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Brican Equipment Lease Litigation

A Mixed Bag for Vendor Finance Companies

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A federal district court's recent summary judgment decision in *In re: Brican America, LLC Equipment Lease Litigation*, 2013 WL 3967920 (S.D. Fla. Aug. 1, 2013), appears to be a mixed bag for vendor finance companies. In *Brican*, a high-profile multi-district litigation arising out of alleged equipment lease fraud, the court both granted in part and denied in part, a lessor's motion for summary judgment on what the court termed the "jugular" issue in the case. Those issues involved the interplay between standard "hell or high water" provisions contained in the applicable lease agreements and "Cancellation" clauses inserted into contemporaneous "Marketing Agreements" between the vendor and its customers. The court's decision provides a learning opportunity for vendor finance companies.

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Factual Background

In 2010, multiple doctors, dentists and other medical professionals ("Plaintiffs") instituted lawsuits throughout the country against various defendants including "Brican, LLC" or its affiliate "Brican, Inc." (collectively, "Brican") and NCMIC Finance Corporation d/b/a Professional Solutions Financial Services ("NCMIC"). The cases were consolidated by the United States Judicial Panel on Multidistrict Litigation and assigned to Judge Patricia A. Seitz of the Southern District of Florida.

The Plaintiffs alleged that they were victimized by a scheme relating to the acquisition of a display system marketed by Brican, which consisted of a flat screen television, a computer, and software ("Display System") used to show advertising in the Plaintiffs' waiting rooms. The Plaintiffs financed the system through equipment lease agreements with various equipment finance companies. Most of the lease agreements — more than 1,300 — were with NCMIC.

At the same time each Plaintiff executed its lease agreement, it entered into a contract termed a "Marketing Agreement" with Brican or a Brican affiliate known as Viso Lasik Med Spas, LLC ("Viso"). Under the Marketing Agreement, Brican or Viso promised to pay the plaintiffs to run advertising on the Display Systems. The Marketing Agreements promised the Plaintiffs advertising revenue that would offset the monthly lease payments. Thus, it was stated or implied that the Plaintiffs would receive their Display Systems at essentially no cost.

What happened next should come as no surprise to any reader, given that the matter ended up in multi-district litigation, Brican and Viso stopped making payments under the Marketing Agreements; NCMIC and some of the other leasing companies continued to insist on payment; collection actions were instituted against some of the recalcitrant lessees; and the Plaintiffs alleged that they had been victimized by fraud.

After denying the Plaintiffs' request for class certification, the court invited the parties to submit summary judgment motions on the "jugular issues" of the case. The court's summary judgment opinion noted that it was addressing other questions in the case, such as whether the Plaintiffs could maintain their fraud claims. The "jugular issues" related to the interplay between the Lease Agreements and Marketing Agreements — in particular, whether "Cancellation" provi-

sions in the Marketing Agreements allowed the Plaintiffs to cancel their respective Lease Agreements, notwithstanding the presence of "hell or high water" clauses.

This issue was significantly complicated by the fact that there were multiple versions of the Lease Agreements and Marketing Agreements at issue, which did not have identical terms. A related area of inquiry focused on whether NCMIC knew of and/or authorized the Marketing Agreements between Brican and its customers. The Plaintiffs took the position that NCMIC was aware of, and expressly or implicitly endorsed, Brican's "return policy," under which customers were told that they could cancel their Lease Agreements if Brican stopped making marketing payments. NCMIC denied that it knew or approved of this policy.

Summary Judgment Opinion

The court's legal analysis began by noting that the Plaintiffs are pursuing a "paper case," *i.e.*, the Plaintiffs' claims are based solely on the contracts or other written documents described in the pleadings, and not on any oral representations made by Brican's sales agents. Thus, a critical question was whether the Plaintiffs would be permitted to submit evidence regarding how the transactions were presented by Brican's sales agents, in order to reconcile the alleged inconsistencies between the Lease Agreements and the Marketing Agreements. NCMIC argued that such evidence was precluded by the parol evidence rule, which prohibits the introduction of evidence outside the four corners of the written document to construe a clear and unambiguous contract.

Citing to standard principles of contract interpretation, the court noted that it could not look to extrinsic sources to determine the parties' intent unless the contractual terms were ambiguous. Put differently, in construing the contract language, the court may consider oral representations by Brican's sales representatives only if the relevant agreements could not be reconciled as a matter of law. On the other hand, the court recognized that it could consider extrinsic evidence that was not being offered to alter or amend the language of the Lease Agreements, but rather to demonstrate what NCMIC knew or should have known about the Marketing Agreements.

Thus, the court summarized the key contract construction issue as whether the "apparently ironclad" hell or high water clauses contained in the Lease Agreements could be reconciled with the "Cancellation" provisions in the Marketing Agreements. If the documents could be reconciled, then NCMIC would be entitled to enforce the hell or high water provision as a matter of law. If not, the contract documents would be ambiguous and their proper construction deemed a disputed factual issue that would need to be resolved by a jury.

The court found that the outcome of this "jugular" issue ultimately turned upon which version of the Marketing Agreement each plaintiff signed. Four of the eight versions of the Marketing Agreement signed by various Plaintiffs (versions 5 through 8) did not state that the Lease Agreement could be cancelled, but rather that that if Viso failed to honor its commitment relating to advertising fees, "the Client may request that Brican repurchase the Client's lease agreement … " (or words to that effect). The court found that, even construing the undisputed facts in the light most favorable to the Plaintiffs, such language did not permit the Lease Agreements to be cancelled, but provided at most that if Viso fails to make its advertising payments, and a client requests it, Brican would repurchase the Lease Agreement or assume the client's obligations. Because there was no inconsistency between these versions of the "Cancellation" provision and the Lease Agreements' hell or high water clause, NCMIC was entitled to summary judgment with respect to transactions involving those versions of the Marketing Agreements.

On the other hand, the court found that there was a genuine issue of material fact that prevented summary judgment with respect to versions 1-4 of the Marketing Agreements, which contained express language stating that "all related agreements can be cancelled … " if Brican or Viso failed to honor their financial commitment under the Marketing Agreement. The court held that determining the parties' intent and, more specifically, whether NCMIC intended to create an exception to the hell or high water clause, required consideration of disputed factual issues. Those facts included: 1) when NCMIC learned about the "Cancellation" clause in the Marketing Agreements; and 2) what actions NCMIC took as a result of this knowledge. Finding that "the evidence is susceptible to multiple reasonable inferences" regarding these issues, the court declined to grant summary judgment with respect to transactions involving versions 1-4 of the Marketing Agreement.

Another critical aspect of the court's decision was its conclusion that there was an issue of fact as to whether Brican's sales representatives acted as NCMIC's "apparent agents" in presenting the

Marketing Agreements. Such issue is relevant in determining whether the actions of Brican's sales agents may be attributed to NCMIC for the purposes of assessing NCMIC's potential liability. While the court agreed with NCMIC that no actual agency existed, it noted that the facts would permit a finding of apparent agency. Among other things, the Plaintiffs dealt exclusively with Brican's sales representatives; the Lease Agreements featured Brican's logo prominently at the top of the page; and the appearance of NCMIC's name in the Lease Agreements could indicate that NCMIC allowed Brican's representatives to hold themselves out as NCMIC's agents. The court found that such facts might permit a finding that NCMIC knowingly permitted and/or held out Brican's sales agents as having authority to negotiate the terms of the Lease Agreements and prepare the paperwork used to execute the agreement, which could give rise to a finding of apparent authority.

Takeaways from *Brican*

It is too soon to know what impact the *Brican* decision might have beyond the immediate parties to the case. Indeed, subsequent filings indicate that the parties interpret the court's ruling differently. Various aspects of the *Brican* opinion will likely be clarified in the months and years to come. Nevertheless, there are a few takeaways that can serve as teaching moments for vendor lease finance companies.

First, like several other recent high-profile decisions, including *De Lage Landen Financial Services, Inc. v. Rasa Floors, LP*, 792 F. Supp. 2d 812 (E.D. Pa. 2011) and *C&J Vantage Leasing Co. v. Wolfe*, 795 N.W.2d 65 (Iowa 2011), the *Brican* case involved a marketing pitch that arguably led the lessees to believe that they were receiving the leased equipment at no cost to them. Likewise, each of those cases involved allegations that the customers were unaware of the nature of the Lease Agreement and believed that it could be cancelled if the vendor did not fulfill its contractual obligations.

Thus, *Brican* reinforces the critical importance of a lessor's employees fully understanding the lease program at issue and how it is being marketed to potential customers. Vendors must be asked for templates of any contemplated customer agreements, which should be scrutinized by the lessor's counsel. The language of any agreement between vendor and customer should make clear that it is a separate and distinct contract from the Lease Agreement; the Lease Agreement is not subject to cancellation; and the customer will remain absolutely and unconditionally liable for making its payments under the Lease Agreement. Under no circumstances should the lessor permit the Vendor to enter into any customer agreements that contain cancellation language that is inconsistent with the Lease Agreement's hell or high water provision.

A second takeaway from *Brican* relates to what is perhaps the most troubling aspect of that opinion: the court's decision to allow the Plaintiffs' apparent agency theory to survive summary judgment. That decision reinforces that apparent authority claims may be more susceptible to factual dispute and, therefore, surviving pre-trial motions, than breach of contract claims. Still, absent intentional fraud by the vendor, there are acts a lessor can take to mitigate the risk of being held liable for the conduct of the vendor's employees.

Careful draftsmanship of lease agreements and vendor program agreements is critical. Such agreements should make clear that the Lease Agreement is solely between the finance company and the lessee, and that the vendor is not acting as the lessor's agent. Clear contractual language, which specifies the roles of the parties, may go a long way toward defeating agency under either an actual authority or apparent authority theory. Similarly, the finance company's role in the transaction should be fully disclosed in any communications with the vendor. Of particular importance, it should be made clear in the Lease Agreement and by the vendor that only the lessor has the authority to negotiate changes to the lease agreement. While some vendors might resist shining sunlight on the finance company's role, experience teaches that lessees who are not aware of the nature of the transaction are more likely to "cry foul" when the lease agreement is enforced, even though the vendor has not fulfilled its obligations to its customer.

The final, and perhaps most important, takeaway from *Brican* is a positive one. The *Brican* court showed no hesitation in enforcing NCMIC's hell or high water provisions where there was no inconsistent language in the Marketing Agreements. Accordingly, lessors should continue to educate courts as to the role of lease finance companies, and the importance of hell or high water provisions to the industry, and should continue to enforce such provisions without hesitation or apology.