paragraph three of the Master Lease contained a provision that upon acceptance of a particular lease item, the lessee would execute a Certificate of Acceptance in which the lessee "unconditionally" accepted each item. In bold print, the Master Lease also contained the standard disclaimer of damage, liability and warranty provision typically found in every equipment lease. Finally, the lease described itself as being a net lease and that the rights of the lessor or its assignee in the rent "are absolute and unconditional and not subject to any abatement, reduction, setoff ..." comprising typical language of a "hell or high water" clause. Further, the lessee assumed the risk of loss on the equipment along with the obligation to maintain and repair it. Conversely, the lessor's only obligations were to fur-

nish the equipment and not to interfere with the lessee's right of quiet enjoyment.

As occurs in all Master Leases, and as contemplated by this one, various items of computer equipment were leased through the procedures described in the Master Lease. Four years after the fact, the DOR challenged documentary tax assessments made by it.

The court started its analysis of the statute by pointing out that §201.08 provides that documentary stamp tax shall be opposed on "promissory notes, non-negotiable notes, *written obligations to pay money*" (emphasis in original) and other articulated items. The court did not hesitate to find that decisional interpretation and the DOR's own rules have recognized that the phrase "written obligations to pay money" only applies to those types of written obligations that are similar to notes, wherein the obligation to pay money is unconditional. *Wometco Enterprises Inc. v. Frank*, 382 So.2d 832 (Fla. 4th DC 1980); *State Department of Revenue v. Peterson Outdoor Advertising Co.*, 296 So.2d 120 (Fla 1st DCA 1974).

The court noted that in this case, although the Master Lease shifts all responsibility for the condition, suitability and performance of the equipment to the lessee, two significant conditions to payment are manifest. First, the lessor has the obligation to furnish the equipment at the outset. Second, and no less significant, even after acceptance of the equipment, the lessor must permit the continued, quiet enjoyment of lessor's equipment throughout the lease term. The nonperformance of either condition would relieve the lessee of its obligation to pay. The court then concluded that the lease agreement was unlike a promissory note where the consideration for payment has been fully provided and the payment is truly unconditional, *see DeVore v. Lee*, 30 So2d 924 (Fla. 1947), where (rent is not an unconditional obligation until it accrues through enjoyment of the property; and that the lease was not subject to documentary tax).

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