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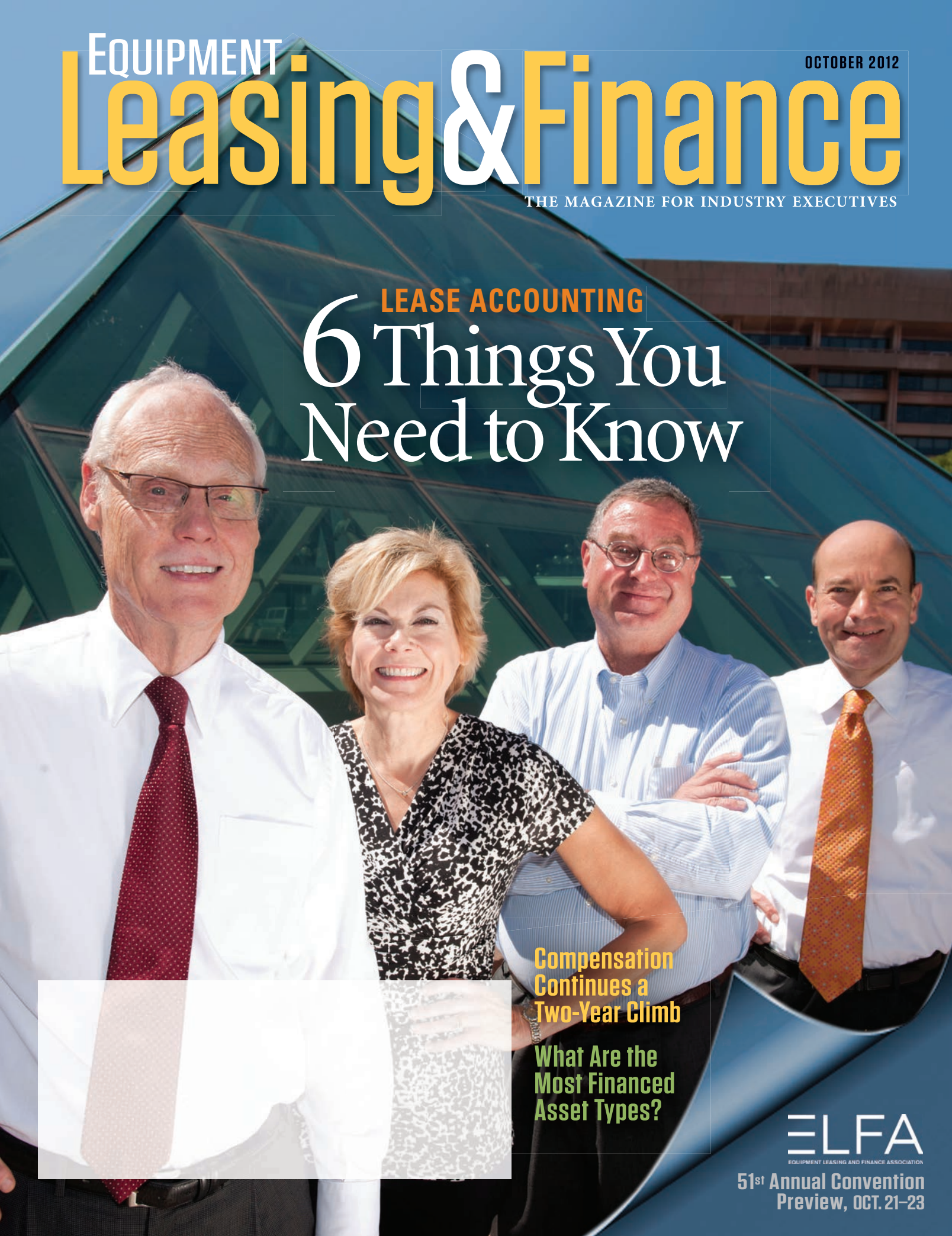

LEASE ACCOUNTING

6 Things You Need to Know

Compensation Continues a Two-Year Climb

What Are the Most Financed Asset Types?

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EQUIPMENT LEASING AND FINANCE ASSOCIATION

51st Annual Convention Preview, OCT. 21–23

By Marc L. Hamroff and Robert M. Tils

Lessor Dodges a Class-Action Bullet

MANY LEASES OF PERSONAL PROPERTY AND CONTRACTS for service, maintenance or repairs (collectively, "contracts") contain automatic renewal provisions that provide, in effect, that the contract will automatically renew for a specified term unless the lessee or party receiving the service, maintenance or repairs (the customer) sends notice prior to the expiration of the contract of their intention not to renew. Such provisions are unenforceable under New York law unless the lessor or service provider sends to the customer by certified mail, or serves personally, written notice calling the attention of the customer to the existence of such a provision. The notice must be received at least 15, but not more than 30, days prior to the time the customer is required to give notice of the intention not to renew.

Failure to comply with the notice requirement can lead to expensive litigation if the customer fails to return equipment at the end of a lease term because, in the absence of an enforceable automatic renewal provision, a lessor will be relegated to recovering the current "fair market rental value of the [now-used] equipment," and a determination of "fair market rental value" will generally require discovery and an evidentiary hearing. At least one trial-level court in New York has ruled that a lessor cannot avoid the impact of New York's notice requirement by use of a choice-of-law clause in an equipment lease. Wisconsin, Louisiana and Rhode Island also have automatic renewal laws that affect commercial equipment lessors, and other states are in various stages of considering similar legislation.

The Ovitz Case

The recent case of *Ovitz v. Bloomberg L.P.* made it all the way to New York's highest court, where, over a strenuous dissent, the lessor/service provider dodged a bullet and was successful in having a class-action complaint dismissed on the pleadings, notwithstanding that the plaintiff had clearly alleged that the lessor/service provider had violated the New York statutes. In *Ovitz*, the plaintiff's complaint alleged that the original term of the lease/service contract expired in 2002 and that the defendant did not send the statutorily required notice of automatic renewal. The plaintiff continued to use and pay for the equipment and services until 2008, at which time he notified the defendant that he wished to terminate. However, the defendant responded to the plaintiff by advising him that the lease/service agreement had automatically renewed to 2010. After an exchange of email between the parties and unsuccessful demands by the defendant for payment, the plaintiff filed a class-action complaint against the defendant alleging various statutory and common law claims, and seeking declaratory and injunctive relief, in addition to other relief. Two weeks after the suit was filed, the defendant waived all fees "as an accommodation" to the plaintiff.

After several years of litigation, the defendant finally prevailed and the case was dismissed, primarily because the plaintiff had not paid for any services it did not receive and thus no monetary damages were suffered. In effect, the court held "no harm, no foul." However, there was a strenuous dissent to the decision, which stressed the defendant's alleged admission that it was its "policy" not to send renewal notices and to then vigorously pursue its lessees to collect unenforceable fees. In the dissent's view, the "no harm, no foul" approach was inappropriate and the case should have been allowed to proceed, given the plaintiff's allegation that the putative class members "are entitled to injunctive relief necessary to ensure that Bloomberg's 'illegal, unfair and deceptive conduct will not continue into the future.'"

Conclusion

It appears that the defendant in *Ovitz* dodged a bullet, solely because it was unsuccessful in collecting any fees after the plaintiff elected to terminate the agreement. Had the defendant been more "successful" in collecting those fees, it likely would have been less successful in the litigation. Lessors with customers in New York, Wisconsin, Louisiana and Rhode Island (and any other states that may pass similar legislation in the future) should periodically review their policies on automatic renewals to ensure that they are in compliance with all existing statutes. ■

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For more information, see New York General Obligations Law §§5-901 and 5-903; Colonial Funding Corp. v. Bon Jour Int'l, Ltd., 148 A.D.2d 654 (2d Dep't 1989); Colonial Funding Corp. v. Bon Jour Int'l, Ltd., 157 A.D.2d 818 (2d Dep't 1990); Andin Int'l Inc. v. Matrix Funding Corporation, 194 Misc.2d 719 (Sup. Ct. N.Y. Co., 2003).