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A L E R T

MAY 2002

**WHAT'S NEW IN NEW YORK'S NOTICE REQUIREMENT
FOR AUTOMATIC LEASE RENEWALS?**

Many leases of personal property and contracts for service, maintenance or repairs contain an automatic renewal provision that provides, in effect, that the lease or contract will automatically renew for a specified term unless the lessee or party receiving the service, maintenance or repairs sends notice prior to the expiration of the lease or contract of their intention not to renew. **Such provisions are unenforceable under New York law** unless the lessor or service provider sends by certified mail or serves personally, written notice to the lessee or the party receiving the service, maintenance or repairs, calling that party's attention 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 lessee or party receiving the service, maintenance or repairs is required to give notice of their intention not to renew. The New York law was amended in 1999, but has been on the books in one form or another since 1963.

In the context of an equipment lease agreement, it should be assumed that the notice requirement applies to renewals triggered by the lessee's failure to return the equipment at lease end, even though the lease may not contain a requirement for the lessee to send notice of their intention not to renew. Although the New York statutes contain exclusions for renewal periods of one month or less, there is no exclusion based on the value of leased property (such as in Rhode Island).

With respect to the content of the notice itself, the key is that it must be clear and conspicuous. If the notice is to be combined with other information, such as on an invoice or in a letter that includes equipment return instructions, the notice should be highlighted in some way to make certain that the recipient's attention is drawn to it.

EFFECT OF FAILURE TO GIVE NOTICE

What if the lessor does not comply with the statute? Failure to comply with certain statutes can lead to a forfeiture of any right to payment (for example, certain licensing statutes). However, failure to comply with New York's notice statute for automatic renewals does not require such a harsh penalty. Instead, courts have held that an equipment lessor may recover the "fair market rental value of the equipment" for the period after the expiration of the lease term. By analogy, a service provider should be able to recover the fair market value of services actually provided after the end of the initial contract term. But how is that value determined? Although "the rental [or service] agreement may be considered in determining such fair market rental value", if an agreed value cannot be negotiated, an expensive and time consuming court hearing may be required.

What if the lessee continues to make payments after the expiration of the lease or contract (usually as a result of continued billing by the lessor or service provider), but then seeks repayment from the lessor after discovering the non-compliance with the statute (usually after consultation with their attorney)? A 2001 New York appellate decision holds that disgorgement by the lessor is not authorized. A party cannot "continue knowingly and willingly to accept the benefit of the leased equipment without compensating [the] lessor" the Court said. Although the decision does not expressly address the point, the court apparently allowed the lessor to keep the amount paid, without a determination that the amount was the "fair market rental value of the equipment". The lessor was deprived of the argument that the lessee would be locked into a full one year renewal.

CONCLUSION

Although compliance with statutory notice of renewal provisions adds another layer of administrative burden to equipment lessors and service providers, the lost revenue and increased collection costs associated with non-compliance may be substantial. As always, attention to detail in contract administration and statutory compliance can prove to be an effective cost cutting measure, well worth the initial investment in putting a compliance plan in place.

LEGISLATIVE HORIZON

On April 15, 2002, Senate Bill 7108 was referred to Consumer Protection review. This Senate Bill requires a written consent (not more than sixty (60) days prior to the effective date of the renewal) be executed by a lessee prior to lease renewal. The Bill does not refer to the corresponding New York statute discussed above and appears to be an "add on" to general business laws effecting deceptive business practices. We will continue to monitor the Bill's progress.

Moritt Hock Hamroff & Horowitz LLP is a broad based corporate law firm with more than 25 lawyers and a staff of paralegals. The firm has extensive experience in litigation; creditors' rights and bankruptcy; real estate law; tax & trusts and estates; direct marketing, advertising & new media; intellectual property & unfair competition; general corporate, financial services, secured lending & leasing.

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