Leases

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

Case Law Developments

This survey covers several 2022 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 under the Uniform Commercial Code (the "U.C.C."),[1] 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.

Recent U.C.C. amendments are likely to impact leases and financings involving goods and, in some cases, the non-goods aspects of those transactions.[2] Perhaps the most noteworthy of these lease-related amendments is the expanded scope of U.C.C. Article 2A, which now includes so-called "bundled" and other similar transactions involving an integrated lease of goods together with related services, licenses, or sales, if constituting "hybrid leases," as now defined in U.C.C. section 2A-103.[3] These and the other amendments to U.C.C. Article 2A, certain related amendments to the scope of U.C.C. Article 2, which now includes "hybrid transactions," as defined in U.C.C. section

* 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.

1. U.C.C. (Am. L. Inst. & Unif. L. Comm'n 2022).

2. See Unif. L. Comm'n & Am. L. Inst., Uniform Commercial Code Amendments 3 (2022) (providing an overview of amendments to Articles 2 and 2A).

3. U.C.C. § 2A-103(1)(h.1) (2022) (defining "hybrid lease"); *id.* § 2A-102 (addressing the scope of Article 2A).

2-106,[4] and the new definition of "chattel paper," under U.C.C. Article 9,[5] are all discussed in detail elsewhere in the Annual Survey.[6]

A. 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 section 9-103 of 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.

In re Roberts[7] was a bankruptcy court decision, in which the court addressed whether certain rent-to-own agreements (the "RTO agreements") created "leases" or secured transactions in connection with a dispute regarding a Chapter 13 plan. The lessees' Chapter 13 plan treated the lessor's claims for amounts due under the RTO agreements as "secured claims," and the lessor objected, arguing that the RTO agreements were true "leases" under Wisconsin's version of the U.C.C.[8]

The court analyzed the U.C.C. characterization under Wisconsin law which was the stipulated governing law of the rental agreements,[9] and applied the true "lease" test set out in section 401.203(2) of the Wisconsin code.[10] Wisconsin's true lease ("bright-line") test follows the uniform version in U.C.C. section 1-203(b), and includes two prongs. The first prong turns on whether the lessee's obligation to pay for use and possession during the term is terminable by the lessee.[11] The second prong lists four factors, the existence of any of which, in conjunction with the first prong being met, would necessarily require treatment as a secured transaction.[12]

4. U.C.C. § 2-106(5) (2022) (defining "hybrid transaction"); *id.* § 2-102 (addressing the scope of Article 2).

5. U.C.C. § 9-102(a)(11) (2022) (redefining "chattel paper").

6. *See* Unif. L. Comm'n & Am. L. Inst., *supra* note 2, at 1–4 (providing background and overview of the 2022 amendments to the U.C.C.).

7. *In re* Roberts, 641 B.R. 613 (Bankr. E.D. Wis. 2022).

8. Wis. Stat. Ann. § 401.203(2) (West, Westlaw through 2023 Act 4).

9. *In re Roberts*, 641 B.R. at 616.

10. *Id.*

11. Wis. Stat. Ann. § 401.203(2) (West, Westlaw through 2023 Act 4).

12. *Id.* § 401.203(2)(a)–(d) (setting forth the following factors: "(a) The original term of the lease is equal to or greater than the remaining economic life of the goods. (b) The lessee is bound to renew the lease for the remaining economic life of the goods or is bound to become the owner of the goods. (c) The lessee has an option to renew the lease for the remaining economic life of the goods for no additional consideration or for nominal additional consideration upon compliance with the lease agreement. (d) The lessee has an option to become the owner of the goods for no additional consideration or for nominal additional consideration upon compliance with the lease agreement.").

The court noted a split in the courts as to whether terminability of a purported lease should conclusively determine its characterization as a "lease" pursuant to the first prong of the bright-line test in U.C.C. section 1-203(b) or if the factors of the second prong should be considered after the first prong is met. Though the court chose not to opine as to where Wisconsin law should land on the split, it ultimately determined that the RTO agreements at issue were leases and not security agreements under either approach.[13]

Under one approach, if a lease is terminable under the first prong, there is no need to consider the factors listed in the second prong. Accordingly, after concluding that the lessees had the right to "terminate the agreements at any time simply by opting not to make payments and returning the property," the court could have held that the agreements were leases without considering the second prong.[14] However, the court nonetheless chose to apply the second prong by also considering "the facts of the case" relevant to the agreements to determine whether their "economic realities" also supported the characterization under the first prong.[15]

The court explained that, when applying "the facts of each case" characterization test under the U.C.C.,[16] "the key focus is 'whether the lessor retains an economically significant reversionary interest' in the property."[17] Citing a 1995 opinion by the Bankruptcy Court in the Southern District of Illinois, the court considered relevant factors to be: "(1) whether the lessee has an option to renew the lease or to become the owner of the property; (2) whether the useful life of the property exceeds the length of the term of the lease; (3) whether the amount of rent exceeds the fair market value of the property; and (4) whether the debtor is responsible for the payment of taxes, insurance, and other costs incident to ownership."[18] The court applied each of the referenced factors and concluded that the lessees were not obligated to purchase the leased goods, the value of the goods was greater than the aggregate rent payments, the lessor was responsible to maintain the goods, and, by "reasonabl[e] infer[ence]," the goods had useful lives beyond the duration of the rental agreements.[19] Based on these conclusions, the court found that, altogether, the circumstances suggested that the "agreements were intended to be leases, not sales."[20]

13. *In re Roberts*, 641 B.R. at 617.
14. *Id.*
15. *Id.* at 617–18.
16. U.C.C. § 1-203(a) (2022).
17. *In re Roberts*, 641 B.R. at 618 (quoting *In re* Roberts, 620 B.R. 336, 342 (Bankr. D.N.M. 2020)).
18. *Id.* (quoting *In re* Meeks, 210 B.R. 1007, 1010 (Bankr. S.D. Ill. 1995)). With respect to the referenced relevant factors considered by the court in its economic realties analysis, note that factor (2) is also one of the four bright-line factors under the U.C.C., *see* WIS. STAT. ANN. § 401.203(2)(a) (West, Westlaw through 2023 Act 4), and that factors (1), (3), and (4) are essentially similar to factors (d), (a), and (c), respectively of Wisconsin's U.C.C. *Id.* § 401.203(3)(a)–(f) (providing that "[a]-transaction in the form of a lease does not create a security interest merely because" it includes any of six specified factors).
19. *In re Roberts*, 641 B.R. at 617–18.
20. *Id.* at 619.

Interestingly, the lessees argued that the Wisconsin Consumer Act (the "WCA"),[21] not the true "lease" test under section 401.203 of Wisconsin's U.C.C., applied to the agreements because they constituted "consumer credit sales" under the WCA.[22] After considering the available pertinent evidence on the record with respect to the true lease attributes referenced above, and noting that the lessees failed to meet their burden of proof regarding the same, the court concluded that it was "compelled" to find that the agreements were leases, not consumer credit sales under the WCA.[23]

In re AJT Services, Inc.[24] involved a motion for relief from the automatic stay by a lessor in a lessee's Chapter 11 bankruptcy case so that the lessor could pursue its rights relating to three trucks leased by the lessor to the lessee. Prior to the lessee filing its bankruptcy petition in the bankruptcy court, the lessor filed suit against the lessee in the U.S. District Court for the District of Utah after the lessee became delinquent on its payments under the lease. After the lessee failed to file an answer to the lessor's motion, the Utah district court entered summary judgment in favor of the lessor and the court issued a writ of replevin requiring the lessee to return the trucks to the lessor within seven days. The lessee neither complied with the writ nor appealed the district court's judgment, and instead filed a bankruptcy petition in Illinois. Shortly thereafter, the lessor filed a motion to modify the stay imposed under section 362(a) of the Bankruptcy Code to recover the leased trucks.[25]

One of the two grounds for relief from the automatic stay under section 362(a) of the Bankruptcy Code is that the lessee lacks equity in the property and the property is not necessary to an effective reorganization.[26] Accordingly, the lessor argued that cause existed to modify the automatic stay because it owned the trucks, and the lessee had no rights to the trucks under the lease and was wrongfully withholding possession in violation of the Utah district court's judgment and writ of replevin.[27] The lessee argued that the stay should not be lifted because the lease was a secured financing agreement and hence the lessee had redemption rights under Article 9 of the U.C.C.[28]

The dispositive issue was whether the lessee should have argued for recharacterization of the lease in the Utah district court proceeding, which resulted in

21. *Id.* (citing Wis. Stat. Ann. §§ 421.301(9), 421.202(6) (West, Westlaw through 2023 Act 4)).

22. *Id.* (quoting Wis. Stat. Ann. § 421.301(9) (West, Westlaw through 2023 Act 4) ("A 'consumer credit sale' means a sale of goods, services or an interest in land to a customer on credit where the debt is payable in installments or a finance charge is imposed and includes any agreement in the form of a bailment of goods or lease of goods or real property if the bailee or lessee pays or agrees to pay as compensation for use a sum substantially equivalent to or in excess of the aggregate value of the goods or real property involved and it is agreed that the bailee or lessee will become, or for no other or a nominal consideration has the option to become, the owner of the goods or real property upon full compliance with the terms of the agreement.")).

23. *Id.* at 620.

24. *In re* AJT Servs., Inc., 640 B.R. 138 (Bankr. N.D. Ill. 2022).

25. *Id.* at 141.

26. 11 U.S.C. § 362(d)(2)(A)–(B) (2018).

27. *In re AJT Servs., Inc.*, 640 B.R. at 141.

28. *Id.*

summary judgment in favor of the lessor. The bankruptcy court applied the laws of Utah because it deemed that those laws should govern the preclusive effect of the district court judgment. Under Utah law, claim preclusion bars re-litigation of a claim if: "(1) both cases involve the same parties, (2) the claim to be barred was presented in the first case or could have and should have been raised in the first case, and (3) the first case resulted in a final judgment on the merits."[29]

The lessee conceded that the first and third elements were met, but claimed that it could not have argued for recharacterization because the cause of action in the district court was based on non-payment and recharacterization would not have been a defense to the lessee's failure to pay.[30] The court rejected the lessee's argument because the lessor had sought a judgment from the district court for return of its vehicles plus damages calculated on the basis that the lease was a true lease, and the district court had granted the judgment on the same basis.[31] The court noted that, if the lessee believed that the lease was not a true lease, and that it had rights under Article 9 as the equitable owner of the trucks, the lessee could have and should have raised that issue before the district court.[32]

Although the opinion focused on the claim preclusion issue, the bankruptcy court did discuss the impact of the characterization of the lease on the respective rights and remedies of the lessee and the lessor. Curiously, when comparing the remedies the lessor might have had if the lease were deemed to create either a security interest or a true lease, the bankruptcy court discussed the remedies available to a secured party under U.C.C. Article 9, but only referenced the contractual remedies set forth in the lease, without mentioning lessor's remedies under U.C.C. Article 2A.[33]

B. Vicarious Liability

The Graves Amendment[34] cases from 2022 focused on whether the vehicle owner at issue was negligent or committed some criminal wrongdoing, either

29. *Id.* at 142 (citing Mack v. Utah State Dep't of Com., 221 P.3d 194, 203 (Utah 2009)).

30. *Id.*

31. The Utah district court specifically stated that the lessor had provided ample basis in its summary judgment motion for the relief sought and that it would enter a "writ of replevin requiring AJT Service Co. to return *the leased trucking equipment*" to the lessor. AVT Ill. v. AJT Servs., No. 20-CV-280, 2021 WL 4747810, at *1 (D. Utah Oct. 12, 2021) (emphasis added). In its references to the district court's conclusion that the lease was a true lease, the bankruptcy court inferred that the district court's characterization analysis was limited to acknowledgments by the debtor in the lease and a related forbearance agreement that the lease was a true lease. *In re AJT Servs., Inc.*, 640 B.R. at 143. The bankruptcy court opinion did not mention whether, when awarding the judgment in favor of the lessor on the basis that the lease was a true lease, the district court had merely relied upon the referenced acknowledgments or if it considered the statutory test in U.C.C. section 1-203.

32. *In re AJT Servs., Inc.*, 640 B.R. at 144.

33. *Id.*

34. *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

of which is expressly excluded from that statutory protection.[35] Unless one of such exclusions is 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, *De Freitas v. Hertz Corp.*[36] involved a collision in the return area of a car rental company in which an individual claimed that his rental car began to accelerate uncontrollably, causing him to strike the plaintiff as the plaintiff returned his own rental car. The court found that, if the rental company was on prior notice that the car at issue was uncontrollably accelerating but took no action to prevent the individual who rented the car from driving it back to the rental facility on his own, the negligence exclusion to the Graves Amendment would apply.[37] The court held that, because there were genuine issues of material fact on this point, the rental company was not entitled to summary judgment under the Graves Amendment.[38]

Butcher v. Ward[39] involved an individual driving a rental car who collided with the plaintiff's car. The court held that there was no evidence or allegations in plaintiff's complaint that the rental company engaged in any criminal wrongdoing in leasing the rental car to the driver who collided with the plaintiff's car.[40] There was also no evidence or allegations in plaintiff's complaint that the rental company was itself negligent.[41] The court noted the plaintiff's complaint only alleged that the negligence of the rental car driver who collided with the plaintiff's car was "imputed" vicariously to the rental company.[42]

Although not pled by the plaintiff, the court addressed whether there was a question of material fact whether the rental company was negligent by leasing the rental car to the driver who collided with the plaintiff's car.[43] The court noted that the rental company had a policy of verifying lessees' driver's licenses.[44] The court further noted that, prior to leasing the rental car to the driver who collided with the plaintiff's car, the rental company verified that such driver held a valid driver's license.[45] The court found that "[t]here is no evidence or allegations that [the rental company] knew or should have known that [the driver who collided with the plaintiff's car] was reckless, heedless, or incompetent."[46] The court held that there was no question of material fact whether the rental company was negligent in leasing the rental car to the driver who collided

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).").

35. *Id.* § 30106(a)(2).
36. De Freitas v. Hertz Corp., No. 18-CV-01522, 2022 WL 4290327 (D. Nev. Sept. 16, 2022).
37. *Id.* at *7.
38. *Id.*
39. Butcher v. Ward, No. 22-CV-00023, 2022 WL 4596665 (E.D. Wash. June 21, 2022).
40. *Id.* at *4.
41. *Id.*
42. *Id.*
43. *Id.* at *5.
44. *Id.*
45. *Id.*
46. *Id.*

with the plaintiff's car.[47] The court therefore granted the rental company's motion for summary judgment.[48]

Lynch v. Collins[49] involved a collision of a driver who was allegedly employed by the co-defendant corporation and the plaintiff who was driving another vehicle and who was injured in the collision. The court noted that negligent hiring and supervision claims, if established, would be direct (not vicarious) liability claims and therefore would not be entitled to the Graves Amendment protections.[50]

The court also noted that any claim based on an employment or other agency relationship between a driver and vehicle owner would not involve liability of the owner merely because of ownership of the vehicle.[51] The court therefore noted that the Graves Amendment protections would not apply to a claim that was premised on such an employment or agency relationship.[52]

Under the facts at hand, however, the court found that there was no basis to find the driver at issue to be an agent or employee of the vehicle owner.[53] The court further found that there was no evidence showing any direct negligence on the part of the vehicle owner.[54] The court therefore held that the Graves Amendment exclusions were not applicable and that the Graves Amendment protections would apply.[55]

In *Thayer v. Randy Marion Chevrolet Buick Cadillac, LLC*,[56] the circuit court affirmed the holding of the district court, which opinion was analyzed in last year's survey.[57] The circuit court held:

> This case requires us to decide whether a vehicle provided by the service department of an automobile dealership to a customer while that customer's car was being serviced is a vehicle that the service department "rents or leases" to the customer. The district court found that it was. After careful review and with the benefit of oral argument, we affirm.[58]

The circuit court affirmed the district court's grant of summary judgment to the automobile dealership based on the Graves Amendment protections[59] because it found that the dealership was engaged "in the trade or business

47. *Id.*
48. *Id.*
49. Lynch v. Collins, No. 20 C 02477, 2022 WL 2159826 (N.D. Ill. June 15, 2022).
50. *Id.* at *2 (citing Fuller v. Briggs, 532 F. Supp. 3d 371, 379–80 (N.D. Tex. 2021)).
51. *Id.* (citing Johnke v. Espinal-Quiroz, No. 14-CV-6992, 2016 WL 454333, at *8 (N.D. Ill. Feb. 5, 2016)).
52. *Id.*
53. *Id.* at *3.
54. *Id.*
55. *Id.*
56. Thayer v. Randy Marion Chevrolet Buick Cadillac, LLC, 30 F.4th 1290 (11th Cir. 2022).
57. Dominic A. Liberatore, Stephen T. Whelan & Edward K. Gross, *Leases*, 77 BUS. LAW. 1261, 1268 (2022) (analyzing Thayer v. Randy Marion Chevrolet Buick Cadillac, LLC, 519 F. Supp. 3d 1062 (M.D. Fla. 2021)).
58. *Thayer*, 30 F.4th at 1291 (quoting 49 U.S.C. § 30106(a)).
59. *Id.* at 1295.

of renting or leasing motor vehicles" as contemplated by the Graves Amendment.[60]

Daane v. Ryder Truck Rental, Inc.[61] involved a rental company that rented a vehicle to another company whose employee was the driver that collided with the plaintiff. The noteworthy aspect of this case for purposes of this survey is that the court highlighted the following general principle:

> It has been held . . . that absent some evidence of a lessor's failure to properly maintain a vehicle which it has expressly agreed to maintain pursuant to a lease agreement, or some similar active negligence on the part of the lessor . . . the negligence [exclusion to the Graves Amendment] is rarely applicable and should be cautiously applied in light of Congress' clear intent to forestall suits against vehicle leasing companies.[62]

The court held that "there [was] no evidence that there was any negligence or criminal wrongdoing on [the rental company's part]."[63] The court therefore granted the rental company's motion for summary judgment.[64]

C. Forum Selection Clauses

In *Avila v. Relocation Express, LLC*,[65] the defendant sought dismissal of a suit brought in a federal court in New Jersey based on the forum selection clause in an equipment lease, which designated Texas as the forum for disputes. The court held that "Rule 12(b)(2) [of the Federal Rules of Civil Procedure], which permits dismissal on *jurisdictional* grounds, is not the appropriate vehicle for enforcing a forum selection clause."[66]

The defendant also moved to dismiss the suit for improper venue under Rule 12(b)(3) of the Federal Rules of Civil Procedure[67] and 28 U.S.C. § 1406(a).[68] The court noted that, regardless of the existence of a forum selection clause, "when venue is challenged, the court must first determine whether venue is proper by examining 'whether the case falls within one of the three categories set out in section 1391(b).'"[69]

60. *Id.* at 1294 (quoting 49 U.S.C. § 30106(a)(1)).

61. Daane v. Ryder Truck Rental, Inc., No. 18-CV-10489, 2022 WL 392906 (S.D.N.Y. Feb. 9, 2022).

62. *Id.* at *3 (quoting Clarke v. Hirt, 999 N.Y.S.2d 692, 695 (Sup. Ct. 2014)).

63. *Id.*

64. *Id.*

65. Avila v. Relocation Express LLC, No. 22-2325, 2022 WL 17820257 (D.N.J. Dec. 20, 2022).

66. *Id.* at *1 (emphasis added) (citing Fed. R. Civ. P. 12(b)(2)).

67. *Id.* at *2 (citing Fed. R. Civ. P. 12(b)(3)).

68. *Id.* (citing 28 U.S.C. § 1406(a)).

69. *Id.* (quoting Atl. Marine Constr. Co. v. U.S. Dist. Ct. for W. Dist. of Tex., 571 U.S. 49, 56 (2013) (citing 28 U.S.C. § 1391(b))); *see* 28 U.S.C. § 1391(b) (2018) ("A civil action may be brought in (1) a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located; (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated; or (3) if there is no district in which an action may otherwise be brought as provided in this section, any judicial district in which any defendant is subject to the court's personal jurisdiction with respect to such action.").

The court denied the defendant's motion to dismiss for improper venue on the basis that a "case filed in the proper venue . . . may not be dismissed under section 1406(a) or Rule 12(b)(3)."[70] The court further held that section "1406(a) and Rule 12(b)(3) are not proper mechanisms to enforce a forum selection clause."[71]

As a practice tip, the defendant should have considered moving to transfer the case from New Jersey to Texas under the forum selection clause rather than seeking dismissal of the case altogether.

Temming v. Summus Holdings, LLC[72] involved a defendant's motion to transfer a suit from a federal court in California to a court in Pennsylvania under a forum selection clause contained in an equipment lease. Defendant was not a party to such equipment lease but was instead merely the equipment supplier. The court held that, "[b]ecause the defendant has not sustained its burden to show that it is a third-party beneficiary of the contract, it cannot benefit from [the lease's] choice-of-law or forum-selection provisions."[73]

The court noted that:

> The terms of the [lease] show no intent to benefit the defendant. It is named as the supplier, but other terms—such as the lessor's representation that it is not warranting the equipment, the terms about the lessee's selecting and approving the equipment, the term that the supplier is not the lessor's agent, and the waiver and indemnity terms—show that this is a standard lease-financing agreement between a lessor and a lessee.[74]

The court therefore denied the defendant's motion to transfer the case to Pennsylvania.[75]

D. Hell-or-High-Water Clauses

In *GreatAmerica Financial Services Corp. v. Ride Now Auto Parts LLC*,[76] Ride Now executed a sixty-month lease agreement with GreatAmerica for several pieces of office equipment obtained from a third-party vendor, but defaulted after making six rental payments. The agreement included a hell-or-high-water clause requiring Ride Now to perform under all conditions—even if the equipment did not work or was damaged. Noting that Ride Now had taken possession of the equipment and made six rental payments, the court upheld the hell-or-high-water clause. The court rejected the lessee's assertion of fraud in the execution of the agreement, holding that, even if the contract was signed under fraud, forgery or mistake, Ride Now had ratified the agreement. When Ride Now took

70. *Avila*, 2022 WL 17820257, at *2 (quoting *Atl. Marine Constr. Co.*, 571 U.S. at 56).
71. *Id.* (quoting *Atl. Marine Constr. Co.*, 571 U.S. at 61).
72. Temming v. Summus Holdings, LLC, No. 21-CV-04858, 2022 WL 195647 (N.D. Cal. Jan. 21, 2022).
73. *Id.* at *4.
74. *Id.*
75. *Id.*
76. GreatAm. Fin. Servs. Corp. v. Ride Now Auto Parts LLC, No. 20-1066, 2022 WL 108563 (Iowa Ct. App. Jan. 12, 2022).

possession of the equipment and made monthly rental payments, its activity demonstrated knowing acceptance of the benefits of the agreement, despite any defects in formation.[77]

In *Highland Capital Corp. v. Pasto*,[78] Pasto executed an Equipment Lease Agreement with Highland, which purchased medical equipment to lease to Pasto. After Pasto made twenty-nine monthly payments, he notified Highland that he could no longer afford payments. The agreement included a hell-or-high-water clause providing that payments are "ABSOLUTE AND UNCONDITIONAL WITHOUT ANY ABATEMENT, SET-OFF, DEFENSE OR CLAIM FOR ANY REASON."[79] Upholding the hell-or-high-water clause, the court noted that Pasto had acknowledged in writing and orally that he had accepted the equipment and that it was in working order. The court held that the agreement's hell-or-high-water clause barred the lessee's counterclaims of fraud and contract unenforceability, and recognized that courts "around the country regularly enforce such clauses."[80]

E. Rights of Assignees

Sandstone Springs, LLC v. Virag Distribution, LLC[81] involved the failure of the buyer to pay the invoiced amount under a sales contract. The seller sued under both U.C.C. section 2-607(1), which provides that the "buyer must pay at the contract rate for any goods accepted,"[82] and a common law breach of contract claim. The court dismissed plaintiff's U.C.C. claim on the grounds that it was redundant to the breach of contract claim.[83] This decision cited approvingly *Cooperwood Capital LLC v. JAG Staffing & Consulting Services, Inc.*,[84] which was discussed in last year's Survey.[85] The advice for practitioners is the same: "[L]essors 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."[86]

Worthy Lending LLC v. New Style Contractors, Inc.[87] correctly reversed erroneous lower court decisions involving an all-assets security interest granted by the borrower, which also notified its account debtors of the assignment. The New

77. *Id.* at *2.
78. Highland Cap. Corp. v. Pasto, No. 19-14282, 2022 WL 6741730 (D.N.J. Oct. 11, 2022).
79. *Id.* at *6 (quoting Equipment Lease Agreement ¶ 2).
80. *Id.* (collecting cases).
81. Sandstone Springs, LLC v. Virag Distrib., LLC, 617 F. Supp. 3d 159 (W.D.N.Y. 2022).
82. U.C.C. § 2-607(1) (2022).
83. *Sandstone Springs, LLC*, 617 F. Supp. 3d at 178.
84. Copperwood Cap. LLC v. JAG Staffing & Consulting Servs., Inc., No. 20-CV-1406, 2021 WL 919871, at *3 (E.D.N.Y. Feb. 10, 2021).
85. Liberatore, Whelan & Gross, *supra* note 57, at 1272 (analyzing *Cooperwood Cap. LLC*, 2021 WL 919871).
86. *Id.*
87. Worthy Lending LLC v. New Style Contractors, Inc., 201 N.E.3d 783 (N.Y. 2022); *see* Liberatore, Whelan & Gross, *supra* note 57, at 1272 (criticizing Worthy Lending, LLC v. New Style Contractors, Inc., No. 653406/2020, 2020 WL 6784174 (N.Y. Sup. Ct. Nov. 17, 2020), *aff'd*, 146 N.Y.S.3d 782 (App. Div. 2021)).

York Court of Appeals held that, under New York's U.C.C. section 9-406, an "assignee" included the holder of a presently exercisable security interest in an assignor's receivables.[88] The court found that the U.C.C. definition of "security interest" does not distinguish between a "security interest" and an "assignment."[89] Even if this wording meant that the account debtor had to pay twice (i.e., having erroneously paid the assignor, it now must pay the assignee too), the court noted that this result was the "statutory consequence of failing to pay a secured party who has notified the account debtor to pay the secured party directly."[90]

88. *See Worthy Lending LLC*, 201 N.E.3d at 784 ("[A] security interest is an assignment and the U.C.C. is purposefully structured to permit a debtor to grant creditors security interests in a debtor's receivables so that the secured creditor can direct account debtors to pay it directly.").

89. *Id.* at 787.

90. *Id.* at 788.