Leases

*By Dominic A. Liberatore, Stephen T. Whelan, and Edward K. Gross**

Case Law Developments

This survey covers several 2021 cases involving disputes among parties to equipment leases or other personal property financings and cases involving third parties claiming to have related rights or interests. The courts in these cases considered many of the fundamental issues often raised by parties and others when litigating commercial enforcement, bankruptcy protections and other claimed rights, including the associated rights and interests and liability considerations, relating to these leases and financings. The issues covered in cases summarized in this Survey include whether a transaction documented as a lease creates a true "lease" or a security interest, the enforceability of certain lease-related remedies, vicarious liability of a lessor, the enforceability and shortcomings of forum selection clauses, the enforceability of hell-or-high-water clauses, and the rights of assignees.

True Leases

When asked to determine whether a transaction that is documented as a lease creates, for commercial law purposes, a "true" lease or a security interest, courts often analyze the proper characterization of the transaction by applying the Uniform Commercial Code (the "U.C.C."), including its text, official commentary, and interpretive case law. Although a transaction may be documented as a lease, courts will consider the substance of the transaction, including the economic terms and pertinent practicalities, to determine its characterization, if disputed. The rights, obligations, and remedies of the parties will be governed by U.C.C. Article 2A if the transaction is deemed a true lease or by U.C.C. Article 9 if it is deemed to create a security interest.

* Dominic A. Liberatore is a member of the New York, Pennsylvania, and New Jersey bars and is Deputy General Counsel for DLL. Mr. Liberatore is a past chair of the Subcommittee on Leasing of the Uniform Commercial Code Committee of the ABA Business Law Section. Stephen T. Whelan is a member of the New York bar and practices law with Blank Rome LLP in New York City. Mr. Whelan is a past chair of the Subcommittee on Leasing of the Uniform Commercial Code Committee of the ABA Business Law Section. Edward K. Gross is a member of the District of Columbia and Maryland bars and practices law with Vedder Price P.C. in Washington, D.C. Mr. Gross is the past chair of the Subcommittee on Leasing of the Uniform Commercial Code Committee of the ABA Business Law Section.

Prospect ECHN, Inc. v. Winthrop Resources Corp.[1] involved a declaratory judgment action by a lessee seeking to have a lease recharacterized as a security interest under U.C.C. section 1-203 because, if so determined, the lessee might be relieved of its obligations for the remaining term of the lease. The lease contained an "evergreen" renewal clause providing that the lease did not automatically end on the scheduled expiration date of the *initial term* unless terminated by the lessee's advanced written notice. The lessor rejected the lessee's untimely termination notice, and the lessee became unconditionally bound by the terms of the lease for all of its obligations during the renewal term. The court applied the two-part bright-line test of U.C.C. section 1-203(b), the first part of which requires that "the consideration that the lessee is to pay the lessor for the right of possession and use of the goods is an obligation *for the term of the lease* and is not subject to termination by the lessee."[2]

Relying on general contract law, the court considered the text of the termination provisions of the lease to determine the intention of the parties. The court concluded that, for the purposes of U.C.C. section 1-203(b), the phrasing distinction between "*for the term of the lease*" found in section 1-203(b) and the "*original term*" referenced in U.C.C. section 1-203(b)(1) (i.e., the "*initial term*" as referenced in the lease) implied that the inability to terminate "for the term of the lease" included both the initial lease term and any renewal term.[3] The court also noted that, even if the non-terminable test had been proven by the lessee, it failed to prove the existence of any of the other factors in U.C.C. section 1-203(b)(1)–(4).[4] Careful drafting by the lessor yielded its desired result.

Lease Damages

Although parties at the inception of a transaction may bargain for certain remedies, if litigated, courts will determine whether those remedies may be enforced. In particular, courts have analyzed the enforceability of liquidated damages and other remedies in leases when challenged by a lessee based on statutory or common law defenses. Lessors may attempt to mitigate this risk by prudent drafting, but the enforceability of any remedy will be, if challenged, subject to a court's analysis of the applicable law and the relevant facts of each case. In many cases, courts have been willing to enforce remedies expressly agreed to by the parties, especially between sophisticated parties to a commercial lease or financing agreement.

AVT New Jersey, L.P. v. Cubitac Corp.[5] involved a lessor's action to collect liquidated damages, interest, and other amounts it claimed were payable by the

1. No. 19-cv-586 (SRN/ECW), 2021 WL 5086274 (D. Minn. Nov. 2, 2021).
2. *Id.* at *8 (emphasis added) (quoting Minn. Stat. Ann. § 336.1-203(b) (West, Westlaw through 2022 Reg. Sess.)).
3. *Id.* at *10 ("When the Legislature uses different words, we normally presume that those words have different meanings." (quoting Nelson v. Schlener, 859 N.W.2d 288, 294 (Minn. 2015))).
4. *Id.* at *10–12 (citing Minn. Stat. Ann. § 336.1-203(b)(1)–(4) (West, Westlaw through 2022 Reg. Sess.)) (addressing the remaining life of the goods and the lessee's ownership option).
5. No. 2:19-cv-00662-JNP-DBP, 2021 WL 4307030 (D. Utah Sept. 22, 2021).

lessee and a personal guarantor pursuant to the express provisions of the related lease and guaranty. In their response to the lessor's motion for summary judgment, the lessee and guarantor argued that the motion should not be granted because, although they were not disputing the lessor's right to liquidated damages, there was a genuine issue of material fact regarding the damages amount to be awarded to the lessor. "Specifically, Defendants argue that, per the Master Lease, they are entitled to a reduction in judgment in the as-yet-unknown amount that AVT collects from future sale or re-lease of the equipment."[6] The court rejected the lessee's argument that various hypothetical scenarios relating to the eventual application, or not, of any disposition proceeds raised any question of material fact as to what the amount of judgment should be.[7]

The court also rejected the defendants' argument that the lessor should not be permitted to exercise both its liquidated damages and repossession remedies because it might result in a double recovery for the lessor, pointing to the lessor's express right to exercise cumulative remedies under the lease. Per the court, "[t]he remedies provision in this contract may be a bad bargain" for the defendants, but absent any argument that the lease is unconscionable, "the court will enforce the terms of the agreement to which the parties agreed."[8] Surprisingly, there was no discussion in the opinion regarding the enforceability of the liquidated damages remedy under U.C.C. section 2A-504 or its interpretive case law and whether it supported or contradicted the defendants' arguments.

Wells Fargo Trust Co. v. Synergy Group Corp.,[9] previously summarized in the fall 2021 *The Business Lawyer,*[10] involved an enforcement action by a lessor of its rights under two aircraft engine leases with a commercial air carrier and its affiliated guarantors. In *Synergy*, the U.S. District Court for the Southern District of New York granted the lessor summary judgment for damages under the leases, including "payments for future rent, end of lease, and repair and maintenance," despite the lessee's assertions that certain of those damages were unenforceable penalties.[11] In a summary order dated May 26, 2021, the U.S. Court of Appeals for the Second Circuit "affirm[ed] for the reasons set out in the district court's thorough and well-reasoned opinion."[12]

PSFS 3 Corp. v. Michael P. Seidman, D.D.S., P.C.[13] involved enforcement actions by an assignee affiliate of a finance company lessor pursuant to leases with doctors, dentists, and their professional associations. The leases financed agreements by the lessees to purchase multimedia systems for their waiting rooms from a third-party vendor. A dispute arose between the lessees and the vendor regarding the purchases of equipment, including claims by the lessees

6. *Id.* at *1.
7. *Id.* at *2.
8. *Id.*
9. 465 F. Supp. 3d 355 (S.D.N.Y. 2020).
10. Dominic A. Liberatore, Stephen T. Whelan & Edward K. Gross, *Leases*, 76 Bus. Law. 1315, 1319–21 (2021).
11. Wells Fargo Tr. Co. v. Synergy Grp. Corp., 848 F. App'x 467, 467 (2d Cir. 2021).
12. *Id.*
13. 962 N.W.2d 810 (Iowa 2021).

that the vendor breached its representations and promises, and sought to stop making payments to the lessor, and the lessor countered by asserting the lessees' payment obligations under the leases were unconditional in light of the "hell-or-high-water clause" in the leases. The lessees challenged the lessor's right to the acceleration and other damages under the leases, arguing that they should not have to pay because, among other reasons, certain of its provisions violated Iowa Code Chapter 535 related to money and credit,[14] the lessor failed to prove its damages, and the default interest rate was unconscionable.[15]

The court's discussion of the damages and unconscionability issues raised by the lessees did not include any analysis, or even a mention, of Article 2A or any other provision of the U.C.C. By way of example, without considering the characterization tests in U.C.C. section 1-203, the court noted that the lessor's response to the lessees' assertions that the leases violated the referenced Iowa statutes included an assertion by the lessor that, although the agreements are labeled "Equipment Lease Application and Agreement," the lessor characterized the documents as finance agreements supporting the purchase of the equipment, rather than leases.[16]

Without considering whether a transaction should be characterized as a lease or whether any references in the documents to the leases being "finance leases" should support the enforcement of any hell-or-high-water provisions in the leases, the court upheld both the lessor's accelerated-rent and default-interest-rate claims relying on general contract law.[17] Regarding the lessor's claims for past-due and accelerated rent, the court agreed with the lessor that the parties expressly agreed to the formula relied upon by the lessor to calculate its rent damages claims, so the lessees' argument that the lessor failed to prove its damages was without merit.[18] The court also relied upon general contract law when upholding the lessor's 18-percent default-interest claim, taking into account that the future payments were discounted to remove the interest portion of those payments, and also that this default rate had been expressly agreed to by the parties and should be presumed to be enforceable, particularly in a business contract: "A party must climb a tall hill to establish that a term of a business agreement is unconscionable."[19] Again, it would be interesting to analyze the likely outcome of this case if the court had applied the applicable provisions of the U.C.C.

14. *Id.* at 834–37. The lessees argued that the leases were "credit agreements," and that the lessor violated Iowa Code section 535.17(1) because it failed to disclose the interest rate being charged in the leases and violated Iowa Code section 535.2 because the interest rate in the leases exceeded the permitted rate. *See id.*; IOWA CODE ANN. § 535.17(5)(c) (West, Westlaw through 2022 Reg. Sess.) (defining "credit agreement"); *id.* § 535.17(1) (providing that a "credit agreement" is not enforceable unless a writing sets forth all material terms); *id.* § 535.2 (imposing caps on interest rates). A discussion regarding the application of the referenced Iowa statutes is beyond the scope of this Survey.

15. *PSFS 3 Corp.*, 962 N.W.2d at 816, 818.

16. *Id.* at 835 n.8.

17. *Id.* at 834, 839.

18. *Id.* at 839.

19. *Id.*

Horne v. Electric Eel Manufacturing Co.[20] involved a suit by a consumer lessee against a lessor for damages for serious injuries suffered by the lessee relating to the lessor's alleged negligence and breach of warranty. The lease included both the lessor's agreement to provide the equipment in "good working condition" as well as an acknowledgment by the lessee that it accepted the equipment "'as is' and on a 'where is' basis, with 'all faults' and without any recourse whatsoever against [lessor]."[21] The court relied on Illinois law and held that the lessor's express promise to provide the equipment in "'good working condition' [took] precedence over the limiting phrases 'as-is' and 'with all faults,'" and accordingly, the lessor was in material breach of the lease and "may not disclaim liability for injuries that occur as a result of a breach of that express promise."[22] Curiously, the court relied on U.C.C. section 2-316(3)(a), not section 2A-214(3)(a), when rejecting the lessee's argument that the exculpatory provision violated public policy.[23] However, under both of the referenced statutes, a conspicuous "as-is" clause disclaims implied warranties but not express warranties.[24] Although the as-is clause was conspicuous, it would not be effective under either Article 2 or 2A to disclaim the lessor's express warranty that the equipment was to be delivered in good working condition. Further, that Article 2 and Article 2A both provide that a limitation on consequential damages for personal injury is *prima facie* unconscionable with respect to consumer goods,[25] the lessor should have been liable for the lessee's injury regardless of the court's misapplication.[26]

Vicarious Liability

Many Graves Amendment[27] cases from 2021 focused on whether the vehicle owner was negligent or committed criminal wrongdoing, either of which is expressly excluded from Graves Amendment protection.[28] If the carve-outs are not

20. 987 F.3d 704 (7th Cir. 2021).

21. *Id.* at 719 (quoting rental agreement).

22. *Id.* at 719–20 (quoting rental agreement).

23. *Id.* at 724; *see* U.C.C. § 2-316 (2011) (addressing warranty modification for sales); *id.* § 2A-214 (addressing warranty modification for leases).

24. U.C.C. §§ 2-316(3)(a), 2A-214(3)(a) (2011).

25. *See id.* §§ 2-719(3), 2A-503(3). *But see id.* § 2-316 cmt. 2 ("This Article treats the limitation or avoidance of consequential damages as a matter of limiting remedies for breach, separate from the matter of creation of liability under a warranty. If no warranty exists, there is of course no problem of limiting remedies for breach of warranty. Under subsection (4) the question of limitation of remedy is governed by the sections referred to rather than by this section."); *id.* § 2-719 cmt. 3 ("The seller in all cases is free to disclaim warranties in the manner provided in Section 2-316.").

26. For a detailed analysis of this case, especially as to the drafting implications of the pertinent provisions of the related lease, see Stephen L. Sepinuck, *Drafting an Exculpatory Clause*, Transactional Law., Apr. 2021, at 1.

27. *See* 49 U.S.C. § 30106(a) (2018) ("An owner of a motor vehicle that rents or leases the vehicle to a person (or an affiliate of the owner) shall not be liable under the law of any State or political subdivision thereof, by reason of being the owner of the vehicle (or an affiliate of the owner), for harm to persons or property that results or arises out of the use, operation, or possession of the vehicle during the period of the rental or lease, if—(1) the owner (or an affiliate of the owner) is engaged in the trade or business of renting or leasing motor vehicles; and (2) there is no negligence or criminal wrongdoing on the part of the owner (or an affiliate of the owner).").

28. *Id.* § 30106(a)(2).

applicable, the Graves Amendment provides certain protections to owners of motor vehicles who are in the business of renting or leasing vehicles who are sued under a theory of vicarious liability. For instance, in *Nelson v. Centerline Car Rentals, Inc.*,[29] plaintiff Terrence Nelson ("Nelson") filed a complaint against defendants Centerline Car Rentals, Inc. ("CCR") and Jonathan Scully ("Scully") regarding a motor vehicle accident between Nelson and Scully while Scully was driving a vehicle rented from CCR. CCR argued it was exempt from vicarious liability under the Graves Amendment. However, Nelson argued that the "Graves Amendment is not applicable here, as [Nelson] is claiming that [CCR] is directly liable for failing to ensure Defendant Scully could properly drive on the roads of the Virgin Islands"[30] and "the Graves Amendment specifically removes protection from car rental companies for their own negligence."[31] Nelson argued that CCR was directly negligent by failing to verify Scully's driver's license and insurance information and driving record.[32]

The court held that "[Nelson] failed to allege any facts pertaining to the element of duty, a necessary element of the negligence claim—namely, what duty of care did [CCR] owe [Nelson]."[33] The court therefore concluded that the negligence carve-out under the Graves Amendment was not applicable.[34] The court granted CCR's motion to dismiss the negligence claim.[35]

In *Muhammad v. Skomsvold*,[36] plaintiff Ameer Muhammad ("Muhammad") was injured in a car accident involving defendant James Skomsvold ("Skomsvold"), who Muhammad alleged was working for defendants Lyft, Inc. ("Lyft") and/or Hertz Vehicles, LLC ("Hertz") at the time of the accident. Muhammad sued all defendants for negligence and negligence per se and Hertz and Lyft for negligent entrustment. Hertz argued that, as owner of the vehicle at issue, it was exempt from vicarious liability under the Graves Amendment. The court noted that "[n]egligent entrustment is not a claim for vicarious liability. Instead, it is based on a theory that Hertz was itself negligent by entrusting the vehicle to Skomsvold."[37] The court held that, "[b]ecause the negligent entrustment claim alleges Hertz was negligent, the Graves Amendment does not apply."[38] The court therefore ordered that Muhammad was entitled to amend his complaint to add facts in support of his negligent entrustment claim.[39]

In *Fuller v. Biggs*,[40] plaintiffs Charles Fuller ("Fuller") and Antonio Davis ("Davis") suffered injuries due to a motor vehicle collision with Scott Biggs

29. No. SX-20-CV-273, 2021 WL 5088802 (V.I. Super. Ct. Oct. 29, 2021).
30. *Id.* at *5 (quoting Response to Motion to Dismiss at 6).
31. *Id.* (quoting Response to Motion to Dismiss at 6).
32. *Id.* at *4.
33. *Id.* at *5.
34. *Id.*
35. *Id.*
36. No. 2:21-CV-01536-APG-EJY, 2021 WL 4943690 (D. Nev. Oct. 22, 2021).
37. *Id.* at *2.
38. *Id.* (citing 49 U.S.C. § 30106(a)(2) (2018)).
39. *Id.*
40. 532 F. Supp. 3d 371 (N.D. Tex. 2021).

("Biggs"). Biggs was operating an eighteen-wheel tractor. PACCAR Leasing Company ("PACCAR") owned the tractor that was operated by Biggs at the time of the accident. PACCAR asserted that it leased the tractor to defendant DKL Transportation, LLC ("DKL"), which, in turn, leased the tractor to Biggs. Plaintiffs asserted that "PACCAR (1) negligently entrusted the tractor to Biggs and (2) negligently hired or trained Biggs."[41] The court noted that "the Graves Amendment preempts neither the negligent hiring nor negligent entrustment claims."[42] The court further noted that the sole basis for PACCAR's motion to dismiss was to challenge the existence of an employment relationship between PACCAR and Biggs and not whether the plaintiffs' claims were based on vicarious liability as required by the Graves Amendment.[43] The court held that, "because the sole basis for PACCAR's motion to dismiss is inapplicable, the court declines to convert the motion to dismiss into a motion for summary judgment."[44] The court therefore denied PACCAR's motion to dismiss.[45]

An interesting application of the Graves Amendment in 2021 involved whether the statute preempts liability for entities that own rental vehicles *and* offer liability protection with the rental of a vehicle. In *Benjamin v. Avis Budget Car Rental LLC*,[46] plaintiff Jacqueline Benjamin and the other named plaintiffs ("Plaintiffs") filed suit relating to a car accident. Plaintiffs alleged that defendant Philip Roux ("Roux") was driving a rental car owned by Avis Budget Car Rental LLC ("Avis") when he improperly turned, causing the accident. Plaintiffs alleged that Avis provided Roux with a "$1M 3rd Party Liability Protection" insurance policy with the rental of the car.[47] Avis moved for dismissal under the Graves Amendment, which preempts vicarious liability for entities that own rental vehicles.

The court noted that "Louisiana recognizes a plaintiff's direct right of action against a tortfeasor's insurer."[48] The court further noted that "[t]he Louisiana Supreme Court has recognized that rental agreements of self-insuring car rental companies can constitute automobile policies, which would place the car rental company in the role of insurer."[49]

The court held that "Plaintiffs' factual allegations that Avis provided liability insurance to Roux states a claim upon which relief can be granted. The Graves Amendment precludes only vicarious liability—not insurance liability—of the leasing entity."[50] The court therefore recommended that Avis's motion to dismiss be denied.[51]

41. *Id.* at 376.
42. *Id.* at 381.
43. *Id.*
44. *Id.*
45. *Id.* at 382.
46. No. 6:21-CV-00836, 2021 WL 2408038 (W.D. La. May 27, 2021).
47. *Id.* at *1.
48. *Id.* at *2 (citing La. Stat. Ann. § 22:1269(B) (West, Westlaw through 2021 Reg. Sess.)).
49. *Id.* (quoting Fusco v. Levine, No. 16-1454, 2018 WL 1660985, at *4 (W.D. La. Apr. 5, 2018) (citing Lindsey v. Colonial Lloyd's Ins. Co., 595 So. 2d 606, 610 (La. 1992))).
50. *Id.*
51. *Id.* Defendant's motion to dismiss was referred to the U.S. Magistrate Judge for review, report, and recommendation.

Another interesting application of the Graves Amendment in 2021 involved whether a loaner vehicle satisfies the statutory requirement that the owner of the vehicle be "engaged in the trade or business of renting or leasing motor vehicles."[52] In *Thayer v. Randy Marion Chevrolet Buick Cadillac, LLC*,[53] Samuel Pope ("Pope") left a vehicle with Randy Marion Chevrolet Buick Cadillac, LLC ("Dealership") for service. The vehicle belonged to Pope's wife, Rebeca Lowthorp ("Lowthorp"). Dealership gave Pope a loaner vehicle to use while Pope's wife's vehicle was being serviced. Pope was driving the loaner vehicle when he collided with a vehicle owned by plaintiff Cindy Thayer ("Thayer"). Thayer sued Dealership for damages under a theory of vicarious liability. Dealership moved for summary judgment based on preemption of vicarious liability under the Graves Amendment.

The court noted that, "[f]or the Graves Amendment to apply, a defendant must show . . . that it was 'engaged in the trade or business of renting or leasing motor vehicles.'"[54] The court further noted that "[t]he plain meaning of 'rental' is a transaction that involves payment of consideration for the use of something."[55]

The court stated that "the key question is whether Lowthorp's use of the loaner vehicle was supported by some form of consideration. If it was, the vehicle qualifies as a rental and the Graves Amendment applies."[56] The court held that:

> [T]he undisputed facts show that Lowthorp's use of the loaner vehicle was supported by consideration. . . . [Dealership] testified that it would not allow [Lowthorp] to use the loaner vehicle unless she allowed [Dealership] to service her own vehicle. And Thayer has offered no evidence that [Dealership] would have allowed Lowthorp to use that loaner vehicle if her car were not being serviced. Lowthorp surrendered her car to [Dealership] and agreed to pay the cost of repairs. In exchange, [Lowthorp] received the use of a loaner vehicle. This is sufficient consideration to bring [Dealership] within the scope of the Graves Amendment.[57]

The court therefore granted Dealership's motion for summary judgment.[58]

Forum Selection Clauses

A 2021 case that provides a good analytical overview of a forum selection clause is *Gehrmann v. Knight-Swift Transportation Holdings Inc*.[59] This case arose out of two contracts between plaintiff Jeffery Gehrmann ("Gehrmann") and

52. 49 U.S.C. § 30106(a)(1) (2018).
53. 519 F. Supp. 3d 1062 (M.D. Fla. 2021).
54. *Id.* at 1065 (quoting 49 U.S.C. § 30106(a) (2018)).
55. *Id.* at 1067 (citing *Rent*, Black's Law Dictionary (11th ed. 2019)).
56. *Id.* at 1068.
57. *Id.* (citations omitted).
58. *Id.*
59. No. C20-6002 BHS, 2021 WL 1090793 (W.D. Wash. Mar. 22, 2021).

Knight-Swift Transportation Holdings Inc. ("Knight-Swift") to transport freight and lease a semi-truck. Both contracts involved a similar forum selection clause:

> This Lease shall in all respects be governed by and construed in accordance with the laws of the United State[s] and the State of Arizona without regard to the choice-of-law rules of Arizona or any other state. THE PARTIES AGREE THAT ANY CLAIM OR DISPUTE ARISING FROM OR IN CONNECTION WITH THIS AGREEMENT, WHETHER UNDER FEDERAL, STATE, LOCAL OR FOREIGN STATUTES, REGULATIONS, OR COMMON LAW (INCLUDING BUT NOT LIMITED TO 49 C.F.R. PART 376), SHALL BE BROUGHT EXCLUSIVELY IN THE STATE OR FEDERAL COURTS SERVING PHOENIX, ARIZONA. LESSOR AND LESSEE HEREBY CONSENT TO THE JURISDICTION OF SUCH COURTS.[60]

As an initial matter, the court agreed with the defendants that, pursuant to the forum-selection clause, the parties agreed to litigate any dispute relating to or arising from the contract to lease the freight truck in Phoenix, Arizona.[61] Without providing much discussion, other than to reference the defendants' argument that the language was clear,[62] the court found the forum-selection clause to be a mandatory clause.[63]

Next, the court noted that, "[w]hen the parties have agreed to a valid forum-selection clause, a district court should ordinarily transfer the case to the forum specified in that clause . . . [and] [o]nly under extraordinary circumstances unrelated to the convenience of the parties should a [transfer] motion be denied."[64] The court further noted that, "[a]lthough there is a presumption in favor of enforcing forum selection clauses, there are three exceptions that can make a forum-selection clause unenforceable."[65] The three exceptions are (1) "if the inclusion of the clause in the agreement was the product of fraud or overreaching"; (2) "if the party wishing to repudiate the clause would effectively be deprived of his day in court were the clause enforced"; and (3) "if enforcement would contravene a strong public policy of the forum in which suit is brought."[66] The court stressed that "[t]he party challenging the forum-selection clause carries a 'heavy burden of proof' and must 'clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching.'"[67]

The court held that the forum selection clause was not overreaching simply because Gehrmann did not have equal bargaining power with Knight-Swift.[68]

60. *Id.* at *1 (quoting lease). Given the limited scope of this Survey. The text above sets forth only the forum selection clause.
61. *Id.* at *2.
62. *Id.*
63. *Id.* at *3.
64. *Id.* at *2 (quoting Atl. Marine Constr. Co. v. U.S. Dist. Ct. for W. Dist. of Tex., 571 U.S. 49, 62 (2013)).
65. *Id.* (citing Murphy v. Schneider Nat'l, Inc., 362 F.3d 1133, 1140 (9th Cir. 2004) (citing Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 12–18 (1972))).
66. *Id.* (quoting Richards v. Lloyd's of London, 135 F.3d 1289, 1294 (9th Cir. 1998) (en banc)).
67. *Id.* (quoting *Bremen*, 407 U.S. at 15, 17).
68. *Id.*

The court noted that, "[t]o the contrary, the Supreme Court has upheld a forum-selection clause in the context of an adhesion contract when the challenging party was given notice of the clause's terms before executing the contract."[69]

The court also held Gehrmann "has not met his 'heavy burden of proof' in establishing that he will be deprived of his day in court if this case is transferred to the District of Arizona."[70] The court noted that Gehrmann "has not made a specific showing that he has contacted potential counsel in Arizona and counsel is unaffordable or unwilling to work on a contingent basis."[71] The court "conclude[d] that the forum selection clauses are mandatory and that Gehrmann has not shown that enforcement of the clauses would be unreasonable and unjust."[72] The court therefore granted defendants' motion to transfer venue.[73]

Two practical takeaways from this case are (1) forum selection clauses should be clear and unambiguous (as the court found to be the case in *Gehrmann*); and (2) a party seeking to challenge the forum selection clause has a heavy burden to demonstrate that enforcement would be unreasonable and unjust, or that the clause was invalid for reasons such as fraud or overreaching (a burden not met in *Gehrmann*).

Hell-or-High-Water Clauses

Prospect ECHN, Inc. v. Winthrop Resources Corp.[74] involved an "evergreen" lease in which the lessee neglected to deliver timely notice of nonrenewal. When it failed to obtain the lessor's consent to termination during a renewal term, the lessee sought declaratory judgment that the hell-or-high-water clause in effect meant that the lessee was deprived of any termination right and hence that the lease was a secured financing arrangement. Upholding the hell-or-high-water clause, the court rejected the lessee's argument and did not recharacterize the lease.[75]

GreatAmerica Financial Services Corp. v. Natalya Rodionova Medical Care, P.C.[76] involved the lessee's challenge to enforceability of the hell-or-high-water clause in a lease for a telephone system and copier products provided by a third party, based on allegations of fraud in the inducement. Rejecting the lessee's claim, the court not only upheld the validity of the clause under Iowa law, but also noted that, after taking possession of and accepting the equipment, the lessee had waited for seven months before attempting to reject the equipment and its lease obligations.[77]

69. *Id.* (citing Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 594–95 (1991)).
70. *Id.* at *3 (quoting *Bremen*, 407 U.S. at 17).
71. *Id.*
72. *Id.*
73. *Id.*
74. No. 19-cv-586 (SRN/ECW), 2021 WL 5086274 (D. Minn. Nov. 2, 2021).
75. *Id.* at *9–10, *14.
76. 956 N.W.2d 148 (Iowa 2021).
77. *Id.* at 155–56.

Rights of Assignees

In re Shoot the Moon,[78] previously summarized in the fall 2021 *The Business Lawyer*,[79] involved a Merchant Agreement with CapCall, LLC ("CapCall"), which provided capital to Shoot the Moon restaurants, and in return CapCall received a portion of all future receivables. The Shoot the Moon entities subsequently filed for bankruptcy, and CapCall argued that it was entitled to all outstanding receivable amounts not yet paid. Entitlement to payment turned on whether the account assignments were true sales or unsecured loans. After an evidentiary hearing, the court identified multiple factors in favor of characterizing the transaction as a disguised loan, including an all-asset description in the U.C.C.-1 financing statement filed against each purported seller, a broad security interest in assets granted by each restaurant seller, a personal guaranty by the principal owner of Shoot the Moon, and a continuing requirement that the guarantor deliver CapCall its financial statements.[80]

The court observed that "[this] panoply of rights, remedies, and potential control is highly unusual in the context of an asset sale."[81] The absence of certain factors (such as any seller right to repurchase the sold receivables or any buyer right to alter the receivables' payment terms) was insufficient to outweigh the conclusion that "the parties allocated risk . . . [so that] the putative seller [remained] exposed to the underlying receivables and [granted] the putative buyer recourse to sources of recovery beyond the receivables."[82] The conclusion is justifiable, but some factors cited by the court should not be relevant to the sale-versus-loan determination, such as the seller's commingling collections from the sold receivables with other funds. That factor does not necessarily affect whether the seller has transferred to the buyer the risk that the receivables will be paid.

DS-Concept Trade Invest LLC v. Atalanta Corp.[83] involved a purchase of accounts receivable by DS-Concept Trade Invest LLC ("DS") from Gourmet Food Imports, LLC ("GFI"). GFI delivered a notice of assignment to an account debtor, Atalanta Corp. ("Atalanta"), but Atalanta erroneously made a $541,000 payment to GFI. Once informed of this payment, DS objected but agreed to credit that amount against future invoices that Atalanta was to remit to DS. When Atalanta failed to remit future invoices to DS, DS sued, arguing that acceptance of a single misdirected payment did not waive its rights under U.C.C. section 9-406(a) and the notice of assignment. The court denied DS's motion for summary judgment, asserting that whether DS had waived its rights was a material fact to be resolved at trial.[84] This decision illustrates that an assignee of a

78. CapCall, LLC v. Foster (*In re* Shoot the Moon, LLC), 635 B.R. 797 (Bankr. D. Mont. 2021).
79. *See* Liberatore, Whelan & Gross, *supra* note 10, at 1332–33 (reporting that the court denied a motion for summary judgment).
80. *In re Shoot the Moon, LLC*, 635 B.R. at 814–20.
81. *Id.* at 817.
82. *Id.* at 813–14.
83. 516 F. Supp. 3d 396 (D.N.J. 2021).
84. *Id.* at 402.

lease or loan obligation, who wishes to be accommodating after a misdirected payment, should obtain the obligor's acknowledgment that it is obligated to remit all future payments to the assignee.

Copperwood Capital LLC v. JAG Staffing & Consulting Services, Inc.[85] involved another factoring transaction in which EVO 360 LLC ("EVO") sold to Copperwood Capital LLC ("Copperwood") all invoices and amounts payable to EVO by JAG Staffing & Consulting Services, Inc. The court declined to rule on whether Copperwood had a valid claim under U.C.C. section 9-406, asserting that its breach of contract and unjust enrichment claims could be adjudicated under non-U.C.C. state law.[86] To avoid this perplexing result in the future, lessors and financiers would be advised to include an express reference to the U.C.C. in the rights and remedies sections of their leases and financing documents.

Worthy Lending, LLC v. New Style Contractors, Inc.[87] involved an account debtor that continued to remit some payments to the borrower (rather than to Worthy Lending, LLC), even after it had received from the lender a notice of its security interest in all of the borrower's assets, including the accounts that the borrower had with the account debtor. Affirming an erroneous trial court decision that "a secured party with a security interest is not the same as an assignee,"[88] the Appellate Division further erred by applying U.C.C. section 9-607(e) to deny the lender the right to collect from the account debtor "[b]ecause there was a dispute between . . . the secured creditor and the [borrower] as to who had the right to collect from [the account debtor]."[89] These decisions overlook both Commentary No. 21 of the Permanent Editorial Board[90] and the plain language of U.C.C. section 9-406(a).[91]

85. No. 20-CV-1406 (EK) (RER), 2021 WL 919871 (E.D.N.Y. Feb. 10, 2021).

86. *Id.* at *3 ("Regardless, the Court need not decide these issues of state law as it does not appear that the remedies available under any potential independent UCC cause of action would be different from the remedies Plaintiff seeks under its breach of contract claim—payment of the amount owed under the invoices. Accordingly, I respectfully recommend that default judgment on Plaintiff's UCC claims be denied, and those claims be dismissed without prejudice.").

87. 196 A.D.3d 422 (N.Y. App. Div. 2021).

88. Worthy Lending, LLC v. New Style Contractors, Inc., No. 653406/2020, 2020 WL 6784174, at *6 (N.Y. Sup. Ct. Nov. 17, 2020), *aff'd*, 196 A.D.3d 422 (N.Y. App. Div. 2021).

89. *Worthy Lending, LLC*, 196 A.D.3d at 423.

90. "'[A]ssignment' . . . refers interchangeably to an outright transfer of a right under a contract and to the creation of a security interest in a right under a contract." PERMANENT ED. BD. FOR THE UNIF. COM. CODE, PEB COMMENTARY NO. 21: USE OF THE TERM "ASSIGNMENT" IN ARTICLE 9 OF THE UNIFORM COMMERCIAL CODE 2 n.12 (Mar. 11, 2020) (citing RESTATEMENT (SECOND) OF CONTRACTS ch. 15 (AM. L. INST. 1981) ("Assignment and Delegation")).

91. U.C.C. § 9-406(a) (2013) (stating that "an account debtor on an account, chattel paper, or a payment intangible may[, after receipt of notification from the assignee,] . . . discharge its obligation by paying the assignee and may not discharge the obligation by paying the assignor").