

Winter 1991

## Personal Property Leasing in Florida: Moving 2A Uniform Treatment

James E. Foster

David G. Shields

Follow this and additional works at: <https://ir.law.fsu.edu/lr>



Part of the Property Law and Real Estate Commons

---

### Recommended Citation

James E. Foster & David G. Shields, *Personal Property Leasing in Florida: Moving 2A Uniform Treatment*, 18 Fla. St. U. L. Rev. 295 (1991).

<https://ir.law.fsu.edu/lr/vol18/iss2/3>

This Article is brought to you for free and open access by Scholarship Repository. It has been accepted for inclusion in Florida State University Law Review by an authorized editor of Scholarship Repository. For more information, please contact [efarrell@law.fsu.edu](mailto:efarrell@law.fsu.edu).

# PERSONAL PROPERTY LEASING IN FLORIDA: MOVING 2A UNIFORM TREATMENT

JAMES E. FOSTER\* AND DAVID G. SHIELDS\*\*

**P**ERSONAL property leasing is widely used in commercial transactions. Businesses and consumers lease everything from office copiers to automobiles and heavy construction equipment.

The personal property or equipment lease is an important alternative to other methods of obtaining the use of goods. Equipment can be purchased outright, financed by a third-party secured or unsecured loan, or purchased under an installment sale contract. These other methods of financing, however, may not always be available, may require more capital than the user desires to commit, or may not be available at a reasonable cost. A bank may be unwilling to loan money to certain types of businesses or for certain types of equipment that are considered high risks. An equipment lease therefore may be the best or even the only reasonable device to obtain the use of necessary equipment. An equipment lessor may be willing to accept a higher risk than a lender because the lessor is not subject to usury laws in determining its pricing for the lease. The lessor may also accept this higher risk because of the residual value of the personal property.

Leases may also present an attractive alternative to the outright purchase of equipment because of tax advantages available to the lessee and the lessor. Rental payments may be expensed in full by the lessee.<sup>1</sup> In contrast, purchased equipment must be capitalized and deductions taken according to depreciation formulas dictated by the Internal Revenue Code.<sup>2</sup>

Given the widespread use of personal property leases, it is surprising there has not been a more comprehensive and definitive body of

---

\* James E. Foster received his B.S. from Dickinson College in 1969, and his J.D., cum laude, in 1972 from the University of Miami. Mr. Foster specializes in commercial law, creditor's rights, and bankruptcy. He is a member of the Orange County Bar Subcommittee on Bankruptcy, the American Association of Equipment Lessors, and the Commercial Law League.

\*\* David G. Shields received his B.A., summa cum laude, from Vanderbilt University in 1979, and his J.D. from the University of Florida in 1987. He is a member of the Florida Bar, the United States District Courts' for the Middle and Southern Districts of Florida, the United States Court of Appeals for the Eleventh Circuit, the American Bar Association's Committee on the Uniform Commercial Code, Subcommittee on Personal Property Leasing, and the Florida Bar Business Law Section UCC Article 2A Revision Committee.

1. I.R.C. § 162 (1988).

2. *Id.* §§ 167, 168.

law to govern these leases, particularly when contrasted to other forms of commercial transactions. For example, sales and secured transactions in personal property are covered by Articles 2 and 9, respectively, of the Uniform Commercial Code (UCC).<sup>3</sup> Also, the sale, financing, and leasing of real estate are governed by a well-developed body of common and statutory law. In contrast, the law of personal property leasing has been adapted from the common law of contracts, broad principles of the UCC, and fringes of the law of real estate leasing.<sup>4</sup> While the personal property leasing industry has developed certain standardized practices and lease provisions, the lack of an established, uniform law governing these lease agreements sometimes has resulted in a disturbing level of uncertainty about the enforceability of lease agreement provisions by the courts.

On October 1, 1987, in an attempt to provide a more consistent legal treatment of personal property leases, the National Conference for Commissioners on Uniform State Laws and the American Law Institute promulgated Article 2A of the UCC entitled "Leases." On March 30, 1988, Oklahoma became the first state to enact Article 2A of the UCC. Subsequently, Article 2A has become law in several other states, including Florida.<sup>5</sup>

On July 3, 1990, Governor Martinez signed Florida's version of Article 2A into law, effective January 1, 1991.<sup>6</sup> Article 2A is not retroac-

---

3. FLA. STAT. §§ 672, 679 (1989).

4. Foreword to Article 2A of the U.C.C. Unless otherwise indicated, all citations to the U.C.C. are to the 1989 Code.

5. These other states include California, South Dakota, Minnesota, Oregon, and Nevada. While Article 2A is pending approval in other states, parties to a non-consumer lease may wish to consider including a provision in their lease agreements for the law of one of these enacting states to govern the interpretation of the agreement, subject of course to conflict of law considerations. In a consumer lease, however, Article 2A would prevent the enforcement of a contractual choice of law unless the forum chosen otherwise had jurisdiction over the lessee. U.C.C. § 2A-106.

California adopted a substantial number of amendments to the Official Text as promulgated by the National Conference for Commissioners on Uniform State Laws and the American Law Institute. Some of these amendments were passed at the behest of consumers and others benefit lessors. Massachusetts appears likely to adopt Article 2A with the California amendments and a few of Massachusetts' own. Other major commercial states are seriously considering the so-called California/Massachusetts amendments, though Minnesota essentially adopted the official text. Thus, it is unclear which version of Article 2A, if any, will ultimately become the widely adopted version. Uniformity of commercial laws among the states is highly desirable for conduct of interstate transactions, but the uniformity of Article 2A at this point is in question.

Florida appears to have opted for the California/Massachusetts version. A detailed comparison of the Official Text and the California/Massachusetts version is beyond the scope of this survey, but significant differences are noted. The subsequent treatment of Article 2A in other states can now be watched, and the Florida legislature can make future changes in the interest of uniformity or for other reasons as necessary.

6. Ch. 90-278, 1990 West's Fla. Sess. Law Ser. 1789 (to be codified at FLA. STAT. §§

tive under the Florida enactment unless the parties agree.<sup>7</sup> This survey discusses the current state of personal property leasing in Florida and the impact Article 2A will have as enacted by the Florida Legislature. The drafters of Article 2A listed three issues begging uniform treatment.<sup>8</sup> What is a lease? What implied warranties will the lessor be deemed to have made to the lessee? What remedies are available to the lessor upon the lessee's default?<sup>9</sup> These issues will be the focus for much of this survey.

### I. OVERVIEW OF ARTICLE 2A

Article 2A is derived in part from both Article 2 and Article 9 of the UCC, but bears closer resemblance in structure and content to Article 2.<sup>10</sup> The drafters of Article 2A concluded that a lease is "closer in spirit and form to the sale of goods than to the creation of a security interest."<sup>11</sup> The drafters reasoned that a sale and a lease are generally bilateral and require the preservation of freedom of contract,<sup>12</sup> while a secured transaction is unilateral, necessitating more limitations on freedom of contract.<sup>13</sup>

Part 1 of Article 2A, "General Provisions," addresses matters of scope,<sup>14</sup> definitions,<sup>15</sup> and matters of application.<sup>16</sup> The Official Comments to Part 1 provide an extensive discussion of the policy and rationale for Article 2A.<sup>17</sup> As with other articles of the UCC, the definitions for Article 2A are vital for uniform usage of the Code. Two of the most important definitions are "consumer lease"<sup>18</sup> and "finance lease,"<sup>19</sup> since a majority of leases will likely fall into at least

---

680.1011-.532). The Official Text Version of Article 2A was introduced in the 1989 Florida legislative session but did not pass. The so-called California/Massachusetts version was subsequently introduced and passed in the 1990 Legislature through House Bill 107.

Article 2A is curiously located in Chapter 680 of the Florida Statutes. Apparently the compilers of the Florida Statutes did not care for a Chapter encumbered with an "A". This paper generally uses the "2A" numeration system for citation purposes. Citations to sections of Chapter 680, Florida Statutes, are used only where the Florida version differs from the official text significantly enough to warrant discussion.

7. Fla. CS for HB 107, § 9 (1990).

8. U.C.C. § 2A-101, Official Comment.

9. *Id.* See footnotes 57-163 and accompanying text.

10. U.C.C. § 2A-101, Official Comment.

11. *Id.*

12. *Id.*

13. *Id.*

14. U.C.C. § 2A-102.

15. U.C.C. § 2A-103.

16. U.C.C. §§ 2A-104 to -106.

17. *See esp.* U.C.C. §§ 2A-101 to -103, Official Comments.

18. U.C.C. § 2A-103(e).

19. U.C.C. § 2A-103(g).

one of these two categories. These two types of leases, which are not mutually exclusive, are discussed later in this survey.<sup>20</sup>

Part 2, entitled "Formation and Construction of Lease Contract," contains provisions dealing with the statute of frauds,<sup>21</sup> the parol evidence rule,<sup>22</sup> warranties,<sup>23</sup> risk of loss,<sup>24</sup> and other matters outlined similarly to the sections found in Part 2 and Part 3 of Article 2 on Sales.

Part 3 is entitled "Effect of Lease Contract." Generally, this part governs the rights of third parties to the lease contract, such as sublessors,<sup>25</sup> holders of liens arising by operation of law,<sup>26</sup> and creditors of the lessee and the lessor.<sup>27</sup> Part 3 also governs the lessor's and lessee's rights when the goods become fixtures.<sup>28</sup>

Part 4 is entitled "Performance of Lease Contract: Repudiated, Substituted and Excused." This part is very similar to sections 2-609 through -616, transposing the terminology for sales to that for leases. Part 5 governs default and is derived to a large extent from the default and remedies provisions of Article 2 on Sales.

Finally, the Article 2A package includes a few conforming amendments to other articles of the UCC, including a new definition of security interest for section 1-201(37).<sup>29</sup> As indicated in the discussion below, the determination of whether a transaction is a true personal property lease or a disguised secured transaction has consistently vexed the courts.<sup>30</sup> This new definition is discussed more fully later in this survey.<sup>31</sup> The other conforming amendment revises section 9-113, which provides for security interests arising under the article on sales, to include leases and references to Article 2A.<sup>32</sup>

20. See footnotes 33 through 56 and accompanying text.

21. U.C.C. § 2A-201.

22. U.C.C. § 2A-202.

23. U.C.C. §§ 2A-210 to -216.

24. U.C.C. §§ 2A-219, -220.

25. U.C.C. §§ 2A-304, -305.

26. U.C.C. § 2A-306.

27. U.C.C. § 2A-307.

28. U.C.C. § 2A-309.

29. U.C.C. § 1-201(37) provides in part:

"Security interest" means an interest in personal property or fixtures which secures payment or performance of an obligation. The retention or reservation of title by a seller of goods notwithstanding shipment or delivery to the buyer . . . is limited in effect to a reservation of a "security interest." The term also includes any interest of a buyer of accounts or chattel paper which is subject to Article 9.

30. See *infra* notes 57-108 and accompanying text.

31. *Id.*

32. U.C.C. § 9-113 provides:

A security interest arising solely under the Article on Sales (Article 2) or the Article on

## II. CONSUMER LEASES

A complete understanding of Article 2A requires consideration of both its overall structure and its specific treatment of certain types of leases, particularly the consumer and finance varieties. As enacted in Florida, Article 2A defines "consumer lease" as "a lease that a lessor regularly engaged in the business of leasing or selling makes to a lessee who is a natural person and takes under the lease primarily for a personal, family, or household purpose."<sup>33</sup> Article 2A creates a set of rules which apply only to consumer leases.<sup>34</sup> Among the more important rules for consumer leases, section 2A-106 generally restricts the choice of law in a consumer lease to a jurisdiction where the lessee resides or where the goods are to be used.

Article 2 codified the concept of unconscionability for sales of goods.<sup>35</sup> Article 2A likewise codifies this concept for leases.<sup>36</sup> Section 2A-108(1) provides relief from unconscionable lease provisions for consumer and nonconsumer lessees. Section 2A-108(2) gives the lessee in a consumer lease the opportunity to obtain relief from leases executed by unconscionable lessors or from unconscionable collection activities. Further, section 2A-108(4) specifically provides for the award of attorney fees to lessees caught in unconscionable consumer leases.<sup>37</sup>

Article 2A provides an assortment of other special provisions generally beneficial to consumer lessees. Section 2A-109 codifies the contractual right of a lessor to accelerate payment if such action is taken

---

Leases (Article 2A) is subject to the provisions of this Article except that to the extent that and so long as the debtor does not have or does not lawfully obtain possession of the goods

- (a) no security agreement is necessary to make the security interest enforceable; and
- (b) no filing is required to perfect the security interest; and
- (c) the rights of the secured party on default by the debtor are governed (i) by the Article on Sales (Article 2) in the case of a security interest arising solely under such Article or (ii) by the Article on Leases (Article 2A) in the case of a security interest arising solely under such Article.

33. FLA. STAT. § 680.1031(e)(1990). U.C.C. § 2A-103(e) of the Official Text limited "consumer leases" to those with total rental payments of less than \$25,000, excluding renewal or purchase options.

34. U.C.C. § 2A-103, Official Comment (e). The sections applying to consumer leases are 2A-106, -108(2), -108(4), -109(2), -221, -309, -406, -407, -504(3)(b), -516(3)(b).

35. U.C.C. § 2-302.

36. U.C.C. § 2A-108.

37. Section 57.105(2), Florida Statutes (1989), provides:

If a contract contains a provision allowing attorney's fees to a party when he is required to take any action to enforce the contract, the court may also allow reasonable attorney's fees to the other party when that party prevails in any action, whether as plaintiff or defendant, with respect to the contract.

This statute provides another opportunity for lessees to recover attorney fees in leases providing for attorney fees to lessors.

in good faith, but in a consumer lease the burden of establishing good faith is on the lessor. In contrast, in nonconsumer leases the party against whom the power has been exercised has the burden of establishing lack of good faith.<sup>38</sup> Section 2A-407 excepts consumer leases from a general rule applicable to finance leases that the lessee's promises under the lease contract are independent and irrevocable upon the lessee's acceptance of the goods. In other words, for all but consumer leases, the lessee's obligations to the lessor, including the obligation to pay rent, are independent of any breach of warranty by the supplier.<sup>39</sup> Other Article 2A sections that allow special exceptions for consumer leases include those on casualty to identified goods,<sup>40</sup> fixtures,<sup>41</sup> delivery problems,<sup>42</sup> stoppage of goods because of the lessee's default or insolvency,<sup>43</sup> and litigation notification requirements.<sup>44</sup>

### III. FINANCE LEASES

While the Article 2A consumer lease rules primarily provide protection to the lessee, the finance lease rules provide greater protections to the finance lessor than to the finance lessee. The finance lease contemplated in section 2A-103(g) is the form most widely used by leasing companies. A classic transaction which results in a finance lease involves three parties: a lessor, a lessee, and a supplier or manufacturer. Under a finance lease, the lessee undertakes a continuing obligation to make payments to the lessor regardless of difficulties with the goods or the supplier. Commonly known as "hell or high water" provisions, these obligations are typical of the provisions used in finance lease agreements today. Although leasing companies consistently rely on these provisions for protection, the propriety of doing so has been brought into question by inconsistent court decisions.<sup>45</sup> Hopefully, the subset of rules for finance leases created by Article 2A will assure consistent treatment for the finance lessor and thus promote the availability of finance leasing. Article 2A also protects the finance lessee by

---

38. U.C.C. § 2A-109(2).

39. See U.C.C. § 2A-407, Official Comment.

40. U.C.C. § 2A-221.

41. U.C.C. § 2A-309(5)(a). Florida adopted the Official Text version of U.C.C. § 2A-309 dealing with lease goods that become fixtures. This is surprising in view of the Florida Legislature's extensive revision of the Article 9 section dealing with security interest in fixtures as originally promulgated in the Uniform Commercial Code. The Florida version of Article 9 is more limiting in granting priority to security interests in fixtures than the Official Text. Compare U.C.C. § 9-313 with FLA. STAT. § 679.313 (1989).

42. U.C.C. § 2A-406.

43. U.C.C. § 2A-504(3).

44. U.C.C. § 2A-516(3)(b).

45. See *infra* notes 125-153 and accompanying text.

making explicit the lessee's rights against the supplier, although it simultaneously restricts the lessee's rights against the finance lessor.<sup>46</sup>

Under section 680.1031(1)(g), Florida Statutes (1990), a finance lease is defined as a lease in which:

1. The lessor does not select, manufacture, or supply the goods;
2. The lessor acquires the goods or the right to possession and use of the goods in connection with the lease; and
3. Either:
  - a. The lessee receives a copy of the contract evidencing the lessor's purchase of the goods on or before signing the lease contract;
  - b. The lessee's approval of the contract evidencing the lessor's purchase of the goods is a condition to effectiveness of the lease contract;
  - c. The lease contract discloses all warranties and other rights provided to the lessee by the lessor and supplier in connection with the lease contract and informs the lessee that there are no warranties or other rights provided to the lessee by the lessor and supplier other than those disclosed in the lease contract; or
  - d. Only if the lease is not a consumer lease, on or before the signing of the lease contract by the lessee the lessor:
    - I. Informs the lessee in writing of the identity of the supplier unless the lessee has selected the supplier and directed the lessor to purchase the goods from the supplier;
    - II. Informs the lessee in writing that the lessee may have rights under the contract evidencing the lessor's purchase of the goods; and
    - III. Advises the lessee in writing to contact the supplier for a description of any such rights.

These provisions reflect the current practice of equipment finance leasing. One potential oversight of this definition, however, is the requirement of subsection 1 that the lessor not be the manufacturer of the goods. Some leasing companies are subsidiaries of parent companies which have other subsidiaries that manufacture goods which may be the subject of an equipment lease. Without additional language or judicial decisions clarifying this definition, equipment leasing companies should be cautious in leasing equipment manufactured by a related entity, unless they are willing to forego the statutory advantages of a finance lease.

Nothing would prevent the leasing subsidiary of a manufacturer from contracting for the same benefits provided by the statute. Offi-

---

46. See U.C.C. § 2A-209.



cial Comment (g) to section 2A-103 states: "If a transaction does not qualify as a finance lease, the parties may achieve the same result by agreement; no negative implications are to be drawn if the transaction does not qualify." One commentator on Article 2A suggests this option would allow leasing companies owned by manufacturers or dealers to enter into finance leases by agreement of the parties.<sup>47</sup> Potential ambiguities, however, are best quelled by statutory language, not by legislative history. Accordingly, one approach would be to add the following sentence at the end of section 2A-103(g): *In a lease which otherwise qualifies as a finance lease under this section, a lessor which is an affiliate of the manufacturer or supplier of the goods shall not be deemed to be the manufacturer or supplier of the goods under this section.* Nevertheless, the Florida Bar Article 2A Revision Committee recommended this issue be clarified in the Florida Official Comment to Article 2A, but these comments were unavailable at time of publication.

Official Comment (g) to section 2A-103 lists the Article 2A provisions which apply only to finance leases.<sup>48</sup> The first of these provisions, section 2A-209, specifically stipulates that the lessee under a finance lease is the beneficiary of the purchasing contract between the supplier and the lessor. As a result, all warranties made by the supplier to the lessor are extended to the lessee.<sup>49</sup> Furthermore, the supplier's promises and warranties to the lessee do not terminate the supplier's rights and obligations with respect to the lessor. In this respect, section 2A-209 directly contradicts a Florida case which is discussed below.<sup>50</sup> Also, the lessee is not under any additional liability to the supplier because of the extension of the warranties to the lessee.<sup>51</sup> Section 2A-209 also outlines procedures for modifying the purchase contract between the supplier and the lessor.<sup>52</sup>

One common lease provision states that the lessee acknowledges that the supplier and the lessor are not agents of one another. Under the section 2A-103 definition, such a provision could be rendered ineffective if the lessor and the manufacturer were related entities. Article 2A codifies the prevailing warranty practice in finance leasing. Section 2A-211(2) exempts the lessor in a finance lease from any warranty that

---

47. Bayer, *Personal Property Leasing: Article 2A of the Uniform Commercial Code*, 43 *BUS. LAW.* 1491, 1503 (1988).

48. U.C.C. §§ 2A-209, -211(2), -212(1), -213, -219(1), -220(1)(a), -221, -405(c), -407, -516(2), -517(1)(a).

49. U.C.C. § 2A-209(1).

50. See *infra* notes 116, 120 and accompanying text.

51. U.C.C. § 2A-209(2).

52. U.C.C. § 2A-209(3).

the goods are delivered free of the rightful claim of any other person, but only when the lessor is a merchant regularly dealing in goods of the kind being leased. Section 2A-212(1) exempts the lessor in a finance lease from any implied warranty of merchantability, and section 2A-213 exempts the finance lessor from any implied warranty of fitness for particular purpose. While an express disclaimer of warranties in the finance lease agreement itself would appear to be unnecessary under these Article 2A sections, including such a disclaimer in the agreement would seem a prudent reinforcement of these statutory disclaimers.

Under section 2A-219, a finance lease ultimately passes the risk of loss to the lessee, subject to rules in sections 2A-219 and 2A-220 relating to delivery and default. In other, non-finance leases, the risk of loss is retained by the lessor. In a finance lease, if a tender or delivery of goods so fails to conform to the lease contract as to give rise to a right of rejection, section 2A-220 provides that the risk of loss prior to cure or acceptance is borne by the supplier, not the lessor. Further, section 2A-405 provides that the supplier, not the lessor, has a duty to notify the other parties of any delay or non-delivery of the goods. Article 2A seems to permit modification of these risks of loss by agreement of the parties, without jeopardizing the validity of a finance lease.<sup>53</sup>

Section 2A-407 provides perhaps the most important advantage to the lessor in a finance lease: "In the case of a finance lease that is not a consumer lease the lessee's promises under the lease contract become irrevocable and independent upon the lessee's acceptance of the goods."<sup>54</sup> As noted in the Official Comment to this section, the finance lease is a three party relationship where the lessee looks to the supplier and not the lessor to perform the essential covenants and warranties regarding the goods.<sup>55</sup> Another important protection to the lessor in a finance lease is provided in section 2A-516(2): "In the case of a finance lease, if made with knowledge of a nonconformity, acceptance cannot be revoked because of it." The Official Comment to this section indicates the lessee's proper remedy in a finance lease after acceptance is against the supplier.<sup>56</sup> However, section 2A-517(1)(b) provides that the lessee may revoke acceptance against the lessor in a finance lease if the lessee accepted without inspecting for the noncon-

---

53. See U.C.C. § 2A-103, Official Comment (g).

54. U.C.C. § 2A-407(1).

55. U.C.C. § 2A-407, Official Comment.

56. U.C.C. § 2A-516, Official Comment.

formity and the lessee's acceptance was reasonably induced by the lessor's assurances.

#### IV. TRUE LEASE VS. SECURITY AGREEMENT

As stated in the introduction, three issues most necessitated the promulgation of Article 2A and its treatment of various types of leases: (1) what is a lease? (2) what warranties will the lessor be deemed to have made to the lessee? and (3) what remedies are available to the lessor upon default?<sup>57</sup> The first issue involves the distinction between a true lease and a disguised security agreement. While a lease of personal property is conceptually distinct from a transfer of personal property subject to a security interest, these transactions can have a similar appearance. Personal property lessors should be careful to structure transactions as true leases rather than as agreements to create security interests in their favor. This issue has been heavily litigated, and there are numerous decisions throughout the country.<sup>58</sup> Whether a particular transaction is a true lease or a disguised security interest is not a mere academic exercise for the courts, but is of great consequence to the parties to the transaction.

The consequences of a court finding a transaction intended as a personal property lease to be a security agreement can be quite severe. If there are other security interests in the property which have been perfected and the lessor has not perfected its security interest, the "lessor" will have lower priority than the prior perfected security interests. Perhaps of greater consequence to the lessor in such a dispute with the lessee are the provisions of Article 9 that place certain requirements on the lessor exercising remedies on the lessee's default. If the lessor is found to be a secured party, these provisions would impose restrictions in the areas of collection of lease payments, repossession of leased property, and disposing of leased property.<sup>59</sup> True leases are not subject to these provisions. Furthermore, a defaulting lessee may be in default to other creditors, including its landlord. Under Florida law, a landlord's lien attaches to all of the tenant's property on the premises, including property which is subject to a security interest.<sup>60</sup> Leased equipment does not belong to the tenant and is thus exempt from the landlord's lien.<sup>61</sup> Equipment intended to be leased

---

57. See *supra* notes 8-9 and accompanying text.

58. See, e.g., U.C.C. Case Digest, para. 1201.37(7)(1986) (containing a digest of such cases running almost one hundred pages).

59. FLA. STAT. §§ 679.501-.507 (1989).

60. *Id.* § 83.08.

61. See, e.g., *Powell v. Lounell, Inc.*, 173 F.2d 743, 745 (5th Cir. 1949).

under a true lease thus may be lost to a lessor if the arrangement is found to be a disguised and unperfected security interest. Finally, rents under true leases, unlike payments under a secured loan, are not subject to the interest limitation provisions of the usury laws.<sup>62</sup>

The definition of security interest in Florida is found in section 671.201(37), Florida Statutes. Prior to the adoption of Article 2A, this section provided in part:

Whether a lease is intended as security is to be determined by the facts of each case; however, (a) the inclusion of an option to purchase does not of itself make the lease one intended for security, and (b) an agreement that upon compliance with the terms of the lease the lessee shall become or has the option to become the owner of the property for no additional consideration or for a nominal consideration does make the lease one intended for security.<sup>63</sup>

By hinging the distinction between a true lease and a security interest on "the intent of the parties" and "the facts of each case," the statute left broad discretion to the courts to determine the form of the transaction.

For instance, in *U.C. Leasing, Inc. v. Barnett Bank*<sup>64</sup> the First District Court of Appeal recited a number of factors before concluding the lease agreements in question were security agreements.<sup>65</sup> In that case, U.C. Leasing appealed a final judgement which awarded Barnett certain equipment. Barnett contended that the equipment had been given as collateral by Fort Walton Manufacturing Corporation (F.W.M.C.) under a security agreement with Barnett and that U.C. Leasing's interest amounted to a subordinate security interest. However, U.C. Leasing claimed a superior interest in the equipment as a lessor. The court found the option price required to be paid by F.W.M.C. upon the expiration of the lease term was nominal compared to the original cost of the equipment and to the total rental payments under the agreement.<sup>66</sup> The court determined that the initial payments, monthly payments, and option prices set forth in the purported lease agreement were the equivalent of making a down payment, monthly installment payments, and a final balloon payment, respectively, and that the resulting yield to the lessor would be equivalent to an interest rate charge by a financial institution.<sup>67</sup> U.C. Leasing

---

62. See *Growth Leasing v. Gulfview Advertiser*, 448 So. 2d 1224 (Fla. 2d DCA 1984).

63. FLA. STAT. § 671.201(37)(1989).

64. 443 So. 2d 384 (Fla. 1st DCA), *appeal dismissed*, 447 So. 2d 384 (Fla. 1983).

65. *Id.* at 385-87.

66. *Id.* at 386.

67. *Id.*

was found not to be regularly engaged in the manufacture or sale of equipment; rather, it procured equipment on the instruction of the buyer.<sup>68</sup> The vendor had shipped the equipment directly to F.W.M.C., and U.C. Leasing had had no contact with the equipment except to make payment to the vendor.<sup>69</sup> According to the court, U.C. Leasing acquired a guarantee of payment which "reflect[ed] security anxiety indicative that the lease [was] actually intended for security."<sup>70</sup> The First District Court of Appeal considered the lessor's remedies to be equivalent to those remedies provided in Chapter 679, Florida Statutes.<sup>71</sup> In this case, F.W.M.C. had paid taxes, procured insurance, maintained and repaired the equipment, borne responsibility for loss and damage, and was entitled to an investment tax credit.<sup>72</sup> In the eyes of the court, the inclusion of all these factors indicated that the supposed lessee was instead an owner.<sup>73</sup> Finally, the court concluded from the evidence that F.W.M.C. had no intention other than to obtain the equipment and to have someone else finance it.<sup>74</sup> Thus, Barnett, the holder of a prior perfected security interest in the "leased" equipment, was able to prevail over U.C. Leasing, which was found to have had neither a true lease nor a senior perfected security interest.<sup>75</sup>

In *Growth Leasing, Ltd. v. Gulfview Advertiser, Inc.*<sup>76</sup> the Second District Court of Appeal held that the substance of the transaction would determine whether the transaction was a lease or a security agreement and that parol evidence of negotiations, circumstances, and conduct of parties would be considered in determining substance.<sup>77</sup> Without reciting any findings of fact, the trial court concluded that the transaction was a loan.<sup>78</sup> In support of the trial court's conclusion, the lessee pointed out many factors, including the lessee's dealing with the supplier and not the lessor, a credit check being performed, the filing of a U.C.C. financing statement,<sup>79</sup> the transfer of all manufac-

---

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* at 387.

76. 448 So. 2d 1224 (Fla. 2d DCA 1984). Unfortunately for legal researchers, this case was poorly headnoted by West Publishing Company. Even though the more important issue addressed in this case was the true lease versus security interest question, all of the headnotes for this case are under "Usury."

77. *Id.* at 1225.

78. *Id.*

79. A lessor may file a financing statement to show it has ownership of the property. Sec-

turing warranties to the lessee, the risk of loss being totally upon the lessee, the lessor not maintaining any showroom, inventory, or repair facilities, and the lessor never being in possession of the equipment until the agreement was breached and the equipment repossessed.<sup>80</sup> The Second District Court of Appeal rejected this analysis, however, and concluded the transaction was a true lease agreement based on one overriding factor. The lease agreement explicitly provided for title to the equipment to remain at all times in the name of the lessor and for the lessee to return the equipment to the lessor upon expiration or termination of the lease.<sup>81</sup>

The bankruptcy courts in Florida have also interpreted state law to determine whether a transaction is a true lease.<sup>82</sup> In *In re First Baptist Church*,<sup>83</sup> the Southern District of Florida Bankruptcy Court held the following factors taken together indicated the leases were intended as security agreements:

- (a) The lessor's books and records did not reflect any residual interest in the equipment at the end of the lease;
- (b) The lease agreements were either discounted or used as collateral with the bank;
- (c) Personal property taxes were paid by the lessee and the lessor was "engaged, not in a true rental business, but financing primarily purchases of machinery, equipment and other tangible property."<sup>84</sup>

Additionally, the lessor and lessee orally agreed between themselves that the equipment would be donated to a third party designated by the lessee at the end of the lease term, presumably so the lessee could

---

tion 679.408, Florida Statutes, provides:

A consignor or lessor of goods may file a financing statement using the terms "consignor," "consignee," "lessor," "lessee," or the like instead of the terms specified in s. 679.402. The provisions of this part shall apply as appropriate to such a financing statement, but its filing shall not of itself be a factor in determining whether or not the consignment or lease is intended as security (s. 671.201(37)). However, if it is determined for other reasons that the consignment or lease is so intended, a security interest of the consignor or lessor which attaches to the consigned or leased goods is perfected by such filing.

In *Fence Wholesalers of Am., Inc. v. Beneficial Commercial Corp.*, 465 So. 2d 570, 572 (Fla. 4th DCA 1985), the Fourth District rejected the lessee's contention that the mere filing of a financing statement showed the transaction was intended as a security agreement. The court noted section 679.408, Florida Statutes, explicitly provides that a lessor's filing of the financing statement does not automatically create a security agreement. *Id.*

80. 448 So. 2d at 1225-26.

81. *Id.*

82. *See U. C. Leasing*, 443 So. 2d at 386.

83. 17 U.C.C. Rep. Serv. (Callaghan) 1098 (Bankr. S.D. Fla. 1975).

84. *Id.* at 1101-03.

retain possession and use of the equipment.<sup>85</sup> The court emphasized its decision was based on the cumulative effect of these factors and not on any one factor.<sup>86</sup>

The Southern District of Florida Bankruptcy Court next visited this issue in *In re Structural Specialties, Inc.*<sup>87</sup> In *Structural Specialties*, the lessee had the option of purchasing the equipment for \$18,500 if all the lease payments had been made or for \$37,000 if no lease payments had been made.<sup>88</sup> At the time of the bankruptcy petition, the lessee had made no payments and the equipment had a value of more than \$30,000.<sup>89</sup> The court held a true lease had been intended by the parties because the purchase option was for an amount more than fifty percent of the value of the equipment at the time of the bankruptcy petition even if the lessee had made all payments under the lease.<sup>90</sup>

In the last Florida bankruptcy case decided prior to the *U.C. Leasing* decision, the Southern District of Florida Bankruptcy Court held that a lease purchase option of less than twenty-five percent of the initial price was "nominal" and created a presumption that the lease agreement was intended as security.<sup>91</sup> Because the lessee had the right to exercise a purchase option for ten percent of the purchase price, the bankruptcy court concluded the only sensible economic choice was to exercise the option.<sup>92</sup> The court also cited several other factors such as risk of loss and liability for taxes on the lessee as further evidence that the lease was intended as security for a sale.<sup>93</sup>

*In re Holywell Corp.*<sup>94</sup> was the first Florida bankruptcy case after the *U.C. Leasing* decision to address the issue of whether an equipment lease is a "true lease." The *Holywell* court held that the leases in question were true leases.<sup>95</sup> Expressly relying on *U.C. Leasing*, the *Holywell* court readily distinguished *U.C. Leasing*. First, in *U.C. Leasing* one of the parties would have received a windfall at the expense of an innocent party, but in *Holywell*, no party would receive any such windfall; the court compared the purchase option provisions of each lease. The *U.C. Leasing* agreement contained a purchase option for ten percent of the purchase price. In *Holywell*, on the other

---

85. *Id.* at 1102.

86. *Id.*

87. 18 Bankr. 399 (Bankr. S.D. Fla. 1981).

88. *Id.* at 400.

89. *Id.*

90. *Id.*

91. *In re AAA Machine Co., Inc.*, 30 Bankr. 323, 325 (Bankr. S.D. Fla. 1983).

92. *Id.*

93. *Id.*

94. 51 Bankr. 56 (Bankr. S.D. Fla. 1985).

95. *Id.*

hand, the option price was "the greater of the unrecovered original cost or the market value at the time the option [was] exercised." This clause alone, however, was not sufficient to insure the option price was not "nominal." The court found that there had to be a further showing that the purchase option would never be nominal during the course of the lease. Further, in *U.C. Leasing* the initial down payments, monthly payments, and option prices were readily equated to payments amortized over the term of the lease at the prevailing rate of interest. The *Holywell* court found no such correlation. In *Holywell* the lessee was not required to supply a guaranty of payment, and the investment tax credit was granted to the lessor.<sup>96</sup> These facts further served to distinguish the two cases according to the court.

In *In re Chisholm*,<sup>97</sup> the court held that the lease agreements were "secured sales" and considered the following factors in determining the intent of the parties to create a secured sale: (a) which party was required to insure the goods; (b) which party suffered the risk of loss; (c) which party paid taxes, repairs, and maintenance costs; (d) whether the rental payments were roughly equal to the purchase price plus any interest; and (e) whether the normal warranties were excluded.<sup>98</sup> In this case, the purchase option provided upon its exercise that any previously made rental payments would be deducted from the original cash purchase price and that the price would be "increased by interest in an amount equivalent to that portion of each monthly rental payment, which would have been interest, had such payment in fact been monthly payment of principal and interest against a promissory obligation equal to the amount" of the purchase price "bearing interest at a rate of 18% simple."<sup>99</sup> In reaching its holding, the court did not identify any single factor as determinative but rather claimed to have considered the totality of the circumstances.<sup>100</sup>

The Florida First District Court of Appeal recently revisited this issue in *Sellers v. Frank Griffin AMC Jeep, Inc.*<sup>101</sup> In concluding that the transaction was a lease, the court considered a number of factors, some of which indicated that the transaction was a lease and some of which indicated that the transaction was a sale.<sup>102</sup> The controlling factor for the court, however, was the clear and unambiguous language of the agreement stating the transaction was a lease and not a sale and

---

96. *Id.* at 58-59.

97. 54 Bankr. 52 (Bankr. M.D. Fla. 1985).

98. *Id.* at 53-54.

99. *Id.* at 54.

100. *Id.*

101. 526 So. 2d 147 (Fla. 1st DCA 1988).

102. *Id.* at 154-55.



providing neither for a purchase option nor for passage of title from lessor to lessee.<sup>103</sup> While Article 2A would not have altered the determination that the transaction was a lease, it may have altered the outcome.

The lessees in *Sellers* sought to characterize the transaction as a sale in order to invoke the warranty and revocation of acceptance provisions of Article 2 of the UCC.<sup>104</sup> All of the warranty provisions contained in Article 2 would apply under Article 2A, in the absence of a contractual exclusion, unless the lease is a finance lease.<sup>105</sup> Since in this case the original lessor also supplied the goods, that is, the original lessor was the dealership that provided the lessee with a vehicle, this lease probably would not qualify as a finance lease under section 2A-103(3). Though the lessees in *Sellers* could not persuade the court to allow them to revoke acceptance under section 2-608, the lessees would have had a remedy for revocation of acceptance under section 2A-517.

Article 2A's conforming amendment to section 1-201(37) which defines "security interest", does not draw a clear cut distinction between a true lease and a security interest, but at least the section more explicitly indicates which criteria are to be relevant. The conforming amendment to section 1-201(37) provides in part:<sup>106</sup>

Whether a transaction creates a lease or security interest is determined by the facts of each case; however, a transaction creates a security interest if the consideration the lessee is to pay the lessor for the right to possession and use of the goods is an obligation for the term of the lease not subject to termination by the lessee, and

(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 nominal additional consideration upon compliance with the lease agreement, or

(d) the lessee has an option to become the owner of the goods for no additional consideration or nominal additional consideration upon compliance with the lease agreement.

---

103. *Id.* at 155.

104. *Id.*

105. U.C.C. §§ 2A-210 through 2A-216.

106. The definition of "security interest" under the conforming amendment is set out in abbreviated form at footnote 29, *supra*.

This definition further provides:

A transaction does not create a security interest merely because it provides that

(a) the present value of the consideration the lessee is obligated to pay the lessor for the right to possession and use of the goods is substantially equal to or is greater than the fair market value of the goods at the time the lease is entered into,

(b) the lessee assumes risk of loss of the goods, or agrees to pay taxes, insurance, filing, recording, or registration fees, or service or maintenance costs with respect to the goods,

(c) the lessee has an option to renew the lease or to become the owner of the goods,

(d) the lessee has an option to renew the lease for a fixed rent that is equal to or greater than the reasonably predictable fair market rent for the use of the goods for the term of the renewal at the time the option is to be performed, or

(e) the lessee has an option to become the owner of the goods for a fixed price that is equal to or greater than the reasonably predictable fair market value of the goods at the time the option is to be performed.

Section 2A-103(1)(j) defines a lease to be:

a transfer of the right to possession and use of goods for a term in return for consideration, but a sale, including a sale on approval or a sale or return, or retention or creation of a security interest is not a lease. Unless the context clearly indicates otherwise, the term includes a sublease.

The definition of security interest under section 671.201(37), Florida Statutes, prior to the adoption of Article 2A, made the facts specific to each case determinative of whether a transaction created a security interest. This led courts to consider a number of criteria which were almost always found in both leases and security agreements. Such criteria included a number of the factors cited in *U.C. Leasing*, such as the lessor not being engaged in the manufacture or sale of equipment, the lessor not having physical contact with the goods, the lessee paying taxes, maintenance costs, and insurance, and the lessee bearing the risk of loss.<sup>107</sup> In an attempt to establish objective criteria, the new section 1-201(37) deletes all reference to the parties' intent. As indicated above, the second half of the new definition

---

107. *U.C. Leasing*, 443 So. 2d 384 at 386.

also lists several factors which were considered determinative in cases like *U.C. Leasing*, but which are no longer to be determinative. According to the Official Comment to the new section 1-201(37), the deletion of reference to the parties' intent is intended to cure the difficulty courts have had in determining which factors are relevant to whether a transaction is a lease or a security interest.<sup>108</sup> It is uncertain whether the section's retention of the case-by-case factual determination will continue to cause confusion. Nevertheless, the new definition focuses the inquiry on the remaining economic life of the goods versus the term of the lease, whether there is a purchase option, and the consideration for exercising this option. While the revised definition will not reduce litigation, at least the definition in Article 2A expressly eliminates a number of factors which should have no bearing on the determination of whether a transaction is a true lease or creates a security interest.

#### V. WARRANTIES AND DISCLAIMERS OF WARRANTIES

Article 2A's second important purpose is to ensure consistent treatment of warranties and disclaimers of warranties.<sup>109</sup> A lessor that is in the business of leasing equipment and not manufacturing or supplying it, i.e. a finance lessor, will typically disclaim any warranties in its leases and transfer any warranty rights it may have against the supplier to the lessee. Reported Florida cases have generally upheld such disclaimers. For example, in *Rudy's Glass Construction Co. v. E.F. Johnson Co.*,<sup>110</sup> the Third District Court of Appeal upheld the lessor's disclaimer of warranty since the disclaimer was conspicuous as required by Article 2 of the UCC.<sup>111</sup> While the court apparently had no difficulty applying Article 2 to lease transactions, Article 2A specifically codifies the lessor's right to disclaim warranties.<sup>112</sup> Article 2 currently provides that an express warranty can be created by any description of the goods which is made part of the basis of the bargain.<sup>113</sup> Article 2 also provides for the exclusion of such express warranties.<sup>114</sup> Article 2A generally follows the Article 2 scheme for both the creation and disclaiming of warranties, transposing lease terminology for sales terminology.

---

108. Official Comment to U.C.C. § 1-201(37).

109. See generally U.C.C. §§ 2A-110 to -216.

110. 404 So. 2d 1087 (Fla. 3d DCA 1981).

111. *Id.* at 1090.

112. U.C.C. § 2A-214.

113. U.C.C. § 2-313.

114. U.C.C. § 2-316.

The enactment of Article 2A codifies results reached by Florida courts.<sup>115</sup> In *Faro Blanco Marine Resort, Inc. v. Key Leasing, Inc.*,<sup>116</sup> the court held that a description of equipment contained in the lease did not create an implied or express warranty since the lessor's obligation under the lease was only to deliver the equipment "as is."<sup>117</sup> The court further held that the lease provided that the lessee's remedies for defects would be against the manufacturer or supplier of the equipment.<sup>118</sup>

Even though Florida courts generally enforce lease disclaimers of warranties, lessors who lease equipment to consumers should not forget to include the notice required by the Federal Trade Commission.<sup>119</sup> This notice makes holders of consumer credit contracts subject to all claims and defenses which the debtor could assert against the original seller. In *Xerographic Supplies Corp. v. Hertz Commercial Leasing Corp.*,<sup>120</sup> the Third District Court of Appeal relieved the lessee from making rental payments to the lessor because the equipment was defective and the lessor's disclaimer was ineffective.<sup>121</sup> While the trial court in turn had granted relief for the lessor against the supplier, the appellate court reversed in part, holding the supplier had effectively disclaimed warranties in its sales contract with the lessor.<sup>122</sup> Thus the lessee and the supplier managed to place the entire loss of unpaid rent on a lessor who had not breached the lease agreement.

The result in *Xerographic* seems rather incongruous. The lessee should only have those remedies which the lessor had against the original supplier. If the supplier had effectively disclaimed warranties against the lessor, then that disclaimer should have extended to the lessee even without the Federal Trade Commission notice. The court may have been penalizing the lessor for omitting the F.T.C. notice and might have extended the disclaimer to the lessee if the lessor had included the notice in the lease agreement. Section 2A-209, however, would alter the result of *Xerographic* in a finance lease. While extend-

---

115. Other reported cases show Florida courts have enforced disclaimers of warranties in leases. See *Meeting Makers, Inc. v. American Airlines, Inc.*, 513 So. 2d 700 (Fla. 3d DCA 1987); *Saunders Leasing System, Inc. v. Gulf Central Distribution Center, Inc.*, 513 So. 2d 1303 (Fla. 2d DCA 1987), *appeal denied*, 520 So. 2d 584 (Fla. 1988).

116. 510 So. 2d 1055 (Fla. 3d DCA 1987).

117. *Id.* at 1056.

118. *Id.*

119. 16 C.F.R. § 433.2 (1990).

120. 386 So. 2d 299 (Fla. 3d DCA 1980).

121. *Id.*

122. *Id.*

ing to the lessee the supplier's warranties to the lessor, this provision also extends the supplier's defenses to the lessor.<sup>123</sup>

## VI. REMEDIES UNDER FLORIDA CASE LAW

The last of the three major issues addressed by Article 2A is remedies. Of the equipment lease law issues represented in the Florida state court decisions, the remedy of the lessor upon the lessee's default is easily the most heavily reported. The maxim espoused in these cases is that the lessor should not be allowed a double recovery. The lessor may not repossess equipment from the defaulting lessee, sell or re-lease the equipment, and then demand the full balance of the rent due from the original lessee. Rather, the proper remedy is simply to make the lessor whole as if the default never occurred.<sup>124</sup> Case law in Florida on this issue has undergone an evolution. The earlier cases emphasize the denial of a double recovery to the lessor, while later cases make it clear that the lessor is not without some remedy for damages in addition to repossession against the original defaulting lessee. Thus, one decision should not be read out of context with other Florida cases.

*Monsalvatge & Co., Inc. v. Ryder Leasing, Inc.*<sup>125</sup> and *Cutler Gate Building Corp. v. United States Leasing Corp.*<sup>126</sup> are two Third Dis-

123. U.C.C. § 2A-209 provides:

(1) The benefit of the supplier's promises to the lessor under the supply contract and of all warranties, whether express or implied, under the supply contract, extends to the lessee to the extent of the lessee's leasehold interest under a finance lease related to the supply contract, but subject to the terms of the supply contract and all of the supplier's defenses or claims arising therefrom.

(2) The extension of the benefit of the supplier's promises and warranties to the lessee (Section 2A-209(1)) does not: (a) modify the rights and obligations of the parties to the supply contract, whether arising therefrom or otherwise, or (b) impose any duty or liability under the supply contract on the lessee.

(3) Any modification or rescission of the supply contract by the supplier and the lessor is effective against the lessee unless, prior to the modification or rescission, the supplier has received notice that the lessee has entered into a finance lease related to the supply contract. If the supply contract is modified or rescinded after the lessee enters the finance lease, the lessee has a cause of action against the lessor, and against the supplier if the supplier has notice of the lessee's entering the finance lease when the supply contract is modified or rescinded. The lessee's recovery from such action shall put the lessee in as good a position as if the modification or rescission had not occurred.

Section 680.209, Florida Statutes, adds the following paragraph:

In addition to the extension of the benefit of the supplier's promises and warranties to the lessee under subsection (1), the lessee retains all rights and remedies which the lessee may have against the supplier that arise from any agreement between the lessee and the supplier or from any other law.

124. See *infra* notes 125-152 and accompanying text.

125. 151 So. 2d 453 (Fla. 3d DCA 1963).

126. 165 So. 2d 207 (Fla. 3d DCA 1964).

trict Court of Appeal decisions from the mid-1960s that emphasize the prohibition of a double recovery by the lessor on a lessee's default. In *Monsalvatge*, the court noted that the lessor had terminated the lease, the title to the leased property was reserved to the lessor, and the lessee was under a lease obligation to return the equipment on termination of the lease.<sup>127</sup> According to the court, the lessor's recovery was limited to those payments which were due and in default at the time of termination.<sup>128</sup> The Third District Court of Appeal considered it inequitable and unjust to allow the lessor to receive full payment under the lease and at the same time have the use and benefit of the leased property.<sup>129</sup>

In *Cutler Gate Building Corp.*, the lessor did not specifically terminate the lease but did repossess the equipment from the defaulting lessee.<sup>130</sup> The court determined that taking possession of the leased equipment was inconsistent with holding the lessee liable for the full term of the lease.<sup>131</sup> Comparing a personal property lease with a real property lease, the court noted that the landlord of real property must elect between holding the tenant to the term of the lease or terminating the tenancy.<sup>132</sup> According to the court, the landlord holding the tenant to the terms of the lease must do so in recognition of the tenancy and not in derogation of it.<sup>133</sup> The court then applied this same rule of law to personal property leases.

Thus, the *Monsalvatge* and *Cutler Gate* courts did not leave lessors without a remedy, but forced them to elect between remedies. Unfortunately, such an election could all too often leave the lessor with less than a full recovery. If the lessor repossesses the equipment and either sells or releases it, the lessor is not likely to achieve full recovery because of depreciation of the equipment. On the other hand, if the lessor elects to hold the lessee to the full term of the lease, the lessor may get nothing more than a paper judgment if the lessee does not have sufficient assets to pay the judgment.

The United States Court of Appeals for the Fifth Circuit took a more realistic approach to this issue in *Chandler Leasing Division, Pepsico Service Industries Leasing Corp. v. Florida-Vanderbilt Development Corp.*<sup>134</sup> Applying Florida real estate law by analogy, the

---

127. 151 So. 2d at 455.

128. *Id.*

129. *Id.*

130. 165 So. 2d at 209.

131. *Id.*

132. *Id.*

133. *Id.*

134. 464 F.2d 267 (5th Cir.), *cert. denied*, 409 U.S. 1041 (1972).

court held that lessors have three remedies available on default.<sup>135</sup> According to the court these three remedies with respect to real property are: (a) treating the lease as terminated and resuming possession of the premises, thereafter using the same exclusively as its own for the lessor's own purposes; or (b) retaking possession of the premises for the account of the tenant, holding the tenant in general damages for the difference between the rentals stipulated to be paid and what, in good faith, the landlord is able to recover from a reletting; or (c) standing by and doing nothing, and suing the lessee as each installment of rent matures, or for the whole when it becomes due.<sup>136</sup>

The Fifth Circuit distinguished *Cutler Gate* and *Monsalvatge* by noting that the lease provisions in those cases provided for a double recovery.<sup>137</sup> The Fifth Circuit concluded these cases could not be interpreted as laying down a per se rule that where the leased property is repossessed only the rentals in default can be recovered.<sup>138</sup> The Fifth Circuit reasoned such a rule would encourage breaches of lease agreements because lessees would know that they would only be liable for payments in default.<sup>139</sup> The court concluded such a rule would seriously impair the commercial utility of the lease transaction.<sup>140</sup>

In *Bidwell v. Carstens*<sup>141</sup>, the Florida Supreme Court addressed *Monsalvatge*, *Cutler Gate*, and *Chandler Leasing*. The Florida Supreme Court found that the lease in *Bidwell* provided for double recovery, and thus held that *Monsalvatge* and *Cutler Gate* were controlling. However, the court specifically indicated that the lease provision in *Chandler Leasing*, requiring the lessor either to sell or to relet the equipment after repossession and to apply all proceeds against the damages, was a reasonable damage provision.<sup>142</sup> Thus, the general rule that may be derived from these four cases is that in a personal property lease, the lessor may repossess the equipment, but to collect the rents for the entire lease term, the lessor must take affirmative steps either to sell or to re-lease the repossessed equipment and apply the proceeds from such sale or re-leasing to the rental amount due.<sup>143</sup> If a transaction is a true lease, the authors submit that this

---

135. *Id.* at 271.

136. *Id.* at 271, n.3.

137. *Id.* at 270.

138. *Id.*

139. *Id.*

140. *Id.*

141. 316 So. 2d 264 (Fla. 1975).

142. *Id.* at 266.

143. This approach has been followed in the subsequent cases of *Latour Auto Sales, Inc. v. Stromberg-Carlson Leasing Corp.*, 335 So. 2d 600 (Fla. 3d DCA 1976); *Gibraltar Financial &*

measure of damages does not make the lessor whole. In a true lease the lessor is the owner of the leased equipment. At the end of the lease term, the lessor will recover the value of the equipment, its residual value. Thus, where the lessee has fully performed under a true lease, the lessor will have received all of the lease payments plus the residual value of the equipment upon its disposition. Any measure of damages must address the residual value of the leased property to fully compensate the lessor in a true lease.

Under Florida case law, other remedies for the lessor have been shown to be possible despite the lessor's inaction. In *John Pagliarulo Building Contractors v. Avco Financial Services Leasing Co.*,<sup>144</sup> the Fourth District Court of Appeal held that the lessor was not required to exercise the option of retaking possession in order to make the lessee liable for the difference between the rental and what the lessor was able to recover in good faith by selling or releasing the equipment.<sup>145</sup> Instead, the lessor could do nothing and hold the lessee liable for lease payments due as they accrued or for all lease payments due pursuant to an acceleration clause.<sup>146</sup> In *Davis v. Avco Financial Services Leasing Co.*,<sup>147</sup> the Third District Court of Appeal found that the lessor had chosen the lease remedy, allowing it to "sue for and recover all rent and payments then accrued or thereafter accruing" upon the lessee's default.<sup>148</sup> The court therefore held that the financing lessor did not have a duty to mitigate damages under this remedy.<sup>149</sup>

A repossessing lessor should nonetheless be forewarned to document its claim for recovery of rent payments ahead of time. A lessor that refrains from this action runs the risk of misinterpretation of its intentions by the court. In *Wolf v. Buchman*,<sup>150</sup> the Third District Court of Appeal indicated its agreement with *Chandler Leasing and Bidwell*, and stated there is no per se rule preventing a lessor from recovering leased equipment from the lessee in default and obtaining future unpaid rent on the lease.<sup>151</sup> In this case, however, the court found that the lessor, in repossessing the equipment, had no intention

---

*Leasing v. Gonzalez*, 353 So. 2d 898 (Fla. 3d DCA 1977), cert. denied, 360 So. 2d 1248 (Fla. 1978); *BVA Credit Corp. v. Fisher*, 369 So. 2d 606 (Fla. 1st DCA 1978), cert. denied, 370 So. 2d 459 (Fla. 1979); *Fence Wholesalers of America, Inc. v. Beneficial Commercial Corp.*, 465 So. 2d 570 (Fla. 4th DCA 1985).

144. 512 So. 2d 1162 (Fla. 4th DCA 1987).

145. *Id.* at 1163.

146. *Id.*

147. 512 So. 2d 1157 (Fla. 2d DCA 1987).

148. *Id.* at 1158.

149. *Id.*

150. 425 So. 2d 182 (Fla. 3d DCA 1983).

151. *Id.* at 185.



of using it for the account of the lessee, but instead treated the lease as terminated and took the property for his own use.<sup>152</sup> The court apparently based this holding on testimony by the lessor that he had made no attempts to re-lease the equipment, and the lease agreement itself made no provision for repossessing the equipment and using it for the account of the lessee.<sup>153</sup> Lessors would be well-advised to ensure their lease agreements include such provisions.

## VII. REMEDIES UNDER ARTICLE 2A

Sections 2A-523 through 2A-531 address remedies when the lessee defaults. According to the Official Comment to section 2A-523, Article 2A rejects the doctrine of election of remedy. One remedy bars another only if a lessor would be put in a better position than if the lessee had fully performed the lease.<sup>154</sup> Article 2A also provides for the enforcement of lessor remedies in the contract in addition to the remedies set out in Article 2A.<sup>155</sup> The parties to a lease transaction may by agreement modify the remedies set forth in Article 2A as long as the prohibition against a double recovery is maintained.<sup>156</sup>

Among the several remedies set forth in sections 2A-523 through 2A-531, section 2A-525(2) authorizes the lessor to repossess the goods on the lessee's default. The manner in which repossessed goods are to be disposed of was slightly modified from the Official Text:

Except as otherwise provided with respect to damages liquidated in the lease agreement (s. 680.504) or determined by agreement of the parties (s. 671.102(3)), if the disposition is by lease agreement substantially similar to the original lease agreement and the lease agreement is made in good faith and in a commercially reasonable manner, the lessor may recover from the lessee as damages:

- (a) Accrued and unpaid rent as of the date of the commencement of the term of the new lease agreement;
- (b) The present value as of the date of the commencement of the term of the new lease agreement of the difference between the total rent for the then remaining lease term of the original lease agreement and the total rent for the lease term of the new lease agreement; and

---

152. *Id.* at 186.

153. *Id.*

154. U.C.C. § 2A-523, Official Comment, *citing* §§ 2A-103(4) and 1-106(1).

155. U.C.C. § 2A-523(2).

156. *Id.* Compare U.C.C. § 2A-523(2) and section 680.523(2). The wording is different but the end result appears basically the same. The Florida (i.e. California/Massachusetts) version is perhaps a little more explicit than the Official Text.

(c) Any incidental damages allowed under s. 680.53, less expenses saved in consequence of the lessee's default.<sup>157</sup>

If the lessor disposes of the goods by a lease agreement not substantially similar to the original lease,<sup>158</sup> or by a sale, then the lessor may be entitled to the remedies under section 2A-528.<sup>159</sup> This section differs significantly from section 2A-527(2) by using the market rent instead of the actual rent for the new lease to calculate damages and also by allowing recovery of lost profit if the other remedies provided by the section are inadequate to put the lessor in as good a position as performance would have.<sup>160</sup>

Article 2A provides that the present value of unpaid future rents is to be used to determine the amount of recovery.<sup>161</sup> Present value is defined in section 2A-103(u) to mean: "the amount as of a date certain of one or more sums payable in the future, discounted to the date certain." Unpaid rental payments are accelerated on default, and the dollar amount collected on acceleration is worth more than the same amount collected in the future. Consequently, discounting the accelerated balance due results in a recovery more closely approximating the lessor's return if the lease agreement had been fully performed.<sup>162</sup> The date of default is the appropriate date certain to be utilized. Once a principal amount is determined by discounting future unpaid rents, interest may run from the date certain. Section 2A-103(u) further provides that the discount rate may be specified by the parties if the rate "was not manifestly unreasonable at the time the transaction was entered into; otherwise, the discount is determined by a commercially reasonable rate that takes into account the facts and circumstances of each case at the time the transaction was entered into."<sup>163</sup>

Under section 2A-530 the lessor's incidental damages include "any commercially reasonable charges, expenses, or commissions incurred in stopping delivery, in the transportation, care and custody of goods after the lessee's default, in connection with return or disposition of the goods, or otherwise resulting from the default."<sup>164</sup> Incidental dam-

---

157. FLA. STAT. § 680.527(2) (1990).

158. The issue whether the new lease is substantially similar to the original lease is to be decided on a case-by-case basis. U.C.C. § 2A-527, Official Comment.

159. U.C.C. § 2A-527.

160. Again, there are some minor variances between U.C.C. § 2A-528 and section 680.528, Florida Statutes (1990).

161. U.C.C. §§ 2A-527(2)(b), 2A-528(1)(b).

162. See U.C.C. § 2A-103, Official Comment (u).

163. The authors suggest that a discount rate be included in the lease terms. Otherwise, the appropriate discount rate could be the sole issue of fact preventing a summary judgment.

164. U.C.C. § 2A-530.

ages apparently do not cover costs and attorneys fees. Recovery for these items would continue to have to be provided for specifically in the lease agreement.

#### VIII. CONCLUSION

Personal property leasing is a fact of modern commercial life. If other forms of commercial transactions deserve uniform statutory treatment to promote consistency in the law, surely personal property leasing, as an important segment of our economy, deserves no less. The courts have treated the personal property lease as a hybrid under the law, unfortunately not always with consistent results. Article 2A will not eliminate all equipment lease litigation any more than other provisions of the UCC have eliminated other forms of commercial litigation, nor is Article 2A a panacea for leasing industry concerns. However, Article 2A should be a great help to courts and the legal profession in understanding the personal property lease and the policies which should govern the interpretation of this form of transaction.