

1989

LMV Leasing Inc. v. Roy W. Mallory, Val Conlin, Barbara Conlin, Tubber T. Okuda, Mary Y. Okuda : Brief of Appellant

Utah Court of Appeals

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Discussion

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Plaintiff/Respondent,

vs.

Defendants/Appellants

No. 14b

Third-Party Plaintiffs

vs.

Third-Party Defendant.

Appeal from a Judgment and Ruling
of the Third Judicial District Court
In and For Salt Lake County, State of Utah
Honorable Patricia L. Brian, Judge

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

LMV LEASING, INC., :
Plaintiff/Respondent, :
vs. :
ROY W. MALLORY, VAL CONLIN, :
BARBARA CONLIN, TUBBER T. :
OKUDA, MARY Y. OKUDA, :
Defendants/Appellants, : Case No. 890504-CA
No. 14b

TUBBER T. OKUDA, MARY Y. OKUDA, :
VAL J. CONLIN, and :
BARBARA CONLIN, :
Third-Party Plaintiffs, :
vs. :
MAUREEN MALLORY, :
Third-Party Defendant. :

INTRODUCTION

Plaintiff, LMV Leasing Inc., a Pennsylvania corporation is the respondent in this action. It will be referred to as plaintiff in this brief.

Appellants are the defendants Val C. Conlin, Barbara Conlin, Tubber T. Okuda and Mary Okuda. Unless otherwise specified, the word, defendants will refer to the four appellants in this brief.

The agreement upon which this action was initiated provides that the action will be brought in Pennsylvania and

Pennsylvania law will govern the contract. However, since plaintiff initiated the action here in Utah and has relied on Utah law throughout the proceedings, defendants contend that the plaintiff has waived its right to interpretation of the transaction under Pennsylvania law.

JURISDICTION

This appeal is taken to the Utah Supreme Court by defendants Okudas and Conlins pursuant to Section 78-2-2(3)(j), Utah Code Annotated, 1953 as amended. Since the filing of the Notice of Appeal, the Utah Supreme Court has assigned this appeal to the Utah Court of Appeals pursuant to Rule 4A, Rules of the Utah Supreme Court. This appeal is further filed pursuant to Rules 3(a) and 4(a), Rules of the Utah Court of Appeals and pursuant to Rule 54(b), Utah Rules of Civil Procedure.

Defendants appeal the summary judgment granted plaintiff by the trial court on the issues pertaining to liability. Defendants further appeal the trial court's order that the issues of damages and attorneys' fees be submitted by affidavit without trial or hearing.

The defendants further appeal the issue of the propriety of the damages and attorneys' fee awarded by the trial court.

NATURE OF PROCEEDINGS

Defendants were sued as guarantors of a transaction which is referred to as a Preferred Vehicle Lease Agreement. Plaintiff a Pennsylvania corporation, provided automobile financing to M.C.O., Inc., a Utah corporation, doing business as American

International Rent-A-Car. M.C.O., Inc. defaulted in making the agreed payments under the contracts. The vehicles were repossessed by plaintiff approximately March 11, 1988, (RA 06, para. 21) and sold for plaintiff by Nate Wade Subaru, a new and used car dealer in Salt Lake City, Utah. Plaintiff initiated this action to recover damages pursuant to the contract which plaintiff contends is a true lease. Thus plaintiff sought to recover damages as outlined in the document, namely the total of all lease payments less interest of 6 percent for the remaining term less the net sales proceed of the vehicles.

Defendants contend that the contract was a security agreement which is governed by the Utah Uniform Commercial Code and provisions relating to secured transactions. (Sections 70A-9-504, 70A-9-506, 70A-9-507, Utah Code Annotated, 1953, as amended.) Thus, defendants contend that the plaintiff is estopped from seeking a deficiency judgment because the collateral was not sold in a commercially reasonable manner. Even if the contract was not a security agreement, the contract specifies that plaintiff will dispose of the vehicles in a commercially reasonable manner and defendants contend that plaintiff failed to meet this requirement.

Defendants further contend that plaintiff did not mitigate its damages or make any effort to mitigate its damages and should, therefore, be estopped from seeking further damages because plaintiff could have avoided all loss had plaintiff made a good-faith effort to mitigate its damages.

Also defendants claim that plaintiff impaired the

collateral and is barred from seeking damages.

Plaintiff obtained a summary judgment on the issue of liability. Subsequently, the trial court, by telephone conference, directed the parties to submit their "positions" on damages by affidavit and memorandum. Defendants objected to plaintiff's attorney's affidavit on attorneys' fees because of the failure to state the hourly rate at which the four (4) attorneys rendered services to plaintiff on this case. Defendants moved to strike the affidavit. The trial court denied defendants motion. The trial court, thereafter, awarded damages and attorney's fees without a hearing or trial.

Defendants filed a cross-claim against Roy Mallory. The cross-claim was stayed because Roy Mallory filed for relief under Chapter 7 of the Bankruptcy Code. He was later discharged from the obligations referred to in the cross-claim.

Defendants also filed a third party complaint against Maureen Mallory. She has submitted a motion to bifurcate which awaits the trial court's ruling.

The trial court entered judgment as a final judgment pursuant to Rule 54(b), Utah Rules of Civil Procedure.

STATEMENT OF ISSUES PRESENTED FOR APPEAL

- I. DID THE TRIAL COURT ERR IN GRANTING SUMMARY JUDGMENT ON LIABILITY WITHOUT RESOLVING THE FACTUAL ISSUE OF WHETHER THE TRANSACTION WAS A LEASE OR A SECURITY AGREEMENT?

II. DID THE TRIAL COURT ERR IN GRANTING SUMMARY JUDGMENT WITHOUT RESOLVING THE FACTUAL ISSUE OF WHETHER THE VEHICLES WERE DISPOSED OF IN A COMMERCIALLY REASONABLE MANNER PURSUANT TO SECTION 70A-9-504(3), UTAH CODE ANNOTATED, 1953, AS AMENDED.

III. DID THE TRIAL COURT ERR IN GRANTING SUMMARY JUDGMENT WITHOUT RESOLVING THE FACTUAL ISSUE OF WHETHER THE VEHICLES WERE SOLD IN A COMMERCIALLY REASONABLE MANNER AS REQUIRED BY THE AGREEMENT ?

IV. DID THE TRIAL COURT ERR IN GRANTING JUDGMENT AND IN AWARDING DAMAGES WITHOUT RESOLVING THE FACTUAL ISSUE OF WHETHER THE PLAINTIFF IMPAIRED THE COLLATERAL TO DEFENDANTS' DETRIMENT?

V. DID THE TRIAL COURT ERR IN GRANTING SUMMARY JUDGMENT WITHOUT RESOLVING THE FACTUAL ISSUE AS TO WHETHER PLAINTIFF FAILED TO MITIGATE ITS DAMAGES?

VI. DID THE TRIAL COURT ERR IN DIRECTING THE PARTIES TO SUBMIT THEIR POSITIONS ON DAMAGES AND ATTORNEYS' FEES ON AFFIDAVITS AND MEMORANDUMS?

VII. DID THE TRIAL COURT ERR IN AWARDING ATTORNEYS' FEES ?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

1. Article I, Sec. 7, Constitution of Utah.
2. Section 78-2-2(3)(j), Utah Code Annotated, 1953, as amended.
3. Section 70A-9-504(3), Utah Code Annotated, 1953, as amended.
4. Rule 4-501(5), Utah Code of Judicial Administration.
5. Rule 4-505(1), Utah Code of Judicial Administration.
6. Rule 54(b), Utah Rules of Civil Procedure.

STATEMENT OF THE CASE

Nature of the Case:

This is an action for recovery of damages for breach of a contract entitled Preferred Vehicle Lease Agreement which was prepared by plaintiff. (RA 13). Plaintiff seeks to recover damages pursuant to the provisions in the agreement. (RA 23, para. 18.2).

The defendants personally guaranteed performance of the agreement in the event the primary obligor, M.C.O., Inc. defaulted in its performance. (RA 111, 113).

Defendants defend on the basis that the plaintiff should not be permitted to seek damages because the contract is a security agreement which is governed by the Uniform Commercial Code and the plaintiff failed to comply with the requirement that the collateral be disposed of in a commercially reasonable manner.

Even if the contract is deemed a lease, the provisions of the document provide that the vehicles will be disposed of in

a commercially reasonable manner and defendants contend that the plaintiff failed to comply with this provision.

Defendants also assert that the plaintiff failed to mitigate its damages and is, therefore, estopped from seeking damages or should not be awarded the damages that are claimed.

Finally, defendant contends that the plaintiff permitted the impairment of the collateral and is estopped from seeking damages against the defendants. (RA 379-390)

Procedural issues relate to the propriety of the summary judgment granted on the issue of liability, to the trial court's order that issues pertaining to damages and attorneys' fees be submitted by affidavit and memorandum, and to the propriety of the award of attorneys' fee.

Course of Proceedings:

Plaintiff was granted summary judgment on the issue of liability. (RA 473, 474-477). Thereafter, the parties were directed by the trial court to simultaneously submit affidavits and memorandums on damages and attorneys' fees by a date certain. The trial court did not request nor obtain the defendants stipulation to proceed on affidavits and memorandums. Defendants objected to plaintiff's attorney's affidavit for attorneys' fees and moved to strike the affidavit because of its deficiency in failing to state the rate of the hourly charges used by four (4) attorneys. (RA 531). Defendants' motion was denied. (RA 550, 551).

Disposition:

The trial court, thereafter, by telephone conference,

discussed his observations on the damage issues and rendered judgment awarding plaintiff damages and attorneys' fees. Defendants appealed from that judgment.

Relevant Facts:

The Defendants Conlin and Okuda, together with Roy Mallory, initiated an auto rental agency under the name of M.C.O., Inc., doing business under the assumed name of American International Rent-A-Car. The American International name was used pursuant to a franchise or license agreement with the national company.

The Plaintiff, LMV Leasing, Inc., provided financing for some of the vehicles which M.C.O., Inc., used as its fleet of rental automobiles. The document which the parties utilized to transact their business is entitled Preferred Vehicle Lease Agreement. (RA 13). However, certain verbiage in the lease document suggests that the transactions may, in fact, have been intended as a security agreement, governed by the Uniform Commercial Code. For example, provisions for default reflect an express agreement by Plaintiff to dispose of the vehicles in a commercially reasonable manner which is the Utah Uniform Commercial Code requirement for disposal of collateral in a secured transaction. (RA 23, para. 19). Equally suggestive of a security agreement is verbiage to the effect that Defendants will be paid any excess from sales proceeds of the vehicle, if there is an excess. (RA 24, para. 19).

The Defendants Conlin and Okuda and their wives signed guaranty agreements with Plaintiff to guaranty payment in the event

of M.C.O., Inc.'s default. (RA 111, 113).

The guaranty agreement, also provided by Plaintiff, does not contain verbiage whereby the Defendants waive their right to notices of default nor does it contain verbiage by which the Defendants waive their defense of collateral impairment.

In May, 1987, the principal shareholders and incorporators of M.C.O., Inc., became embroiled in internal conflict which resulted in a claimed "repossession" of the entire business of M.C.O., Inc., by Roy Mallory, an incorporator, officer, director and a creditor of M.C.O., Inc. A state court action ensued and eventually, in August of 1987, Roy W. Mallory, one of the Defendants in this action, but not a party to this appeal, filed a petition in the Bankruptcy Court under Chapter 11 of the Bankruptcy Code to forestall the state court action. The Chapter 11 petition was eventually converted to a Chapter 7 proceeding by application of the U. S. Trustee. (RA 387-390).

In December of 1987, before the vehicles were repossessed by Plaintiff, the Defendants Okuda and Conlin, together with the attorney for M C.O., Inc. bankruptcy, Loren E. Weiss, conveyed to Plaintiff's attorney in Salt Lake City, Utah, a proposal from one Alma Demar Egbert who offered to either assume the M.C.O., Inc. agreement with LMV Leasing or purchase the vehicles in question, in place, at the American International premises because Egbert had obtained the rights to the American International franchise after M.C.O., Inc., defaulted in the franchise payments. Plaintiff did not respond to the offer nor did Plaintiff communicate any ac-

knowledge of the offer. (RA 283-288).

Approximately March 11, 1988, the Plaintiff took possession of the vehicles it had provided financing for M.C.O., Inc., and the vehicles were placed with Nate Wade Subaru, a local new and used car dealer, to be sold for Plaintiff. (RA 328).

The "Notice of Sale" states that cars will be sold after April 13, 1988, at the Nate Wade Subaru lot "and will be sold in the same manner and fashion as other used vehicles located at Nate Wade Subaru." (RA 328).

All of the repossessed vehicles were sold between May 10 and June 10, 1988. (RA 326, para. 11).

Plaintiff initiated this action in April of 1988, seeking damages for breach of the lease agreement. Defendants Okudas and Conlins were named as defendants because of their personal guarantees.

Defendants Okudas and Conlins claimed, as part of their defense, that Plaintiff permitted the impairment of the collateral after default, that Plaintiff failed to mitigate its damages, and further that the disposal of the vehicles was not done in a commercially reasonable manner and, therefore, Plaintiff should not be permitted to recover for the alleged damages. (RA 379).

In August, 1988, Plaintiff moved for Summary Judgment on the issues of liability and damages. (RA 242). Defendants Okudas and Conlins resisted on the basis that material issues of fact remained to be litigated as to Plaintiff's failure to mitigate damages, as to whether the transaction was a lease or a security

agreement subject to the Utah Uniform Commercial Code, as to the Plaintiff's failure to dispose of the vehicles in a commercially reasonable manner, and as to the issue of damages and mitigation of damages. (RA 278, 396). The trial court, after oral argument on the 13th day of October, 1988, denied Plaintiff's Motion for Summary Judgment. (RA 402).

The Defendants filed cross-claims and third party complaints against Roy W. Mallory and Maureen Mallory. Roy W. Mallory filed a petition in bankruptcy under Chapter 7 of the Bankruptcy Code and, therefore, the Plaintiff's claim and Defendants Okuda and Conlin's cross-claim against Roy W. Mallory were stayed. (RA 412).

Maureen Mallory moved for bifurcation of the third party action and awaits the trial court's decision on bifurcation.

On the 13th day of February, 1989, Plaintiff moved for Summary Judgment as to liability only. (RA 448). This subsequent motion was submitted pursuant to Rule 4-501, Utah Code of Judicial Administration. Plaintiff submitted the Affidavit of Edward T. McCracken dated August 4, 1988, which had been submitted with Plaintiff's earlier motion for summary judgment. (RA 250, 423).

The McCracken affidavits do not state whether the vehicles were advertised for sale as the other used cars of Nate Wade Subaru are advertised; it does not state who was invited to bid; it does not state whether the cars were sold to the highest bidder; it does not state that the sales prices were within acceptable range of similar vehicles sold in Salt Lake City. (Compare RA 250, 323, 423). The McCracken affidavits do not rebut the Affidavit of

Alma Demar Egbert to the effect that an offer was made in December of 1987 to assume the auto leases or to purchase the vehicles, in place, at the American International business premises since Egbert had assumed the American International franchise. (RA 283). No other opposing affidavits were submitted to rebut Egbert's affidavit.

The Affidavit of Ivar Blackner, who was acting in behalf of Defendants, to the effect that he was denied the right on three (3) separate occasions to inspect the vehicles in anticipation of submitting bids remains unopposed. (RA 393 Affidavit of Blackner).

Loren E. Weiss, attorney for M.C.O., Inc., in its bankruptcy proceedings, submitted an affidavit stating he personally communicated to plaintiff's attorney, Wes Harris of Watkiss & Campbell, an offer by Egbert to purchase or lease, in place, all of the vehicles plaintiff provided to M.C.O., Inc. Mr. Weiss further states that neither he nor M.C.O., Inc., received a response to that offer. (RA 286-288).

Affidavit of Conlin dated the 20th day of February, 1989, to the effect that he had authority to buy the vehicles for a vehicle dealer in Las Vegas, Nevada, and would have done so, except for the problem encountered by Blackner is unopposed. (RA 467 Affidavit of Conlin).

The Affidavit of David Wilden to the effect that Val J. Conlin had authority to purchase the repossessed vehicles for resale in Las Vegas, Nevada, is unopposed. (RA 470 Affidavit of Wilden).

Notwithstanding the Affidavits of Conlin, Wilden, Egbert, Blackner, and Weiss, the trial court granted plaintiff's Second Motion for Summary Judgment on the issue of liability on the basis that there was no genuine issue as to any material fact regarding liability. Included in this judgment of liability is a statement that the remaining issue on damages would be determined by Affidavits or hearing. (RA 474-476 Judgment on Liability).

Defendants were notified by telephone on March 1, 1989, that the trial court had granted plaintiff's Second Motion for Summary Judgment. Defendants subsequently received a copy of the unsigned Final Judgment of Liability on March 6, 1989.

On March 13, 1989, Brad Willis, Judge Brian's Clerk, telephoned and arranged for a telephone conference with counsel for plaintiff and defendants. On March 14, 1989, Judge Brian by telephone conference stated the issue of damages would be determined by Affidavits and Memorandums to be submitted by plaintiff and defendants simultaneously. The parties were given two (2) weeks to file Affidavits and Memorandum of damages.

At the direction of the trial court, defendants Okudas and Conlins submitted the second Affidavit of Val J. Conlin which was directed primarily at the issue of damages. (RA 488 Affidavit of Conlin dated March 18, 1989). However, by Memorandum, defendants contended that the plaintiff may have avoided all damages if plaintiff had diligently pursued the Egbert offer to assume or purchase the vehicles while the vehicles were still at the American International lot, and before repossession had taken place.

Consequently, the defendants contended that, depending upon the facts proven in this case, plaintiff may have been made whole on the transaction with defendants had plaintiff pursued the Egbert offer to purchase or assume the lease. (RA 492-498 Defendants' Memorandum dated March 31, 1989).

On April 25, 1989, Brad Willis again arranged for a telephone conference with the trial court, counsel for Plaintiff, and counsel for Defendants. On April 26, 1989, Judge Brian stated, by telephone conference, his decision on the issue of damages.

The Final Judgment on liability and damages was received by counsel for defendants Conlins and Okudas on May 1, 1989, although the judgment was dated May 4, 1989. (RA 544 Final Judgment dated May 4, 1989).

As part of the judgment, plaintiff was awarded attorneys' fees of \$13,500.00 based on an Affidavit of Brett F. Wood dated April 21, 1989. (RA 551). The Affidavit, paragraph 10, lists the hours expended by the respective attorneys but does not state what rate was charged by each of the four (4) attorneys. (RA 526-530).

Defendants Okuda and Conlin objected to the adequacy of the Affidavit for Attorney's Fees and moved to strike the Affidavit for failure to comply with Rule 4-505(1), Utah Code of Judicial Administration, pertaining to the hourly rate charged and the reasonableness of that rate. (RA 531).

The trial court ruled that the Affidavit was adequate and awarded the sum of \$13,500.00 as attorney's fees. (RA 544-552 Final Judgment dated May 4, 1989).

SUMMARY OF ARGUMENTS

1. The trial court erred in granting summary judgment on liability because there was an unresolved issue of fact as to whether the transaction sued upon was a lease or a security agreement.

2. The trial court erred in granting summary judgment because there remained an unresolved issue of fact as to whether the vehicles were disposed of in a commercially reasonable manner as required by Section 70A-9-504(3), Utah Code Annotated, 1953, as amended.

3. The trial court erred in granting summary judgment because there remained an unresolved issue of fact on the commercially reasonable disposition of the vehicles as required by the terms of the agreements.

4. The trial court erred in granting summary judgment because there remained an unresolved issue of fact as to whether plaintiff failed to mitigate its damages. If plaintiff failed to mitigate its damages;

a) was plaintiff entitled to recover any damages?

b) if plaintiff was entitled to recover some damages, what amount of damages was plaintiff entitled to?

5. The trial court erred in granting summary judgment because there remained an unresolved issue of fact as to the impairment of the collateral by plaintiff.

6. The trial court erred in directing the parties to submit the issues of damages and attorneys' fees on affidavit

without trial or hearing because it deprives defendants of their right to trial on those issues. Furthermore, the trial court's order that the affidavit and memorandum on damages be submitted simultaneously denies defendants their right to due process because it places upon defendants, a burden of disproving damages before plaintiff carries its burden to prove damages and attorneys' fees.

7. The trial court erred in denying defendants' motion to strike plaintiff's affidavit of attorneys' fees because the affidavit did not state the hourly rate of the attorneys participating in behalf of plaintiff as required by Rule 4-505(1), Utah Code of Judicial Administration. Defendants contend that without disclosure of the hourly rate at which attorneys' fees are sought or awarded, defendants are unable to challenge the reasonableness of the fees requested.

ARGUMENT

POINT I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON LIABILITY BECAUSE THERE REMAINED AN ISSUE OF FACT AS TO WHETHER THE TRANSACTION SUE UPON WAS A LEASE AGREEMENT OR A SECURITY AGREEMENT.

Plaintiff initiated this action seeking to recover damages for breach of the agreement entitled, "Preferred Vehicle Lease Agreement." Pursuant to the terms of the agreement, plaintiff sought damages which represented the full-term lease price, less the sales proceeds of the repossessed vehicles, less interest for the remaining term of the lease computed at 6 percent. The actual interest rate on the transaction was at two percent over prime computed monthly as of the 15th day of each month.

As part of defendants' second amended answer, defendants alleged that the transaction was a sales agreement rather than a lease agreement and, therefore, provisions of the Utah Uniform Commercial Code were applicable to this transaction; more specifically, provisions requiring the commercially reasonable disposition or sale of the collateral. (RA 371)

The Preferred Vehicle Lease Agreement, which was provided by the plaintiff, contains provisions and verbiage that suggests the transaction was intended as an installment sales contract or a security agreement rather than a lease.

For example, the document contains verbiage such as "Purchase Orders," (RA 14, para. 1.14) and contains a disclaimer as to "merchantability of the vehicle." (RA 16, para. 5). The document provides for acceleration in the event of default and prescribes a commercially reasonable sale of the vehicles. (RA 22, para. 18, RA 23, para. 19)

The document suggests that the purchaser may gain some "equity" in the vehicles. The document provides that defendants will be paid any surplus or excess after the sale of the vehicles if a surplus is realized after termination by expiration or default of the agreement. (RA 23-24, para. 19). Schedule A to the agreement further suggests that the parties intended a sales-security agreement rather than a lease agreement. (RA 237). Paragraph 1 appears to provide plaintiff a sales commission of \$75.00 per vehicle M.C.O. obtains through the plaintiff. Paragraph 2 outlines what appears to be a commission of \$75.00 per vehicle on the resale

of the vehicles upon termination or expiration of the individual agreements. The wording is to the effect that plaintiff will receive \$75.00 for each vehicle "sold by LMV on behalf of M.C.O., Inc., DBA/American International Car Rental." (Emphasis added) (RA 237, para. 2)

The document further provides for sales margin in favor of plaintiff of \$100.00 over invoice or 2% over procurement cost of all vehicles acquired by the defendants. (RA 28, para 6).

As part of this agreement, defendants were obligated to pay for insurance, service, repair, license, taxes and were responsible for any risk of loss. (RA 13-31). A review of the entire transaction leads to the obvious conclusion that plaintiff does not have cars to lease but is merely a financier who makes loans for acquisition of vehicles by commercial entities.

In Colonial Leasing Company of New England, Inc. v. Larsen Brothers Construction Co., 731 P.2d 483 (Utah, 1986), the Utah Supreme Court outlined the factors which must be considered when determination is required on whether a document is a lease or a security agreement which may afford the protection of Article 9 of the Uniform Commercial Code. Justice Stewart, writing for the Court stated:

"Numerous factors bear on determining whether the terms of an agreement show that it was meant to be a lease or a security agreement. Among others, those factors are whether (1) the lessor is a financier, (2) the lessee is required to insure the goods in favor of the lessor, (3) the lessee bears the risk of loss or damage, (4) the lessee is to pay the taxes, repairs, maintenance, (5) the agreement establishes default provisions governing

acceleration and resale, (6) a substantial non-refundable deposit is required, (7) the goods are to be selected from a third party by the lessee, (8) the rental payments were equivalent to the costs of the goods plus interest, (9) the lessor lacks facilities to store or retake the goods, (10) the lease may be discounted with a bank, (11) the warranties usually found in leases are omitted, and (12) the goods or fixtures are impractical to remove."

In this case most of the factors enumerated in Colonial are contained in the agreement. These provisions, considered with other factors outlined earlier, such as the provision that the plaintiff would receive \$75.00 for each vehicle plaintiff sold "in behalf of M.C.O., Inc.," strongly suggests that the transaction in question was intended to be a security agreement rather than a lease.

In reversing the summary judgment granted to the plaintiff in Colonial, Justice Stewart states:

" In sum, whether a lease was intended as a security for a sale is a question to be determined on the facts of each case, as is the issue of whether the nature of the document raises questions of fact that preclude summary judgment." (Id)

Defendants contend that the document in question contains sufficient indications which suggest that the document was a sales and security agreement and not a lease. The trial court, therefore, erred in not permitting defendants the opportunity to litigate that issue of fact.

POINT II : THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT BECAUSE THERE REMAINED AN UNRESOLVED FACTUAL ISSUE AS TO WHETHER THE VEHICLES WERE DISPOSED OF IN A COMMERCIALY REASONABLE MANNER.

If the document is deemed to be a sale and security agreement, plaintiffs would have been obliged to carry the burden of proof as to whether the vehicles were disposed of in a commercially reasonable manner. Section 70A-9-504(3), Utah Code Annotated, 1953, as amended. This provision has been held to require the secured party to prove that every aspect of the sale of the vehicles was commercially reasonable. Haggis Management, Inc. v. Turtle Management, Inc., 745 P.2d 442 (Utah, 1985). Chief Justice Hall, speaking for the Court stated:

"Whether proper notice of the disposition was sent to the debtor is but one factor to be considered in determining whether the disposition was commercially reasonable under section 9-504(3). In addition, we must consider whether 'every aspect of the disposition including the method, manner, time, place and terms' was commercially reasonable. Of prime importance, are the secured party's attempts to obtain a fair price for the collateral by advertising the collateral or otherwise notifying potential buyers that the collateral is for sale. Haggis asserts that before the sale to Chianti, potential buyers were solicited. The record shows there was no advertisement or public notice of sale and that, at most, only a few potential buyers were contacted and no firm bids were received before the sale to Chianti. Such minimal efforts are insufficient as a matter of law to establish that the collateral was sold in a commercially reasonable manner." (Emphasis added)

"Generally, a secured party who fails to dispose of collateral in a commercially reasonable manner is barred from recovering a deficiency judgment. Inasmuch as the disposition of the collateral in this case was not commercially reasonable, plaintiff is barred from recovering a deficiency judgment against the guarantors." (Emphasis added)

In the instant case, the plaintiff repossessed the

vehicles and placed them with Nate Wade Subaru, a new and used car dealer in Salt Lake City, Utah. No evidence was provided by plaintiff to indicate what advertising was done before the sale of the vehicles nor did plaintiff indicate who was permitted to bid on or purchase the repossessed vehicles. The notice of sale provides that the vehicles will be sold by Nate Wade Subaru "in the same manner and fashion as other used vehicles located at Nate Wade Subaru." (RA 328)

In Pioneer Dodge Center, Inc. v. Glaubenskle, 649 P.2d 28 (Utah, 1982), the Utah Supreme Court ruled that a used car dealer should at least advertise the sale of a repossessed vehicle in a newspaper of general circulation for a reasonable period of time. Justice Stewart, speaking for the Court stated:

" Although there may be exceptions, (citation omitted) we think that in general an automobile dealer should advertise a repossessed car in a newspaper of general circulation for a reasonable period of time and in a manner consistent with the manner by which other used cars are advertised."

Since the plaintiff in this case elected to place the cars at Nate Wade Subaru and sell them "in the same manner and fashion as other used vehicles at Nate Wade Subaru," plaintiff was obligated to advertise the sale of the vehicles in a newspaper of general circulation for a reasonable period of time.

The defendants do not dispute the claim that notification of the sale was sent by plaintiff. However, defendants contend that after notice was received, they sent one Ivar Blackner to inspect the vehicles in anticipation of submitting bids to purchase

the vehicles. Defendants contend that three (3) separate attempts were made by Blackner to inspect the vehicles but he was not permitted to inspect the vehicles in anticipation of bidding on them. Defendants also contend that they were financially capable of purchasing the vehicles had they been afforded the opportunity to do so. (RA 393, 467, 470, 488, Affidavits of Blackner, Conlin, Wilden.)

The Utah Supreme Court, in K.J. Scharf v. BMG Corporation, 700 P.2d 1068 (Utah, 1985), held:

"The purpose of the notice requirement is for the protection of the debtor, by permitting him to bid at the sale, or arrange for interested parties to bid, and to otherwise assure that the sale is conducted in a commercially reasonable manner"

Since the defendants, in this case, were prevented from bidding on the vehicles, the Court should determine, as matter of law, that the sale was not commercially reasonable and that plaintiff, is therefore, not entitled to a deficiency judgment.

POINT III: THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT BECAUSE THERE REMAINED AN UNRESOLVED QUESTION OF FACT AS TO WHETHER THE VEHICLES WERE DISPOSED OF IN A COMMERCIALY REASONABLE MANNER AS REQUIRED BY THE AGREEMENT.

Even if defendants were to concede, for the purpose of this argument, that the transaction in question was a lease rather than a security agreement, the document provides that the repossessed vehicles will be sold in a commercially reasonable manner. The document does not define what commercially reasonable disposition means. Since the phrase is apparently adopted from the

Uniform Commercial Code, the logical assumption is that the phrase requires the same tests of commercial reasonableness that is required by the Uniform Commercial Code. The arguments and citations on the issue of the commercially reasonable disposition of the collateral, whether required by the Uniform Commercial Code or by agreement are identical. Defendants adopt the arguments and citations advanced under the previous heading.

POINT IV: THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT BECAUSE THERE REMAINED AN ISSUE OF FACT AS TO WHETHER PLAINTIFF WAS ESTOPPED FROM SEEKING RECOVERY BECAUSE OF IMPAIRMENT OF THE COLLATERAL.

As part of defendants' second amended complaint, defendants alleged that the plaintiff violated its fiduciary duty to defendants and also permitted the impairment of the collateral and, therefore, should be estopped from seeking recovery from defendants. (RA 371).

As stated earlier in this brief, the plaintiff ignored the offer of Alma D. Egbert and permitted Roy Mallory and Alma D. Egbert to use the vehicles for rentals from at least, December, 1987, to March of 1988, before plaintiff elected to repossess the vehicles. (RA 278-282). Furthermore, after repossessing the cars, the plaintiff failed to advertise the vehicles for sale and refused to permit defendants to inspect the vehicles so defendants could intelligently bid on the vehicles.

In Valley Bank and Trust Company v. Rite Way Concrete Forming, Inc., 742 P.2d 105 (Utah, 1987), defendants, guarantors, were sued by the bank because the debtor defaulted in its obliga-

tion. The defendants informed the bank where the collateral was located but the bank did not attempt to recover the collateral and, instead, elected to release its interest to the collateral to another claimant. The Utah Court of Appeals reversed the summary judgment granted by the trial court to the bank. Judge Garff, speaking for the court stated:

"However, a guarantor, upon payment of the guaranteed obligation, has a right of subrogation to any collateral pledged as security. (Citations omitted) This is true even of an absolute guarantor. This right to subrogation is a 'creature of equity' whose 'purpose is the prevention of injustice and is the mode which equity adopts to compel the ultimate payment of a debt by one who in justice, equity, and good conscience ought to pay it.' (Citations omitted.) The rationale is that the creditor, having elected to proceed against security for payment of the debt, is deemed to be in a trustee relationship with the guarantor. The creditor may liquidate the security and apply the proceeds to the obligation, or he may forego recourse to the security and proceed against the guarantor of payment, provided he does not subvert the guarantor's subrogation rights against collateral pledged by the principal obligor. If he breaches that trust duty by destroying, losing, or otherwise improvidently dissipating the collateral, he may not hold the guarantor wholly liable because the guarantor would have been subrogated to the creditor's right of resort to that security. (Citation omitted) Thus, where a creditor's actions impair the value of the collateral in its possession which secures an obligation guaranteed by a guarantor, either absolute or conditional, the guarantor will be discharged from his obligation to the extent of the impairment."

In the instant case, the collateral was permitted to remain in the possession of strangers to this transaction and in use as rentals long after the plaintiff was entitled to possession.

Furthermore, once plaintiff took possession, it did not permit defendants the opportunity to bid on the vehicles nor did the plaintiff advertise the sale of the vehicles. Under these circumstances, defendants contend that there is, at least, an issue of fact as to whether the plaintiff violated defendants'/guarantors' right to subrogation to the collateral by denying defendants the right to bid on and purchase the collateral.

Additionally, there is the question of whether plaintiff permitted the impairment of the collateral by permitting persons, namely Alma D. Egbert and company, not directly accountable to plaintiff, to defendants or to the primary obligor, M.C.O., Inc., to use the vehicles as rentals long after plaintiff was entitled to possession of the vehicles and entitled to sell the collateral without permitting defendants to bid on or purchase the vehicles.

Defendants assert that they should be relieved of their obligation as a matter of law because plaintiff permitted the impairment of the collateral and plaintiff deprived defendants their right of subrogation to the collateral.

POINT V: THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT BECAUSE THERE REMAINED ISSUES OF FACTS AS TO DAMAGES AND MITIGATION OF DAMAGES.

Shortly after receiving notification and prior to the sale of the repossessed vehicles, the defendants requested Ivar Blackner, a person engaged in the automobile sales business, to inspect the repossessed vehicles which were being stored at Nate Wade Subaru in Salt Lake City, Utah. By affidavit, Mr. Blackner

states he attempted on three (3) separate occasions to inspect the vehicles but was not permitted to see the vehicles. (RA 393)

Defendant Conlin submitted affidavits stating that he, as manager of a used car division of an automobile leasing and sales company in Las Vegas, Nevada, would have purchased the vehicles had the plaintiff permitted the inspection of the vehicles. (RA 468) The owner of the business in Las Vegas, Nevada, Mr. Wilden, submitted an affidavit confirming that Defendant Conlin had authority to purchase the vehicles for resale in Las Vegas. (RA 470-471).

Prior to the repossession of the vehicles by plaintiff, counsel for plaintiff in Salt Lake City was contacted by attorney Loren Weiss and informed that one Alma D. Egbert was interested in either assuming the defendants' lease or in purchasing the vehicles from plaintiff. This information was conveyed by Weiss to counsel for the plaintiff by December of 1987, approximately four (4) months before the plaintiff's repossessed the vehicles. (RA 286-288).

Alma D. Egbert submitted an affidavit that he had earlier submitted an offer to the officers of plaintiff corporation to either assume the lease or purchase the vehicles in place at the M.C.O., Inc., business location. This offer was made because Mr. Egbert had procured the American International Rent-A-Car franchise which M.C.O., Inc., had lost because of default in payments. (RA 283-285).

Plaintiff's did not respond to either communications.

However, plaintiff offers, after the fact, for summary judgment purposes, a copy of a petition in bankruptcy for Alma D. Egbert which was filed in August of 1987. (RA 518). Yet Mr. Weiss states in his affidavit that Mr. Egbert, in December of 1987 assumed or satisfied several substantial debts that the defendants and MCO Inc., had incurred.

If the evidence at trial were to show that Mr. Egbert would have been able to assume the lease or purchase the vehicles for the remaining balance of defendants' contract, it would be possible that plaintiff would not have been entitled to any damages because of its failure to mitigate its damages. The degree of any of plaintiff's loss would have been dependant upon the evidence at trial.

If the evidence at trial proved that plaintiff failed to mitigate its damages but was, nevertheless, entitled to some damages, the factual issue remained as to the amount of damages plaintiff suffered..

In Utah Farm Production Credit Association v. Cox, 627 P.2d 62, (Utah, 1981), the Utah Supreme Court ruled that the defendant was barred from recovering from a breach of an agreement where he failed to actively pursue other alternatives to mitigate his losses. In that case, Justice Hall, writing for the majority stated:

"Where a contractual agreement has been breached by a party thereto, the aggrieved party is entitled to those damages that will put him in as good a position as he would have been had the other party performed pursuant to the agreement. A corollary to this rule is

that the aggrieved party may not, either by action or inaction, aggravate the injury occasioned by the breach, but has a duty actively to mitigate his damages..."

". . . Where an alternative financing source is available, other damages due to the breach are generally avoidable, and hence not compensable."

In the instant case, defendant contends that had plaintiff pursued the offer of Alma D. Egbert, or had plaintiff's agent, Nate Wade Subaru, not prevented defendants from inspecting and subsequently purchasing the vehicles, plaintiff may not have suffered a loss and, in any event, plaintiff would not have suffered the loss it claims after the sale of the vehicles.

Since plaintiff failed to take any action to mitigate its losses, plaintiff should be barred, as a matter of law, from recovering damages.

POINT VI: THE TRIAL COURT ERRED IN DIRECTING THE PARTIES TO SUBMIT THE ISSUES OF DAMAGES AND ATTORNEYS' FEES ON AFFIDAVITS TO BE FILED SIMULTANEOUSLY.

It is axiomatic in the field of law that the plaintiff has the burden of proving his damages or any other claim the plaintiff advances. Only then is it incumbent upon the defendant to present its evidence to counter that of the plaintiff.

In the instant case, the trial court directed the defendant to submit its affidavit and memorandum on damages and attorneys' fees simultaneously with that of the plaintiff. In effect, the court placed a burden upon the defendant to disprove plaintiff's damages at the same time plaintiff was to submit it's

proof of damages. As the circumstances developed, plaintiff submitted its affidavits on damages approximately three (3) weeks after the trial court's deadline and after the defendant submitted their affidavits and memorandum of damages. (Compare filing dates RA 492 and RA 502).

The Utah Court of Appeals has ruled that the improper shifting of the burden of proof constitutes a violation of defendant's right to due process under Article I, Section 7 of the Utah Constitution.

In State v. Sorenson, 758 P.2d 466 (Utah, 1988), the trial court found the defendant guilty of possession and consumption of alcoholic beverages within the State of Utah although the prosecution presented no evidence that the violation occurred in Utah. The trial court justified its decision by stating the defendant did not present evidence to show he did not consume or possess the alcoholic beverages in Utah. The Utah Court of Appeals reversed the conviction. Judge Orme, speaking for the court stated:

"Without regard to the location of the defendant's arrest, we find the presumption or assumption used by the court unconstitutional in that it shifted the burden of proof on the fact of jurisdiction to defendant in violation of the due process clause of Article 1, Section 7 of the Utah Constitution...."

Defendants contend that the trial court, in this case, shifted the burden to the defendant to disprove damages simultaneous to the plaintiff's proof of damages and the rationale in State v. Sorenson is controlling, albeit, this is a civil case and

the issues are damages and attorneys' fees rather than jurisdiction of a criminal offense.

Defendants further assert that the trial court erred in depriving defendants their right to trial on the issues of damages and attorneys' fees.

After summary judgment on liability was rendered by the trial court, the court announced, by telephone conference, that the issues of damages and attorneys' fees would be submitted by affidavits and memorandum. The parties were given a deadline to simultaneously submit their affidavits and memorandum. The defendants did not agree or stipulate to this procedure nor were the parties asked if this procedure was acceptable. Subsequently, the trial court rendered judgment on damages and attorneys' fees without trial or hearing.

In Christensen v. Harris, 109 U. 1, 163 P.2d 314, the Utah Supreme Court outlined some of the factors to be considered to determine whether a person was provided due process under Article I, Section 7 of the Utah Constitution. One of the factors enumerated is a "fair opportunity to submit evidence, examine and cross-examine witnesses."

The circumstances of this case did not justify the determination of damages without a trial or hearing.

POINT VII: THE TRIAL COURT ERRED IN AWARDING ATTORNEYS' FEES BECAUSE THE AFFIDAVIT FOR ATTORNEYS' FEES DID NOT COMPLY WITH THE REQUIREMENTS OF RULE 4-505(1), UTAH CODE OF JUDICIAL ADMINISTRATION, AND CASE LAW.

Plaintiff submitted the affidavit of one of its attor-

neys, Brett F. Wood, in support of plaintiff's request for attorneys' fees. (RA 526). The affidavit reflects the cumulative hours spent by each attorney on the case and also reflects the hours spent by clerks and "other firm personnel." While the hourly rates of the non-attorneys are shown, the rates charged by the four (4) attorneys are not shown.

Rule 4-505(1), Utah Code of Judicial Administration, appears unclear as to whether the hourly rate charged by attorneys must be stated in the affidavit. However, when read in conjunction with recent decisions, the intent of the Rule is clear. Section 1 of the Rule reads:

"Affidavits in support of an award of attorneys' fees must set forth specifically the legal basis for the award, the nature of the work performed by the attorney, the number of hours spent to prosecute the claim to judgment, or the time spent in pursuing the matter to the stage for which attorneys' fees are claimed, and affirm the reasonableness of the fees for comparable legal services. The affidavit must also separately state the hours by persons other than attorneys, for time spent, work completed and hourly rate billed."

The Utah courts have consistently required evidence of the reasonableness of the fees sought. In Talley v. Talley, 739 P.2d 83 (Utah, 1987), the Utah Court of Appeals upheld the trial court's denial of attorney's fees because the attorney failed to present evidence as to the reasonableness of the fees requested. Judge Bench stated:

"Conspicuously absent is any evidence 'regarding the necessity of the number of hours dedicated, the reasonableness of the rate charged in light of the difficulty of the case and the result accomplished, and the rates

commonly charged for divorce actions in the community." (Emphasis added)

The Talley decision on attorneys' fees was reaffirmed in Maughan v. Maughan, 770 P.2d 156 (Utah, 1989).

Although the trial court in this case ruled that the affidavit for attorneys' fees was sufficient to justify the award, it is obviously impossible for the opposition to challenge the reasonableness of the fees requested unless the rates charged by each attorney is disclosed. Without that disclosure, there would be a failure of proof as to the reasonableness since no rate is stated. Under these circumstances, one is bound to inquire as to how he is to prove or challenge the reasonableness of the rate charged if the rate is not disclosed.

The trial court obviously erred in awarding attorneys' fees and the attorneys' fees should be denied as a matter of law because of the deficiency of Mr. Wood's affidavit.

CONCLUSION

In the instant case, the trial court, in effect, granted summary judgment on liability, damages and attorneys' fees, notwithstanding the factual issues raised on these matters.

The trial court was obligated to view the evidence in the light most favorable to the defendants which is the same standard used by the Utah Supreme Court and the Utah Court of Appeals. Briggs v. Holcomb, 740 P.2d 281, (Utah Ct. App. 1987)

Rule 4-501(5), Utah Code of Judicial Administration, states that all material facts set forth in movant's statement

which remain uncontroverted are deemed to be true for the purpose of summary judgment. Although the rule is silent as to statements of opposing party which remain uncontroverted, a logical corollary of that rule is that uncontroverted statements of the defending party, particularly those contained in affidavits, should also be deemed to be true.

Furthermore, the Utah Supreme Court has held that a single sworn statement is sufficient to create an issue of fact. Webster v. Sill, 675 P.2d 1170 (Utah 1983).

In the instant case, there were several issues of facts pertaining to the nature of the agreement, to the reasonableness of the sale of the vehicles, to the mitigation of or failure to mitigate damages, and to the reasonableness of the attorneys' fees awarded.

Defendants submit that the Utah Court of Appeals should rule, as a matter of law, that the plaintiff did not dispose of the vehicles in a commercially reasonable manner and is, therefore, not entitled to a deficiency judgment.

Defendants further submit that the plaintiff failed to actively pursue a possible alternate contract to mitigate its damages and plaintiff should, therefore, be denied recovery as a matter of law.

Plaintiff should be denied recovery as a matter of law for impairing the collateral to which the defendants had a right of subrogation.

Finally, plaintiff should also be denied attorneys' fees

as a matter of law for failing to state the rates at which plaintiffs attorneys rendered their services to plaintiff.

In the alternative, the judgment should be reversed and the case remanded to the District Court for trial on all issues.

Respectfully submitted,



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CERTIFICATE OF DELIVERY

I hereby certify that I delivered four (4) true and accurate copies of the foregoing Brief of Appellants to:

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02-2LMV.20A

ADDENDUM

Exhibit A	Article I, Sec. 7, <u>Constitution of Utah</u>
Exhibit B	Sec. 70A-9-504(3), <u>Utah Code Annotated</u> , 1953, as amended
Exhibit C	Rule 4-505(1), <u>Utah Code of Judicial Administration</u>
RA 13	Preferred Vehicle Lease Agreement
RA 111	Guaranty Conlin
RA 113	Guaranty Okuda
RA 328	Notice of Sale

Gun control laws, validity and construction of, 28 A. L. R. 3d 845.

Law Reviews.

The Constitutional Right to Keep and

Bear Arms, Lucilius A. Emery, 28 Harv. L. Rev. 473.

Restrictions on the Right To Bear Arms—State and Federal Firearms Legislation, 98 U. Pa. L. Rev. 905.

Sec. 7. [Due process of law.]

No person shall be deprived of life, liberty or property, without due process of law.

Comparable Provision.

Montana Const., Art. III, § 27.

Cross-Reference.

Eminent domain generally, 78-34-1 et seq.

In general.

"Due process of law" comes to us from the Great Charter and is synonymous with "law of the land." It means that a party shall have his day in court—trial. *Jensen v. Union Pac. Ry. Co.*, 6 U. 253, 21 P. 994, 4 L. R. A. 724.

Due process of law is not necessarily judicial process. *People v. Hasbrouck*, 11 U. 291, 39 P. 918.

Judgment against defendant, not served with process and not appearing either in person or by attorney, would not be due process of law. *Blyth & Fargo Co. v. Swenson*, 15 U. 345, 49 P. 1027.

It is elementary that there can be no judicial action affecting vested rights that is not based upon some process or notice whereby the interested parties are brought within the jurisdiction of the judicial tribunal about to render judgment. *Parry v. Bonneville Irr. Dist.*, 71 U. 202, 263 P. 751.

"Due process of law" requires that, before one can be bound by a judgment affecting his property rights, some process must be served upon him which in some degree at least is calculated to give him notice. *Naisbitt v. Herriek*, 76 U. 575, 290 P. 950.

Due process of law requires that notice be given to the persons whose rights are to be affected. It hears before it condemns, proceeds upon inquiry, and renders judgment only after trial. *Riggins v. District Court of Salt Lake County*, 89 U. 183, 51 P. 2d 645.

The phrase "due process of law" apparently originated with Lord Coke, who defined the terms. Many attempts have been made to further define due process of law, but all of them resolve into the thought that a party shall have his day in court. *Christiansen v. Harris*, 109 U. 1, 163 P. 2d 314.

In depriving a person of life or liberty, the essentials of due process are: (a) the existence of a competent person,

body, or agency authorized by law to determine the questions; (b) an inquiry into the merits of the question by such person, body or agency; (c) notice to the person of the inauguration and purpose of the inquiry and the time at which such person should appear if he wishes to be heard; (d) right to appear in person or by counsel; (e) fair opportunity to submit evidence, examine and cross-examine witnesses; (f) judgment to be rendered upon the record thus made. In the absence of statute laying down other or more specific requirements, the above conditions meet the demands of due process. In the absence of specific provisions to the contrary, due process does not require that any or all of these requirements must be in writing or in any particular form. In the interests of orderly procedure and certainty as to its proceedings and action taken, any legally constituted body or agency should as far as practical have written records of all proceedings before it, except where otherwise provided by law. *Christiansen v. Harris*, 109 U. 1, 163 P. 2d 314.

In the trial of criminal cases the statutes prescribe certain rules of procedure, which must be substantially complied with to keep the proceedings within the due processes of the law. A somewhat different set of rules is prescribed in civil cases and in special proceedings. Some rules, affecting all types, are not found in the statutes, but in that great basic body of the law commonly known as the decisions or rules of the courts. But all these methods and means provided for the protection and enforcement of human rights have the same basic requirements—that no party can be affected by such action, until his legal rights have been the subject of an inquiry by a person or body authorized by law to determine such rights, of which inquiry the party has due notice, and at which he had an opportunity to be heard and to give evidence as to his rights or defenses. *Christiansen v. Harris*, 109 U. 1, 163 P. 2d 314.

While normally we think of "due process of law" as requiring judicial action, yet "due process" is not necessarily judicial action. *Christiansen v. Harris*, 109 U. 1, 163 P. 2d 314.

of the last sentence of subsec. (2); and made minor changes in punctuation.

Cross-References.

Liability of secured party for failure to comply with part 5 of this chapter, 70A-9-507.

Policy and scope of chapter, 70A-9-102.

Secured party's rights on disposition of collateral, 70A-9-306.

Secured party's right to dispose of collateral after default, 70A-9-504.

Transactions excluded from chapter, 70A-9-104.

Use or disposition of collateral without accounting permissible, 70A-9-205.

Collateral References.

Secured Transactions ⇔ 227.

79 CJS Supp. Secured Transactions § 104.

69 AmJur 2d 469 to 473, Secured Transactions §§ 580 to 582.

70A-9-503. Secured party's right to take possession after default. Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action. If the security agreement so provides the secured party may require the debtor to assemble the collateral and make it available to the secured party at a place to be designated by the secured party which is reasonably convenient to both parties. Without removal a secured party may render equipment unusable, and may dispose of collateral on the debtor's premises under section 70A-9-504. If a secured party elects to proceed by process of law he may proceed by writ of replevin or otherwise.

History: L. 1965, ch. 154, § 9-503.

Cross-References.

Secured party's right to dispose of collateral after default, 70A-9-504.

Collateral References.

Secured Transactions ⇔ 228.

79 CJS Supp. Secured Transactions § 105.

69 AmJur 2d 473 to 497, Secured Transactions §§ 583 to 599.

Validity, under state law, of self-help repossession of goods pursuant to UCC § 9-503, 75 ALR 3d 1061.

Law Reviews.

Breach of the Peace and New Mexico's Uniform Commercial Code, 4 Natural Resources J. 85.

Note, Sniadach, Fuentes and Mitchell: A Confusing Trilogy and Utah Prejudgment Remedies, 1974 Utah L. Rev. 536.

DECISIONS UNDER FORMER LAW

Replevin.

Where chattel mortgage provided that in event default was made in payment of debt mortgagee could take possession of property and proceed to foreclose mortgage, mort-

gagee could maintain action in claim and delivery to recover such possession after default, remedy by foreclosing mortgage not being exclusive. *Morgan v. Layton* (1922) 60 U 280, 208 P 505.

70A-9-504. Secured party's right to dispose of¹ collateral after default — Effect of disposition.

- (1) A secured party after default may sell, lease or otherwise dispose of any or all of the collateral in its then condition or following any commercially reasonable preparation or processing. Any sale of goods is subject to the chapter on Sales (chapter 2). The proceeds of disposition shall be applied in the order following to

- (a) the reasonable expenses of retaking, holding, preparing for sale or lease, selling, leasing and the like and, to the extent provided for in the agreement and not prohibited by law, the reasonable attorneys' fees and legal expenses incurred by the secured party;
 - (b) the satisfaction of indebtedness secured by the security interest under which the disposition is made,
 - (c) the satisfaction of indebtedness secured by any subordinate security interest in the collateral if written notification of demand therefor is received before distribution of the proceeds is completed. If requested by the secured party, the holder of a subordinate security interest must seasonably furnish reasonable proof of his interest, and unless he does so, the secured party need not comply with his demand.
- (2) If the security interest secures an indebtedness, the secured party must account to the debtor for any surplus, and, unless otherwise agreed, the debtor is liable for any deficiency. But if the underlying transaction was a sale of accounts or chattel paper, the debtor is entitled to any surplus or is liable for any deficiency only if the security agreement so provides.

Disposition of the collateral may be by public or private proceedings and may be made by way of one or more contracts. Sale or other disposition may be as a unit or in parcels and at any time, and place and on any terms but every aspect of the disposition including the method, manner, time, place and terms must be commercially reasonable. Unless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, reasonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor, if he has not signed after default a statement renouncing or modifying his right to notification of sale. In the case of consumer goods no other notification need be sent. In other cases notification shall be sent to any other secured party from whom the secured party has received (before sending his notification to the debtor or before the debtor's renunciation of his rights) written notice of a claim of an interest in the collateral. The secured party may buy at any public sale and if the collateral is of a type customarily sold in a recognized market or is of a type which is the subject of widely distributed standard price quotations he may buy at private sale.

When collateral is disposed of by a secured party after default, the disposition transfers to a purchaser for value all of the debtor's rights therein, discharges the security interest under which it is made and any security interest or lien subordinate thereto. The

purchaser takes free of all such rights and interests even though the secured party fails to comply with the requirements of this part or of any judicial proceedings

- (a) in the case of a public sale, if the purchaser has no knowledge of any defects in the sale and if he does not buy in collusion with the secured party, other bidders or the person conducting the sale; or
 - (b) in any other case, if the purchaser acts in good faith.
- (5) A person who is liable to a secured party under a guaranty, indorsement, repurchase agreement or the like and who receives a transfer of collateral from the secured party or is subrogated to his rights has thereafter the rights and duties of the secured party. Such a transfer of collateral is not a sale or disposition of the collateral under this chapter.

History: L. 1965, ch. 154, § 9-504; 1977, ch. 272, § 38.

Compiler's Notes.

The 1977 amendment inserted "or lease" near the beginning of subd. (1) (a); added the second sentence of subsec. (2) relating to a sale of accounts or chattel paper; substituted "if he has not signed after default a statement renouncing or modifying his right to notification of sale" at the end of the third sentence of subsec. (3) for "and except in the case of consumer goods to any other person who has a security interest in the collateral and who has duly filed a financing statement indexed in the name of the debtor in this state or who is known by the secured party to have a security interest in the collateral"; and inserted the fourth sentence of subsec. (3) relating to notification of other secured parties.

Cross-References.

Collateral not owned by debtor, 70A-9-112.
Compulsory disposition of collateral, 70A-9-505.
Contract for sale of goods, breach by buyer, resale by seller, 70A-2-706.
Policy and subject matter of chapter, 70A-9-102.
Secured party's liability for failure to comply with part 5 of this chapter, 70A-9-507.

Notice of disposition.

Secured party is barred from obtaining a deficiency judgment after a disposition of the property securing the debt where no notice of the disposition was given the debtor and the disposition was not conducted in a commercially reasonable manner. *FMA Financial Corp. v. Pro-Printers* (1979) 590 P 2d 803.

Notice of sale.

Secured party should give notice of time and place of sale of the collateral to a guarantor of the debt. *Zions First Nat. Bank v. Hurst* (1977) 570 P 2d 1031.

Collateral References.

Secured Transactions ⇐ 229 to 237, 240.
79 CJS Supp. Secured Transactions §§ 106 to 113.
69 AmJur 2d 499 to 532, Secured Transactions §§ 602 to 624.

Rights and duties of parties to conditional sales contract as to resale of repossessed property, 49 ALR 2d 15.

Uniform Commercial Code: burden of proof as to commercially reasonable disposition of collateral, 59 ALR 3d 369.

Uniform Commercial Code: failure of secured creditor to give required notice of disposition of collateral as bar to deficiency judgment, 59 ALR 3d 401.

What constitutes a "public sale," 4 ALR 2d 575.

DECISIONS UNDER FORMER LAW

Foreclosure by advertisement or sale — Perishable property or livestock.

In proceeding under former section 9-1-6, relating to mortgagor's right to enjoin foreclosure by advertisement and sale, court had

power, where it appeared that mortgaged property was perishable, or that it was livestock and that cost of feeding and keeping it pending action would be great, to call on mortgagor to consent to sale or furnish indemnity bond to hold mortgagee harmless.

the court otherwise orders. Notice of objections shall be submitted to the court and counsel within (5) days after service.

(3) Stipulated settlements and dismissals shall also be reduced to writing and presented to the court for signature within fifteen (15) days of the settlement and dismissal.

(4) Upon entry of judgment, notice of such judgment shall be served upon the opposing party and proof of such service shall be filed with the court. All judgments, orders, and decrees, or copies thereof, which are to be transmitted after signature by the judge, including other correspondence requiring a reply, must be accompanied by pre-addressed envelopes and pre-paid postage.

(5) All orders, judgments, and decrees shall be prepared in such a manner as to show whether they are entered upon the stipulation of counsel, the motion of counsel or upon the court's own initiative and shall identify the attorneys of record in the cause or proceeding in which the judgment, order or decree is made.

(6) Except where otherwise ordered, all judgments and decrees shall contain the address or the last known address of the judgment debtor and the social security number of the judgment debtor if known.

(7) All judgments and decrees shall be prepared as separate documents and shall not include any matters by reference unless otherwise directed by the court. Orders not constituting judgments or decrees may be made a part of the documents containing the stipulation or motion upon which the order is based.

(8) No orders, judgments, or decrees based upon stipulation shall be signed or entered unless the stipulation is in writing, signed by the attorneys of record for the respective parties and filed with the clerk or the stipulation was made on the record.

(9) In all cases where judgment is rendered upon a written obligation to pay money and a judgment has previously been rendered upon the same written obligation, the plaintiff or plaintiff's counsel shall attach to the new complaint a copy of all previous judgments based upon the same written obligation.

Rule 4-505. Attorneys' fees affidavits.

Intent:

To establish uniform criteria and a uniform format for affidavits in support of attorneys' fees.

Applicability:

This rule shall govern the award of attorneys' fees in the trial courts.

Statement of the Rule:

(1) Affidavits in support of an award of attorneys' fees must set forth specifically the legal basis for the award, the nature of the work performed by the attorney, the number of hours spent to prosecute the claim to judgment, or the time spent in pursuing the matter to the stage for which attorneys' fees are claimed, and affirm the reasonableness of the fees for comparable legal services. The affidavit must also separately state hours by persons other than attorneys, for time spent, work completed and hourly rate billed.

(2) If the fee arrangement with the client is other than at an hourly rate an affidavit of the client or correspondence from the client shall be filed with the

court setting forth the terms and conditions of the arrangement, whether a flat rate or contingent fee, or the percentage of funds recovered or dealt with.

(3) If judgment is being taken by default for a principal sum which it is expected will require considerable additional work to collect, the following phrase may be included in the judgment after an award consistent with the time spent to the point of default judgment, to cover additional fees incurred in pursuit of collection:

"AND IT IS FURTHER ORDERED THAT THIS JUDGMENT SHALL BE AUGMENTED IN THE AMOUNT OF REASONABLE COSTS AND ATTORNEY'S FEES EXPENDED IN COLLECTING SAID JUDGMENT BY EXECUTION OR OTHERWISE AS SHALL BE ESTABLISHED BY AFFIDAVIT."

(4) Judgments for attorney's fees should not be awarded except as they conform to the provisions of this rule.

Rule 4-506. Withdrawal of counsel in civil cases.

Intent:

To establish a uniform procedure and criteria for withdrawal of counsel in civil cases.

Applicability:

This rule shall apply to all trial courts of record and not of record.

Statement of the Rule:

(1) An attorney may withdraw **as counsel** of record in all cases except where withdrawal would result in a **delay of trial**. In that case, an attorney may not withdraw without the approval of the court.

(2) When an attorney withdraws as counsel of record, written notice of the withdrawal must be served upon the client of the withdrawing attorney and **upon** all other parties not in default and a certificate of service must be filed with the court. If a trial date has been set, the notice of withdrawal served upon the client shall include a notification of the trial date.

(3) When an attorney dies or is removed or suspended or withdraws from the case or ceases to act as an attorney, opposing counsel must notify the unrepresented client of his/her responsibility to retain another attorney or appear in person before opposing counsel can initiate further proceedings against the client.

Rule 4-507. Disposition of funds on trustee's sale.

Intent:

To establish a uniform procedure for filing trustee affidavits of deposit and claimant petitions for adjudication of priority in trustee's sales.

To establish a uniform procedure in determining the disposition of funds on trustee's sales.

Applicability:

This rule shall apply to all courts of record.

Statement of the Rule:

(1) At the time of depositing **with the Clerk of the Court** any proceeds from a trustee's sale in accordance with Utah Code Ann. Section 57-1-29, the

PREFERRED VEHICLE LEASE AGREEMENT

THIS AGREEMENT, made the 29th day of December, 1986, by and between _____

LMV LEASING, INC., 121 Freeport Road, Pittsburgh, PA 15238
hereinafter called "Lessor"

A
N
D
Inc.
MCQ/DBA/AMERICAN INTERNATIONAL CAR RENTAL

1380 W. North Temple Street, Salt Lake City, UT 84116
hereinafter called "Lessee".

WITNESSETH

WHEREAS, Lessee contemplates the leasing of various vehicles; and
WHEREAS, Lessor is willing to lease said vehicles upon the terms and conditions hereinafter set forth;
NOW, THEREFORE, the parties hereto do mutually agree as follows:

1. DEFINITIONS. As herein used:

- 1.1 "Accounting Form" is a record with respect to a specific vehicle. Each Accounting Form will show the date of delivery of the vehicle, the make, manufacturer, model number, serial number, Agreed Price, Rental Payment, Base Lease Term in months, Interim Rental, Interim Lease Term, location and such other applicable details as Lessor and Lessee may desire.
- 1.2 "Acquisition Fee" is a charge made by Lessor for procuring each vehicle. The amount and manner of payment are set forth in Schedule "A".
- 1.3 "Administrative Fee" is a monthly service charge payable by Lessee to Lessor; agreed upon between Lessor and Lessee as set forth in Schedule "A".
- 1.4 "Agreed Price" of any vehicle is determined as set forth in Schedule "A".
- 1.5 "Base Lease Term", with respect to any vehicle, is the period commencing on the 15th day of the month following the month in which such vehicle is first delivered to Lessee and ending on the 14th day of the month identified in the Purchase Order as the last month of the Base Lease Term.
- 1.6 "Basic Rent", when used, combines and replaces Financing Charge" and "Monthly Depreciation", and, if used, is as set forth in Schedule "A".
- 1.7 "Book Value" of any vehicle is the Agreed Price less the aggregate Monthly Depreciation.
- 1.8 "Extended Rental" is a charge made by Lessor and payable by Lessee as set forth in Schedule "A" for continuing to lease any vehicle beyond the Base Lease Term thereof.
- 1.9 "Financing Charge" is a component of the monthly Rental Payment determined as set forth in Schedule "A".
- 1.10 "Interim Lease Term", with respect to any vehicle, is (a) in the case of delivery by the manufacturer, the period commencing on the 10th day following shipping date (as set forth in the manufacturer's invoice, a copy of which is delivered to Lessee) of such vehicle by the manufacturer thereof and (b) in the case of delivery by anyone other than the manufacturer, commencing on the date of delivery of such vehicle to Lessee and ending, in each

Interim Lease Term") plus (b) the period, if any, commencing on the day on which Lessee returns such vehicle to Lessor in connection with Lessee's exercise of any option to terminate the lease of such vehicle prior to the regularly scheduled expiration of the Base Lease Term thereof (provided that on such day Lessee pays to Lessor the monthly Rental Payment due on such date, if any), and ending on the day on which Lessor shall have received the net proceeds of sale of such vehicle together with any termination payment due under Section 19 from Lessee with respect to such sale the ("Second Interim Lease Term").

- 1.11 "Interim Rental" is the amount payable by Lessee to Lessor with respect to the lease of any vehicle during the Interim Lease Term thereof and shall be equal to the Financing Charge multiplied by the unamortized balance of the Agreed Price, computed on the basis of a 360-day year and twelve 30-day months, for the actual number of days involved.
- 1.12 "Monthly Depreciation" for any vehicle is that portion of the monthly Rental Payment which is used to reduce the Agreed Price to Book Value.
- 1.13 "Overall Lease Term" with respect to any vehicle is the period consisting of the Interim Lease Term and the Base Lease Term thereof; provided, however, that it also includes any other period, whether prior to the Interim Lease Term or the subsequent to the expiration or other termination of the Base Lease Term or the Interim Lease Term, as the case may be, during which Lessee has possession of such vehicle (including any period contemplated by Section 3.4).
- 1.14 "Purchase Order" is a form supplied or approved by Lessor and signed (or electronically entered) by Lessee that specifies the Lessee's preference as to delivery area, date of delivery, vehicle to be furnished, the make, manufacturer, model number, color, accessories, optional items and any other features to be furnished and the number of months in the Base Lease Term.
- 1.15 "Rental Payment" is the amount payable by Lessee to Lessor each month for the use of a specific vehicle during the Base Lease Term thereof and consists of, but is not necessarily limited to:

Monthly Depreciation (1.12 above)	Basic Rent (1.6 above)
Financing Charge (1.9 above)	Maintenance (6 below)
Administrative Fee (1.3 above)	Taxes and Fees (7 below)
- 1.16. "Settlement Fee" is a charge made by Lessor at termination of the lease of each vehicle as set forth in Schedule "A".
- 1.17 "Termination Value", with respect to any vehicle, is the amount determined in accordance with Exhibit "I" and payable pursuant to Section 19.
- 1.18 "Vehicle" means one or more automobiles, vans, trucks or similar items.

2. **LEASE AGREEMENT**

- 2.1 Lessor hereby leases to Lessee, and the Lessee hereby leases from Lessor, the vehicles described in Accounting Forms delivered and/or to be delivered upon the terms and conditions set forth in this Agreement, as supplemented with respect to each vehicle by the terms and conditions set forth in the appropriate Accounting Form identifying such vehicle.
- 2.2 The vehicles to be leased hereunder shall be those identified and specified in Purchase Orders placed by Lessee with Lessor from time to time and which Lessor undertakes to have delivered to Lessee. In the event the usual supplier of any particular vehicle is unable to provide the same in time to meet the delivery date specified by Lessee, Lessor and Lessee shall agree on substituted actions appropriate to the circumstance. Upon delivery of any vehicle, Lessee shall

deliver to Lessor a delivery receipt signed by the individual to whom delivery is authorized by Lessee. Upon delivery of a vehicle to Lessee, Lessor and Lessee shall execute an Accounting Form with respect to such vehicle. Except as specifically modified with respect to any vehicle by the terms and conditions set forth in the appropriate Accounting Form identifying such vehicle, all of the terms and conditions of this Agreement shall govern the rights and obligations of Lessor and Lessee. Whatever reference is made to "this Agreement" it shall be deemed to include, as required, the one or more Accounting Forms identifying the vehicle.

- 2.3 Each vehicle shall at all times be the sole and exclusive property of Lessor, and Lessee shall have no right, title or interest therein except the right to use the same as herein provided. As long as Lessee is not in default in any obligation to Lessor, Lessee may use the vehicles in the regular course of its business for any lawful purpose.

3. TERM

- 3.1 The Base Lease Term with respect to any vehicle is set forth in the Accounting Form relating thereto.
- 3.2 This Agreement shall remain in effect until such time as no further vehicles are subject hereto and until Lessee has satisfied in full all of its obligations to Lessor with respect to any vehicle at any time leased hereunder. Provided that no Event of Default shall have occurred and be continuing, the termination of this Agreement in respect of any vehicle shall not affect any other vehicle subject hereto at the time of such termination and any such other vehicle shall remain subject to the terms of this Agreement and the appropriate Accounting Form identifying such other vehicle.
- 3.3 Lessee may retire from service any vehicle leased pursuant to this Agreement by giving to Lessor written notice and surrendering possession of such vehicle to Lessor at the point where same was originally delivered to Lessee, or at such other point as may be mutually agreed upon. The lease as to such vehicle shall terminate upon the date such vehicle is sold by Lessor pursuant to Section 19, subject, however, to the provisions hereof including, but not limited to, Sections 16 and 19.
- 3.4 At Lessee's option any vehicle may be continued in service beyond the Base Lease Term thereof, in which event (a) the monthly rental due therefor during such continuation will be the Extended Rental and (b) no Interim Rental will be payable with respect to any Second Interim Lease Term of such vehicle.

4. RENTAL PAYMENTS

- 4.1 Lessee agrees to pay Lessor, as rent for each vehicle leased hereunder, Interim Rental and monthly Rental Payments, and any other charges due, during each month of the Overall Lease Term with respect to such vehicle in such amounts as are set forth in the Accounting Form relating to such vehicle and are calculated in accordance with methods of computation set forth in Schedule "A". With respect to each vehicle, all rent and other charges shall be due and payable on or before the fifteenth (15th) day of each month during the Overall Lease Term thereof, commencing with the first such fifteenth (15th) day after the commencement of the Interim Lease Term with respect to such vehicle. A LATE CHARGE OF 2% OF THE AMOUNT DUE WITH A MINIMUM CHARGE OF \$2.00 WILL BE ADDED TO EACH SUCH PAYMENT UNPAID ON THE DUE DATE AND THE SAME CHARGE WILL BE ADDED FOR EACH SUBSEQUENT MONTH OR PART THEREOF ON WHICH SUCH PAYMENT REMAINS UNPAID.

- 4.2 With respect to any vehicle returned to Lessor pursuant to Section 3.3, monthly Rental Payments shall cease on the day after the return date.
- 4.3 Interim Rental and monthly Rental Payments shall be paid to Lessor at the address set forth above or such other address as Lessor shall provide to Lessee.

5. WARRANTIES.

LESSOR, NOT BEING THE MANUFACTURER OR A DISTRIBUTOR OF THE VEHICLES NOR THE MANUFACTURER'S OR A DISTRIBUTOR'S AGENT, MAKES NO EXPRESS OR IMPLIED WARRANTY OR REPRESENTATION OF ANY KIND WHATSOEVER WITH RESPECT TO ANY VEHICLE, INCLUDING BUT NOT LIMITED TO: THE MERCHANTABILITY OF THE VEHICLE OR ITS FITNESS FOR ANY PARTICULAR PURPOSE; THE DESIGN OR CONDITION OF THE VEHICLE; THE QUALITY OR CAPACITY OF THE VEHICLE; THE WORKMANSHIP IN THE VEHICLE; COMPLIANCE OF THE VEHICLE WITH THE REQUIREMENTS OF ANY LAW, RULE, SPECIFICATION OR CONTRACT PERTAINING THERETO; PATENT INFRINGEMENT; IT BEING AGREED THAT THE VEHICLES ARE LEASED "AS IS". WITHOUT LIMITING THE GENERALITY OF THE FOREGOING, LESSOR SHALL NOT BE LIABLE FOR ANY DEFECTS, EITHER LATENT OR PATENT IN ANY VEHICLE, OR FOR ANY DIRECT OR CONSEQUENTIAL DAMAGE THEREFROM, OR FOR ANY LOSS OF USE THEROF OR FOR ANY INTERRUPTION IN LESSEE'S BUSINESS BY ITS INABILITY TO USE ANY VEHICLE FOR ANY REASON WHATSOEVER. Lessee will be subrogated to Lessor's claims, if any, against the manufacturer or supplier of any vehicle for breach of any warranty or representation, by such manufacturers or suppliers and, upon written request from Lessee, Lessor shall take all reasonable action requested by Lessee to enforce any such warranty, express or implied, issued on or applicable to any vehicle which is enforceable by Lessor in its own name, provided, however, that (a) no Event of Default has occurred and (b) Lessor shall not be obligated to take any action to enforce any such warranty unless Lessee shall pay all expenses in connection therewith. Upon request by Lessor, Lessee shall pay Lessor's reasonably estimated costs in advance. Notwithstanding the foregoing, Lessee's obligations to pay the Interim Rental, monthly Rental Payments and other charges under this Agreement shall be and are absolute and unconditional. All proceeds of any such warranty recovered from the manufacturer or supplier of a vehicle shall first be used to repair the affected vehicle.

6. MAINTENANCE, REPAIRS, OPERATING EXPENSES AND RETURN OF VEHICLES.

- 6.1 Unless otherwise specified in a schedule hereto separately signed by Lessor, Lessee will pay for all maintenance and repairs to keep the vehicles in good working order and condition and any other expenses associated with operating the vehicles. Lessee will service the vehicles according to the manufacturers' recommendations as outlined in the owner's manual and the maintenance schedule folder accompanying each vehicle.
- 6.2 Lessee will return each vehicle at the end of the lease thereof in good condition with no excessive wear and tear including, among other things: (1) no glass breakage or discoloration, (2) no damage or deterioration of body, fenders, metal work, trim or paint, (3) no original equipment including wheel covers or tires (including spare) that are missing or not in safe condition, (6) no damage from flood water, hail, or sand, and (7) no damage or alteration that makes the vehicle either unsafe or unlawful to operate.
- 6.3 Lessee shall comply with any and all governmental requirements affecting the maintenance, operation or use of each of the vehicles including, without limitation, any changes or safeguards therein to keep each of the vehicles in such compliance. Any replacement parts, changes in or improvements to each of the vehicles shall become and remain the property of Lessor.

7. LICENSE, REGISTRATION, TAXES AND INSPECTION.

Lessee will be responsible for payment for titling, registration and licensing and all inspections of the vehicles required by any government authority during the overall lease term. Lessee must pay for all excise, sale, use, personal property, gross receipts, and other taxes incurred, or assessed by federal, state or local governments, during the Overall Lease Term whether with respect to this Agreement or the ownership, lease, use or operation of the vehicle, or with respect to the receipt of rental and other payments by Lessor, except those taxes levied on the net income of the Lessor, provided that the foregoing exception shall not apply to any such net income taxes which are in substitution for, or relieve the Lessee from the payment of, taxes which it would otherwise be obligated to pay or reimburse. Lessee shall comply with all federal, state, county and municipal statutes, ordinances, rules, and regulations which may be applicable to the leasing, use, insuring, condition, maintenance or operation of the vehicles hereunder, and shall prepare and furnish to Lessor all documents, returns, or forms legally required thereunder. Lessee shall provide all drivers or other operators of the vehicles and shall be solely responsible for any and all fines, penalties and forfeitures (including, without limitation, the confiscation of any of the vehicles) arising out of or due to the use, operation, condition, maintenance or insuring of each of the vehicles in violation of any law, regulation, statute or similar requirement of any governmental authority.

8. DELIVERY

- 8.1 Lessor will not be responsible for any loss resulting from delay in delivery of any vehicle.
- 8.2 Lessee hereby warrants to Lessor that any person accepting delivery of any vehicle has authority to do so on behalf of Lessee and that the signature of such person on any document executed in connection herewith shall be binding on Lessee.

9. USE.

- 9.1 Lessee will allow only licensed drivers to operate the vehicles and Lessee agrees that Lessee (if a natural person) and all such licensed drivers are drivers in good standing under the laws of the state in which they are licensed and have not within the past five (5) years had any driver's license suspended or revoked or had any insurance premium adjusted because of a poor driving record.
- 9.2 Lessee will keep the vehicles free of all fines, liens and encumbrances. If Lessor receives notice of any motor vehicle violation relating to any vehicle, Lessor may charge Lessee a reasonable service charge, as determined by Lessor from time to time, for processing such notice. Nothing in this Section 9.2 shall require Lessor, however, to take any action with respect to such notice.
- 9.3 Lessee will not use the vehicles illegally, improperly or for hire, or permit such use.
- 9.4 Lessee will not use the vehicles to pull trailers unless designed for that purpose.
- 9.5 Lessee will not remove the vehicles from the continental United States.
- 9.6 Lessee will not alter, mark or install equipment in the vehicles without Lessor's written consent.
- 9.7 Lessee will not change the locations at which the vehicles are permanently garaged without prior notification to Lessor of such relocation.

10. OWNERSHIP.

- 10.1 This Agreement is a lease only and Lessor remains the owner of the vehicles. This Agreement is a net lease and Lessee shall not be entitled to any abatement of Interim Rentals, Rental Payments or other amounts payable hereunder or reduction thereof, including, but not limited to, abatements or reductions due to any present or future claims of Lessee against Lessor under this Agreement or

otherwise, or against the manufacturer or vendor of the vehicles nor, except as otherwise expressly provided herein, shall this Agreement terminate, or the respective obligations of Lessor or Lessee be otherwise affected, by reason of any defect in or damage to or loss or destruction of all or any of the vehicles from whatsoever cause, the taking or requisitioning of all or any vehicles by condemnation or otherwise, the prohibition by law of Lessee's use of all or any vehicles, the interference with such use by any private person or corporation, the invalidity or unenforceability or lack of due authorization or other infirmity of this Agreement, or lack of right, power or authority of Lessor to enter into this Agreement, or for any other cause whether similar or dissimilar to the foregoing, any present or future law to the contrary notwithstanding, it being the intention of the parties hereto that the rents and other amounts payable by Lessee hereunder shall continue to be payable in all events unless the obligation to pay the same shall be terminated pursuant to the terms hereof.

- 10.2 Lessee will not transfer, sublease, or rent any of the vehicles or do anything to interfere with Lessor's ownership of the vehicles. Lessee agrees that this Lease will be treated as a true lease for federal income tax purposes and that unless there is a written agreement with Lessor to the contrary, Lessor will receive all of the tax and other benefits of ownership of the vehicles and Lessee will not claim any depreciation or ACRS deductions or investment tax credits with respect to the vehicles. Lessee will, from time to time, execute such statements as may be requested by Lessor in order to confirm Lessor's ownership of the vehicles and Lessor's right to claim such tax benefits with respect thereto.

11. RISK OF LOSS AND INSURANCE.

All risks of loss from public liability, damage to property or third persons, or damage to each vehicle, whether caused by an unavoidable casualty, accident, abuse or misuse thereof by Lessee, its employees, agents or others, shall be borne by Lessee. Lessee shall provide public liability and ~~property damage coverage, coverage against fire and theft and comprehensive and collision coverage~~ with a responsible qualified insurance company acceptable to Lessor, protecting the interests of Lessor and Lessee against liability for damages for personal injury or death, property damage to others, or damage to the vehicles wherever such vehicles may be used or be located, all as set forth in Schedule "A". Said insurance shall not be excess over other coverage, but shall be primary insurance up to and including the limits set forth in Schedule "A". Said insurance policies shall be satisfactory to Lessor as to form and substance, shall be payable to Lessor or its assigns as their interests may appear and shall name Lessor as an additional named insured without liability for premiums. Said policies shall provide for at least ten (10) days written notice of cancellation to Lessor or its assigns and Lessee shall furnish certificates, policies or endorsements to Lessor or any such assigns as proof of such insurance. Lessor or its assigns may act as attorney for Lessee in making, adjusting or settling any claims under any insurance policies insuring the vehicles. Lessee assigns to Lessor all of its right, title, and interest to any insurance policies insuring the vehicles, including all rights to receive the proceeds of insurance not in excess of the unpaid obligations under this Lease, and directs any insurer to pay all such proceeds directly to Lessor or its assigns and authorizes Lessor or its assigns to endorse Lessee's name on any draft for such proceeds. No such loss, damage, theft or destruction of any vehicle, in whole or part, shall impair the obligations of Lessee under this Agreement, all of which shall continue in full force and effect subject to Lessee's right to terminate the lease of any vehicle pursuant to Section 3.3. After compliance with the foregoing to Lessor's satisfaction, and provided no Event of Default has occurred and is continuing, Lessee shall be subrogated to Lessor's rights with respect to any insurance policies or claims for reimbursement by others with respect to such loss.

12. GENERAL INDEMNITY.

Lessee assumes liability for and hereby agrees to indemnify, protect, and save and keep harmless Lessor, its agents, servants, successors and assigns from and against all claims, whether or not due in whole or in part to any act or omission or other negligence of Lessor, its agents, servants, successors, assigns or any of their employees, for losses, damages, injuries, costs, expenses, attorneys' fees and court costs arising out of the use, condition (including, but not limited to, latent and other defects, whether or not discoverable by it), or operation of any vehicle, regardless of where, how and by whom operated or arising out of or resulting from the condition of the vehicles sold or disposed of after use by Lessee or, if Lessee shall not take delivery of any vehicle hereunder, after Lessee shall have signed (or electronically entered) a Purchase Order with respect to such vehicle arising out of or resulting from any claims that the manufacturer or supplier of such vehicle may assert against Lessor with respect to such Purchase Order. Lessee shall assume the settlement of, and the defense of any suit or suits, or other legal proceedings brought to enforce all such losses, damages, injuries, claims, demands and expenses, and shall pay all judgments entered in any such suit or suits or other legal proceedings. The indemnities and assumptions of liabilities and obligations herein provided for shall continue in full force and effect from and after the date of Lessee's execution of this Agreement, notwithstanding the subsequent termination hereof by expiration of time, by operation of law, or otherwise. Lessee shall indemnify, protect and save and keep harmless Lessor, its agents, servants, successors and assigns from and against all liability arising under Title IV of the Motor Vehicle Information and Cost Saving Act, P.L. 92-513, and similar laws of any other jurisdiction relating to false or inaccurate odometer readings. Lessee hereby represents and warrants that this Agreement constitutes a "qualified motor vehicle operating agreement", as defined in Section 168 (f) (13) of the Internal Revenue Code, and shall indemnify Lessor in the event of the incorrectness of such representation and warranty pursuant to this Section 12. Lessee is an independent contractor and nothing contained in the Agreement shall authorize Lessee or any other person to operate any vehicle so as to incur or impose any liability or obligation for or on behalf of Lessor.

13. ASSIGNMENT AND SUBLEASE BY LESSEE; CHANGE IN CONTROL.

13.1 Without Lessor's prior written consent, Lessee may not, by operation of law or otherwise; (a) assign, transfer, pledge, hypothecate or otherwise dispose of this Agreement or any interest therein or (b) sublet or lend the vehicles or permit the same to be used by anyone other than Lessee or Lessee's employees, except that, following written notice to Lessor, it may sublet the same to any of its present or future subsidiaries or affiliated companies, but every such sublease shall be subject and subordinate to the terms of this Agreement and shall in no event relieve Lessee of its obligations hereunder, and each such sublessee shall, in addition, agree in writing with Lessor at the time of the sublease to be bound by the terms and conditions hereof.

13.2 If there is a change in control of Lessee, such change in control shall be deemed to be a transfer of this Agreement for purposes of Section 13.1. In addition to any actual change of control, a change in control shall be deemed to have occurred if, at any time, the ownership of more than 50 percent of either the voting power or value of the equity interests in Lessee is different than on the date hereof.

ASSIGNMENT BY LESSOR.

For the purpose of providing funds for financing the purchase of vehicles to be leased or for any other purpose, Lessor may assign to any third party all or any part of the lease and interest in and to this Agreement and in and to the vehicles and monies due and to become due to the Lessor hereunder. In such event all the provisions of this

Agreement for the benefit of Lessor shall, to the extent of the rights assigned, inure to the benefit of and may, to such extent, be exercised by or on behalf of such third party, and all rental payments and other amounts due and to become due under this Agreement and assigned to such third party, upon notice by Lessor or assignee to Lessee, shall be paid directly to such third party, and THE RIGHTS OF SUCH ASSIGNEE SHALL NOT BE SUBJECT TO ANY DEFENSE, COUNTERCLAIM OR SET-OFF WHICH LESSEE MAY HAVE AGAINST LESSOR, for any claim of the Lessee whatsoever; whether arising from breach of warranty or representation relating to any vehicle, or arising from the termination of this Agreement or of any lease of any vehicle hereunder, or arising from the breach or failure of Lessor to observe or perform any of the terms or provisions of this Agreement or of any other agreement or transaction whatsoever between Lessor and the Lessee. Lessee agrees to make prompt payment to such third party of the rentals and other amounts so assigned even though bankruptcy, reorganization, arrangement, insolvency, liquidation or dissolution proceedings are instituted by or against the Lessor and regardless of whether a trustee or receiver in any such proceedings shall assume or reject this Agreement. In the event of such assignment, the liability of Lessee to pay such third party the full amount of the rental and other sums assigned with respect to each vehicle hereunder shall not be terminated, notwithstanding anything herein contained to the contrary, unless (1) Lessee shall have paid such third party all assigned sums due hereunder with respect to such vehicle or (2) such third party or Lessor shall have furnished to Lessee a release executed by such third party in substantially the following form:

"The vehicle herein described has been released from the assignment made by LMV LEASING, INC., to the undersigned". (Signature of third party or authorized officer to be added.)

Such third party shall have no obligation or liabilities under this Agreement by reason of or arising out of such assignment, nor shall such third party be required or obligated in any manner to perform or fulfill any duties or obligations of the Lessor under this Agreement.

15. LESSOR'S PERFORMANCE OF LESSEE OBLIGATIONS.

If Lessee shall fail to duly and promptly perform any of its obligations under this Agreement with respect to any vehicle, Lessor may (at its option) perform any act or make any payment which Lessor deems necessary for the maintenance and preservation of such vehicle and Lessor's title thereto, including payments for satisfaction of liens, repairs, taxes, levies and insurance and all sums so paid or incurred by Lessor, together with interest at the maximum rate permitted by law from the date of payment, and any reasonable legal fees incurred by Lessor in connection therewith shall be additional amounts due under this Agreement and payable by Lessee to Lessor on demand. The performance of any act or payment by Lessor as aforesaid shall not be deemed a waiver or release of any obligation or default on the part of Lessee.

16. TAX INDEMNITY.

This Section 16 applies unless otherwise specified in Exhibit "I".

- 16.1 If (a) for any reason other than a Law Change (as hereinafter defined) Lessor is not entitled to claim or shall have reduced or disallowed all or any portion of the investment tax credit or the depreciation or ACRS deductions described in Exhibit "I" ("Tax Benefits") or any such Tax Benefits are recaptured or deferred in whole or in part pursuant to the Internal Revenue Code of 1954, as amended (a "Tax Benefits Loss") or (b) there occurs a Law Change that would result in a reduction of Lessor's after-tax yield from the leasing of any vehicle hereunder (a "Law Change Loss"), then Lessee shall pay to Lessor as additional rent such amount as, after deduction of all taxes required to be paid by Lessor in respect

of the receipt thereof under the laws of any governmental or taxing authority in the United States, shall be required to cause Lessor's net return and cash flow to equal the net return and cash flow that would have been available to Lessor if it (i) Lessor had been entitled to the utilization of the Tax Benefits or (ii) such Law Change had not occurred (in either case, the "Tax Indemnity Amount"). For purposes hereof, "Law Change" means any amendment of the Internal Revenue Code of 1954 that is enacted after the date on which the Overall Lease Term commences as to a particular vehicle.

- 16.2 Lessor shall be responsible for, and shall not be entitled to a payment by Lessee on account of, any Tax Benefits Loss arising solely as a direct result of the occurrence of any one or more of the following events: (i) the failure of Lessor to timely and properly claim Tax Benefits (unless tax counsel to Lessor shall have advised it that such Tax Benefits cannot properly be claimed for any vehicle on the tax return of Lessor (or the consolidated Federal taxpayer group of which Lessor is a part); or (ii) the failure of Lessor (or the consolidated Federal taxpayer group of which Lessor is a part) to have sufficient taxable income before depreciation or ACRS deductions with respect to the vehicles to offset the full amount of any such depreciation or ACRS deduction or to have sufficient tax liability to utilize the investment tax credit with respect to the vehicles.
- 16.3 Lessor promptly shall notify Lessee in writing of any Tax Benefits Loss or Law Change Loss and of the Tax Indemnity Amount relating thereto and Lessee shall pay to Lessor such Tax Indemnity Amount within thirty (30) days of such notice. For purposes of this Section 16, a Tax Benefits Loss shall occur upon the earliest of (i) the happening of any event (such as a change in use of any vehicle or a disposition of a vehicle by Lessor after Lessee has terminated the lease of such vehicle before the end of the Base Lease Term thereof) which may cause such Tax Benefits Loss; (ii) the payment by Lessor (or the consolidated Federal taxpayer group of which Lessor is a part) to the Internal Revenue Service or a state or local taxing authority of the tax increase resulting from such Tax Benefits Loss; or (iii) the adjustment of the tax return of Lessor (or the consolidated Federal taxpayer group of which Lessor is a part) by an examining agent to reflect such Tax Benefits Loss; for purposes hereof, a Law Change Loss shall occur upon the effective date of such Law Change.
- 16.4 Notwithstanding the foregoing, following the sale or other disposition of a vehicle by Lessor, if no Tax Benefits Loss has previously occurred with respect to such vehicle, a Tax Benefits Loss shall (unless Lessee shall have paid in full the Termination Value of such vehicle pursuant to Section 19) be deemed to have resulted and the Tax Indemnity Amount with respect thereto shall be that amount determined by multiplying the factor set forth on Exhibit "I" by the Agreed Price.
- 16.5 Lessee's obligations under this Section shall survive the termination of this Agreement.

17. EVENTS OF DEFAULT.

Lessee shall be in default under this Agreement with respect to all vehicles acquired hereunder upon the happening of any of the following events or conditions ("Events of Default"):

- 17.1 Default by Lessee in payment of any Interim Rental or Rental Payment or any other indebtedness or obligation now or hereafter owed by Lessee to Lessor under this Agreement or otherwise;

- 17.2 Default in the performance of any obligation, covenant or liability contained in this Agreement or any other agreement or document with Lessor, and the continuance of such default for ten (10) consecutive days after written notice thereof by Lessor to Lessee;
- 17.3 Any warranty, representation or statement made or furnished to Lessor by or on behalf of Lessee or any permitted sublessee proves to have been false in any material respect when made or furnished;
- 17.4 Loss, theft, damage, or destruction of any vehicle not covered by insurance or the attempted sale or encumbrance by Lessee of any vehicle, or the making of any levy, seizure or attachment thereof or thereon;
- 17.5 Dissolution, termination of existence, discontinuance of its business, insolvency, business failure, or appointment of a receiver of any part of the property of, or assignment for the benefit of creditors by, Lessee or any permitted sublessee or the commencement of any proceedings under any insolvency, bankruptcy, reorganization or arrangement laws by or against Lessee or any permitted sublessee; or
- 17.6 Lessee or any permitted sublessee shall fail generally to pay its debts as they become due, or shall take any corporate action in furtherance of any Event of Default.

Anything to the contrary contained in the preceding provisions of this Section 17 notwithstanding, in the event that the Lessor shall have assigned to one or more third parties all or any part of its right, title and interest hereunder, each such third party shall, to the extent of the rights assigned to it, have the right to determine whether the happening of any of the foregoing events or conditions (a) with respect to any Interim Rentals or Rental Payments or other payment not assigned to such third party, or (b) with respect to any of the Lessee's obligations, covenants, liabilities, representations and warranties regarding any vehicle, rights to which have not been assigned to such third party, shall constitute Events of Default for purposes of such third party's rights in and to this Agreement.

In the event of an affirmative election in writing by any such third party to treat an event or condition described in the preceding clause (a) or clause (b) as an Event of Default, for purposes of such third party's rights hereunder, such third party shall, to the extent of the rights assigned to it, be entitled to exercise the remedies provided for in Section 18. Absent such an affirmative election by such third party, (i) the rights assigned to such third party shall be deemed, for purposes of this Section 17, to arise under a separate lease agreement and (ii) there shall not be any cross-default between such deemed separate lease agreement and this Agreement.

18. REMEDIES OF LESSOR.

Upon the occurrence of any Event of Default and at any time thereafter:

- 18.1 Lessor may without any further notice exercise one or more of the following remedies, as Lessor in its sole discretion shall elect: (a) declare all unpaid rentals under this Agreement (discounted, however, to their then present value at a discount rate of 6% per annum) to be immediately due and payable; (b) terminate this Agreement as to any or all vehicles; (c) take possession of the vehicles wherever found, and for this purpose enter upon any premises of Lessee or any other person and remove the vehicles, without liability for suit, action or other proceeding by the Lessee or any person acting by, for or under Lessee, and remove the same; (d) cause Lessee at its expense promptly to return the vehicles to Lessor in the condition set forth in Section 6.2; (e) use, hold, sell, repair, lease

or otherwise dispose of the vehicles on the premises of Lessee or any other location without affecting the obligations of Lessee as provided in this Agreement; (f) sell or lease the vehicles at public auction or by private sale or lease at such time or times and upon such terms as Lessor may determine, free and clear of any rights of Lessee and, if notice thereof is required by law, any notice in writing of any such sale or lease by Lessor to Lessee not less than ten (10) days prior to the date thereof shall constitute reasonable notice thereof to Lessee; (g) proceed by appropriate action either at law or in equity to enforce performance by Lessee of the applicable covenants of this Agreement or to recover damages for the breach thereof; and (h) exercise any and all rights accruing to a lessor under any applicable law upon a default by a lessee.

18.2 In addition, Lessor shall be entitled to recover immediately as liquidated damages, and not as a penalty, a sum equal to the aggregate of the following: (a) all unpaid rentals or other sums which are due and payable hereunder up to the date of redelivery to, or repossession by, Lessor; (b) any expenses paid or incurred by Lessor in connection with exercising any of its remedies under Section 18.1, including attorneys' fees, legal expenses and court costs; (c) all unpaid rentals due and to become due under this Agreement for any vehicle which Lessee fails to return to Lessor as provided above or converts or destroys, or which Lessor is unable to repossess; (d) the Tax Indemnity Amount (if Section 16 applies); and (e) an amount equal to the difference between (i) all unpaid rentals for any vehicle returned to or repossessed by Lessor from the date thereof to the end of the term therefor plus the expected Termination Value (if any) of such vehicle at the end of the term therefor, and (ii) the wholesale value of each such vehicle on such date, provided, however, that the value of each vehicle shall not exceed the proceeds of any sale thereof by Lessor. Should Lessor, however, estimate its actual damages to exceed the foregoing, Lessor may, at its option, recover its actual damages in lieu thereof or in addition thereto. Lessor shall not be obligated to sell, lease or otherwise dispose of any vehicle hereunder if it would impair the sale, lease or other disposition of other vehicles in the ordinary course of Lessor's business or vehicles which were previously repossessed by Lessor from any party.

18.3 None of the remedies under this Agreement are intended to be exclusive, but each shall be cumulative and in addition to any other remedy referred to herein or otherwise available to Lessor at law or in equity and the third party election set forth in the penultimate paragraph of Section 17 shall be exercisable so long as the Events and Default described in clause (a) or (b) of said paragraph are continuing. Any repossession or subsequent sale or lease by Lessor of any vehicle shall not bar an action for a deficiency as herein provided, and the bringing of an action or the entry of judgment against the Lessee shall not bar the Lessor's right to repossess any or all vehicles. LESSEE WAIVES ANY AND ALL RIGHTS TO NOTICE AND TO A JUDICIAL HEARING WITH RESPECT TO THE REPOSSESSION OF THE VEHICLES BY LESSOR IN THE EVENT OF A DEFAULT HEREUNDER BY LESSEE.

19. TERMINATION.

At the end of the Base Lease Term of any vehicle or upon the termination of the lease pursuant to Section 18 hereof by Lessor, or upon the exercise by Lessee of its right to retire any vehicle from service pursuant to Section 3.3, Lessee will return such vehicle to Lessor at the location specified in Section 3.3. Lessor will sell it at wholesale in a commercially reasonable manner. If the net selling price is more than the amount (the "Termination Value" with respect to such vehicle) determined by applying the formula set forth in Exhibit

"T" (if a formula for such determination appears therein or by multiplying the factor set forth in Exhibit "T" by the Agreed Price, (if a table of factors for such determination appears therein), Lessor will pay Lessee the surplus less any amounts owed under this Agreement. If it is less, Lessee will pay the deficiency plus any amounts owed under this Agreement. The net selling price is the sale price less the sum of (a) Lessor's direct expenses of selling, preparing and storing such vehicle and (b) the Settlement Fee shown on Schedule "A".

20. FURTHER ASSURANCES.

Lessee shall execute and deliver to Lessor, upon Lessor's request, such instruments, opinions of counsel, authorizing resolutions, financing statements and assurances as Lessor deems necessary for the confirmation or perfection of this Agreement and Lessor's rights hereunder. In furtherance thereof, Lessor may file or record this Agreement or financing statements with respect thereto so as to give notice to any interested parties. Any such filing or recording shall not be deemed evidence that this Agreement is intended as security or of any intent to create a security interest under the Uniform Commercial Code. Lessee authorizes Lessor and Lessor's assignee and each subsequent assignee to file a financing statement signed only by Lessor or such assignee in all places where such authorization is permitted by law.

21. SEVERABILITY.

Any provision of this Agreement that is prohibited or unenforceable in any jurisdiction shall, as to such jurisdiction, be ineffective to the extent of such prohibition and unenforceability without invalidating the remaining provision hereof. To the extent permitted by applicable law, Lessee hereby waives any provision of law which prohibits or renders unenforceable any provisions hereof in any respect.

22. NOTICES.

All notices, reports and other documents provided for herein shall be deemed to have been given or made when mailed, postage prepaid, or delivered to a telegraph or cable company, addressed to Lessor or Lessee at their respective addresses set forth above or such other addresses as either of the parties hereto may designate in writing to the other from time to time for such purpose.

23. AMENDMENTS AND WAIVERS.

This Agreement, the Accounting Forms, Purchase Orders and Schedules executed by Lessor and Lessee constitute the entire agreement between Lessor and Lessee with respect to the vehicles and the subject matter of this Agreement. No term or provision of this Agreement, the Accounting Forms, Purchase Orders and Schedules may be changed, waived, amended or terminated except by a written agreement signed by both Lessor and Lessee, except that Lessor may insert the serial number of any vehicle or other identifying information on the appropriate documents after delivery of such vehicle. No express or implied waiver by Lessor of any Event of Default hereunder shall in any way be, or be construed to be, a waiver of any future or subsequent Event of Default, whether similar in kind or otherwise.

24. CHOICE OF LAW; CONSTRUCTION.

THIS AGREEMENT SHALL BE BINDING, WHEN ACCEPTED BY LESSOR IN THE COMMONWEALTH OF PENNSYLVANIA, AND SHALL BE CONSTRUED AND ENFORCED IN ACCORDANCE WITH AND GOVERNED BY THE LAWS OF THE COMMONWEALTH OF PENNSYLVANIA. LESSEE CONSENTS TO THE EXERCISE OF PERSONAL JURISDICTION OVER LESSEE BY ANY COURT OF RECORD SITTING IN PENNSYLVANIA IN CONNECTION WITH ANY ACTION ARISING OUT OF THIS AGREEMENT, AND WAIVES ALL OBJECTIONS TO VENUE IN ANY SUCH COURT AND TO SERVICE OF PROCESS ON LESSEE AT ITS DESIGNATED ADDRESS FOR PURPOSES OF NOTICE HEREUNDER IN ACCORDANCE WITH THE PENNSYLVANIA UNIFORM INTERSTATE AND INTERNATIONAL PROCEDURE ACT OR ANY SUCCESSOR STATUTE IN CONNECTION WITH SUCH ACTION. Lessee waives, insofar as permitted by law, trial by jury and right of counterclaim in any action between the parties. The titles of the sections of this Agreement are for convenience only and shall not define or limit any of the terms or provisions hereof. Time is of the essence of this Agreement in each and all of its provisions.

25. PARTIES.

The provisions of this Agreement shall be binding upon, and inure to the benefit of, the permitted assigns, representatives and successors of the Lessor and Lessee. If there is more than one Lessee named in this Agreement, the liability of each shall be joint and several.

26. FINANCIAL STATEMENTS.

Lessee will furnish Lessor (a) within 45 days of the close of each fiscal quarter of Lessee a balance sheet and profit and loss statement of Lessee as of the end of such quarter, (b) within 90 days after the close of each fiscal year of Lessee, a balance sheet and profit and loss statement of lessee as of the end of such year, the yearly statement to be certified by public accountants of recognized standing acceptable to Lessor, (c) such other financial statements and information to be furnished promptly after the same is made available to said stockholders, and (d) such other information respecting the financial condition and operations of Lessee as Lessor may from time to time reasonably respect.

27. CONFESSION OF JUDGMENT.

UPON DEFAULT LESSEE HEREBY EMPOWERS THE PROTHONOTARY OR ANY ATTORNEY OF ANY COURT OF RECORD WITHIN THE UNITED STATES OR ELSEWHERE TO APPEAR FOR IT AND, WITH OR WITHOUT ONE OR MORE DECLARATIONS FILED, CONFESS A JUDGMENT OR JUDGMENTS AGAINST IT IN THE FAVOR OF LESSOR OR ANY ASSIGNEE AS OF ANY TERM FOR THE UNPAID BALANCE HEREOF WITH COSTS OF SUIT AND AN ATTORNEY'S COMMISSION OF 10% FOR COLLECTION, WITH RELEASE OF ALL ERRORS AND WITHOUT STAY OF EXECUTION, AND INQUISITION AND EXTENSION UPON ANY LEVY ON REAL ESTATE IS HEREBY WAIVED AND CONDEMNATION AGREED TO, AND THE EXEMPTION OF ALL PROPERTY FROM LEVY AND SALE ON ANY EXECUTION THEREON, AND EXEMPTION OF WAGES FROM ATTACHMENT, ARE ALSO HEREBY EXPRESSLY WAIVED, AND NO BENEFIT EXEMPTION SHALL BE CLAIMED UNDER OR BY VIRTUE OF ANY EXEMPTION LAW NOW IN FORCE OR WHICH MAY HEREAFTER BE ENACTED.

IT IS HEREBY ACKNOWLEDGED THAT THE CONFESSION OF JUDGMENT PROVISIONS HEREIN CONTAINED AFFECT AND WAIVE CERTAIN LEGAL RIGHTS OF LESSEE AND HAVE BEEN READ, UNDERSTOOD AND VOLUNTARILY AGREED TO BY LESSEE.

LESSEE HEREBY ACKNOWLEDGES RECEIPT OF AN EXECUTED AND TRUE COPY OF THIS LEASE.

IN WITNESS WHEREOF, the Lessor and Lessee, intending to be legally bound, have caused these presents to be duly executed the day and year first above written.

WITNESS:

INC.
MCQADBA/AMERICAN
LESSEE: INTERNATIONAL CAR RENTAL
By: [Signature]
Title: President

Accepted by Lessor this December 29, 1986, at 121 Freeport Road, Pittsburgh, PA 15238.

3/20/87 [Signature]

By: [Signature]
Title: Asst. Dir.

TERMINAL RENTAL ADJUSTMENT CLAUSE
LR.C. 168(1)(3) Statement

The undersigned hereby certifies, under penalty of perjury, that it intends that more than 50 percent of the use of the vehicles subject to the above Agreement will be in the undersigned's trade or business.

The undersigned has further been advised that it will not be treated as the owner of the vehicles subject to the Agreement for federal income tax purposes and the undersigned is not aware of any information which may lead Lessor to believe that this certification is false.

Date: 1-5-87

INC.
MCQADBA/AMERICAN
LESSEE: INTERNATIONAL CAR RENTAL
By: [Signature]
Title: President

SCHEDULE "A"
TO PREFERRED VEHICLE LEASE AGREEMENT
NON-TAX ORIENTED

1. ACQUISITION FEE

\$75.00

2. SETTLEMENT FEE

\$75.00 per vehicle on vehicles sold by LMV on behalf of MCO, Inc. DBA/American International Car Rental.

3. APPORTIONMENT OF EXCESS OF SALES OR SETTLEMENT PRICE IN EXCESS OF BOOK VALUE AFTER DEDUCTION OF SETTLEMENT FEE.

Lessor shall pay to Lessee as a rental adjustment 100% of any such excess. If the amount remaining results in a deficiency, Lessee shall pay to Lessor as rental adjustment the amount of such deficiency, provided that Lessor shall guarantee to Lessee minimum net resale proceeds equal to 20% of the Agreed Price at the beginning of the initial lease term. If Lessee is otherwise permitted to and does elect to extend the lease of any vehicle beyond the Base Lease Term, Lessor shall guarantee 25% of the fair value of the vehicle at the inception of the extension period.

"Fair value" shall be defined as 85% of resale value for automobiles, and 70% of resale value on light trucks as reported by "Automotive Market Report" published by Automotive Auction Publishing, Inc., as of the publication date immediately preceding the last day of the month which immediately precedes the month in which termination as to the particular vehicle occurs.

Settlements of excess or deficiency from resale, as described above, shall be based on calendar-year-to-date sales. Tentative settlements will be made monthly, but adjusted quarterly, to year-to-date results. For this purpose, a quarter is defined as a three-month period ending March 31, June 30, September 30 and December 31.

4. FINANCING CHARGE

Financing charges shall be charged at an interest rate of two percent (2%) in excess of the prime rate. The prime rate shall be that rate charged by Citibank, New York. This rate will be changed every month by reference to the prime rate as reported by Citibank, New York on the 15th calendar day of the applicable lease period.

5. ADMINISTRATIVE FEE

.0011 of the Agreed Price per month per vehicle. After forty-eight months, the administrative fee shall be 20% of the Monthly Rental Payment per month per vehicle.

6. AGREED PRICE

\$100.00 over Dealer Invoice. This pricing applies only to ordered vehicles customarily used by corporate fleets which are manufactured by Buick, Chevrolet, Chrysler, Dodge, Ford, Mercury, Oldsmobile, Plymouth, Pontiac and Chevrolet, Dodge and Ford Trucks having a GVW of 11,000 pounds or under. This pricing is premised on continuation of the vehicle manufacturers' existing pricing structure and dealer incentive programs for the sale of motor vehicles to its dealers for 1987 models. In the event the pricing structure or dealer incentive is changed by any of the manufacturers for 1987 or subsequent models, then the pricing agreed to herein shall be null and void with respect to that manufacturer's vehicle and the parties hereto agree to negotiate revised pricing.

If a motor vehicle is taken from the existing inventory of a dealer or is ordered by LMV from a dealer specified by Lessee, LMV shall be entitled to a fee of 2% over procurement cost.

7. METHOD OF COMPUTATION FOR RENTAL PAYMENTS

Each Monthly Rental Payment shall be equal to:

- I. The Agreed Price less the balloon Payment of each vehicle divided by the Base Lease Term as set forth in the Accounting Form.

PLUS

- II. The financing amount determined by multiplying the financing charge by the preceding month's book value.

8. INSURANCE

In accordance with the provisions of paragraph 11 of this Agreement, Lessee is to provide insurance as follows:

Comprehensive, fire, theft and collision insurance for the actual cash value of the equipment. Lessee shall be responsible for any deductible provision applicable to this insurance. Lessee shall also provide public liability insurance with minimum limits of \$250,000 per person and \$500,000 per accident for bodily injury and \$250,000 for property or a combined single limit in the amount of \$500,000. LMV Leasing, Inc. shall be named as additional insured and Lost Payee.

9. LEASE TERMS IN MONTHS

Forty-eight (48) months. The minimum lease term of any piece of equipment lease hereunder is twelve (12) months. Unless Lessor otherwise consents, the lease with respect to any piece of equipment may not be terminated by Lessee prior to the end of the twelfth (12th) month of the Base Lease Term thereof. In the event that Lessor so consents and the lease is so terminated by Lessee, Lessee agrees that Lessor shall be entitled, in addition to the amount specified in Exhibit "I" hereto, to reasonable administrative charges associated with such termination including any residual value of the vehicle and any penalties and charges imposed by financial institution.

10. EXTENDED RENTAL

Not Available

11. ADDITIONAL PROVISIONS

Should any equipment leased hereunder be terminated or replaced prior to the end of the Base Lease Term for the purposes (directly or indirectly) of refinancing, Lessee agrees to pay to Lessor all costs and penalties associated with such premature termination or replacement, including, without limitation, any and all penalties of financial institutions, reasonable administrative charges of Lessor to effect such premature termination or replacement and any loss of anticipated tax benefits to Lessor as specified in this Agreement.

Upon occurrence of a default by Lessee, or guarantor(s), if any, as provided for under this Agreement or under the terms of any other agreement of lease entered into between Lessee and Lessor that has been guaranteed by guarantor(s), if any, Lessor at its option shall have and may exercise, with respect to this Agreement or any other agreement or lease, any and all rights and remedies available to Lessor under the terms of this Agreement or any other agreement or under the terms of this Agreement or any other agreement or lease, at law or in equity. Except as otherwise provided in paragraph 17 of this Agreement, a default under the terms of any lease or agreement is, at Lessor's option, a default under all leases or agreements between Lessor and Lessee and/or guarantor, if any.

12. BROKER

Lessee represents and warrants that it has not retained a finder or a broker in connection with this Lease or the transactions contemplated by this Lease. Lessor represents and warrants that it has not retained a finder or a broker in connection with this Lease or the transactions contemplated hereby other than Rental Car Leasing and Services Inc., whose fee will be paid by Lessor alone. Lessee acknowledges that neither Rental Car Leasing and Services Inc., nor its employees or representatives are the employee, agent or representative of Lessor for any purposes whatsoever and has not and cannot make any representation, statements, promises, claims or contract modifications of any kind or the like on behalf of Lessor.

CONTINUATION OF ADDITIONAL PROVISIONS

13. Add a new section "2.4: Lessee represents and warrants (a) that this Lease constitutes, and each Schedule and attachment when executed will constitute, a duly authorized and valid obligation of Lessee, enforceable against Lessee in accordance with the terms thereof, (b) that neither the execution by Lessee of this Lease and each Schedule nor its performance thereof will result in any breach of, or constitute a default under or a violation of Lessee's certificate of incorporation, Lessee's by-laws or any other governing instrument of Lessee, any law, rule, or regulation or any agreement, order or judgement, (c) that Lessee is in good standing in its state of incorporation and other form of organization and is entitled to own properties and to carry on business in each state where any vehicle is to be located, (d) that no consent, filing or other action by or with any governmental agency or other regulatory body is necessary for the acquisition and operation of the vehicles as contemplated by this Lease, (e) that there is no litigation pending or threatened against its obligations hereunder and (f) that all financial statements furnished by Lessee to Lessor fairly present the financial condition and results of operations of Lessee as of the respective dates and for the respective periods covered and do not contain any untrue statement, or any omission, of a material fact, and that since the date of the most recent of such financial statements, there has occurred no material adverse change in the business or condition of Lessee. Lessee's execution of each Schedule shall constitute a reaffirmation of these representations and warranties. Lessee shall provide Lessor an opinion of counsel, acceptable to Lessor and its counsel, that items 2.4(a) through (e) are correct as represented.
14. On page 7, paragraph 12. GENERAL INDEMNITY insert on line 3 after "in part" the following: "arising out of activities permitted hereunder and/or (b) related".
15. Modifications for paragraph 10.2 and 13.1. "The above paragraphs notwithstanding, Lessee may rent vehicles provided under this Lease for periods of time, not to exceed the term of the vehicle under this Lease, to licensed drivers over 21 years of age and otherwise qualifying hereunder. This right to rent is expressly limited to rentals in the normal course of Lessee's business under restrictions contained in the Exhibit "A" - MCO, Inc. Standard Form Agreement.
16. Add to paragraph 17.6 at the end, after "defaults" the following as part of the last sentence, "Lessee shall fail to rent any vehicle in accordance with the terms of Exhibit "A" or any restrictions of this Lease."
17. DEPOSIT. Lessor has the right to demand Lessee make and maintain a deposit with Lessor equal to the last preceding monthly rental at any given point in time. Failure by Lessee to maintain such a deposit amount with Lessor, upon Lessor's demand, shall be a breach of this Agreement by Lessee and shall constitute a full Event of Default with all the consequences thereof.

THIS SCHEDULE "A" IS AN ADDENDUM TO THE ABOVE REFERENCED PREFERRED VEHICLE LEASE AGREEMENT WITH CAPITALIZED TERMS USED IN THIS ADDENDUM AND NOT OTHERWISE DEFINED HEREIN HAVING THE RESPECTIVE MEANINGS AS SPECIFIED IN THE AGREEMENT. THIS SCHEDULE IS INCORPORATED INTO AND CONSTITUTES AN INTEGRAL PART OF THE ABOVE REFERENCED AGREEMENT.

This Schedule "A" is part of the Preferred Vehicle Lease Agreement dated December 29, 1986 between the parties and is hereby made a part thereof.

LMV LEASING, INC., LESSOR

By: Mary E. Zoltak
Title: Asst. Secy

LMC.
MCOADBA/
AMERICAN INTERNATIONAL CAR RENTAL, LESSEE

By: X
Title: President

**UNCONDITIONAL AND IRREVOCABLE
GUARANTY OF PAYMENT**

In consideration of the sum of Ten Dollars (\$10.00) and other good and valuable considerations, the receipt and sufficiency of which is hereby acknowledged, and for the purpose of seeking to induce LHV Leasing, Inc. ("Lessor") to enter into a leasing arrangement with

MCO, INC. DBA/AMERICAN INTERNATIONAL CAR RENTAL

("Lessee"), the Undersigned, jointly and severally if more than one, does hereby irrevocably and unconditionally guarantee to Lessor, and to its transferees, successors, and assigns the prompt payment and performance of all sums and other obligations which are due or hereafter may become due and the performance and observance by Lessee of all of the terms, conditions (including those pertaining to insurance liability), stipulations and agreements pursuant to that certain lease agreement between Lessor and Lessee dated December 29, 1987 ("Lease"), including any and all renewals, modifications, amendments or extensions, in whole or in part, made with respect thereto.

No act, course of dealing, delay, or omission on the part of Lessor in exercising or enforcing any of its rights or remedies under the Lease or under this instrument executed in connection with the Lease (including the release of any guarantor of the Lease) shall impair or be prejudicial to the rights and remedies of Lessor hereunder and the enforcement hereof. Lessor may extend, modify, or postpone the time and manner of payment and performance of the terms, conditions, stipulations and agreements of the Lease and any other document or instrument in connection therewith, all without notice to or consent by the Undersigned. Lessor may enforce the provisions hereof from time to time as often as the occasion therefore may arise and Lessor shall not be required to first initiate, pursue or exercise any of its rights or remedies against any other person or party primarily or secondarily liable under the Lease.

The Undersigned agrees
governed by the laws of the
Undersigned hereby consents
of the State of Pennsylvania


it shall be
a and the
of the courts
herein.

IN WITNESS WHEREOF, it
delivered this instrument at
JAN, 1987.

executed and
by of

Signed, sealed and delivered
in the presence of:

By:


Spouse

UNCONDITIONAL AND IRREVOCABLE
GURANTY OF PAYMENT

In consideration of the sum of Ten Dollars (\$10.00) and other good and valuable considerations, the receipt and sufficiency of which is hereby acknowledged, and for the purpose of seeking to induce LMV Leasing, Inc. ("Lessor") to enter into a leasing arrangement with

MCO, INC. DBA /AMERICAN INTERNATIONAL CAR RENTAL

("Lessee"), the Undersigned, jointly and severally if more than one, does hereby irrevocably and unconditionally guarantee to Lessor, and to its transferees, successors, and assigns the prompt payment and performance of all sums and other obligations which are due or hereafter may become due and the performance and observance by Lessee of all of the terms, conditions (including those pertaining to insurance liability), stipulations and agreements pursuant to that certain lease agreement between Lessor and Lessee dated December 29, 1986 ("Lease"), including any and all renewals, modifications, amendments or extensions, in whole or in part, made with respect thereto.

No act, course of dealing, delay, or omission on the part of Lessor in exercising or enforcing any of its rights or remedies under the Lease or under this instrument executed in connection with the Lease (including the release of any guarantor of the Lease) shall impair or be prejudicial to the rights and remedies of Lessor hereunder and the enforcement hereof. Lessor may extend, modify, or postpone the time and manner of payment and performance of the terms, conditions, stipulations and agreements of the Lease and any other document or instrument in connection therewith, all without notice to or consent by the Undersigned. Lessor may enforce the provisions hereof from time to time as often as the occasion therefore may arise and Lessor shall not be required to first initiate, pursue or exercise any of its rights or remedies against any other person or party primarily or secondarily liable under the Lease.

The Undersigned agrees that this instrument shall be governed by the laws of the State of Pennsylvania and the Undersigned hereby consents to the jurisdiction of the courts of the State of Pennsylvania and to being sued therein.

IN WITNESS WHEREOF, the Undersigned has executed and delivered this instrument under seal this 11th day of February, 1987.

Signed, sealed and delivered
in the presence of:

[Signature]

By: [Signature]
Mary Z. Okuda

Notice of Sale

To: MCO, Inc., d/b/a/ American
International Rent-A-Car
1380 North West Temple
Salt Lake City, Utah 84116

(This Notice is for informational
purposes only as to MCO, Inc.,
which is currently in a Chapter 11
Bankruptcy Proceeding)

Mr. Roy W. Mallory
2980 Apache Way
Provo, Utah 84604

Mr. and Mrs. Val Conlin
2214 Temple View Circle
Provo, Utah 84604

Mr. and Mrs. Tubber T. Okuda
1994 South 1175 East
Bountiful, Utah 84010

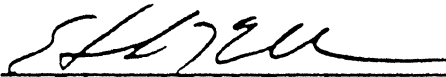
Pursuant to Section 18 of the Preferred Vehicle Lease Agreement ("Lease") entered into between LMV LEASING, INC. ("Lessor") and MCO, Inc., d/b/a American International Car Rental on December 29, 1986, NOTICE IS HEREBY GIVEN that based the Lessee's default under the Lease, the Lessor will sell, as provided herein, the vehicles listed on Schedule "A", attached hereto, with the proceeds from such sale to be applied first to the costs of preparing the vehicles for sale, costs of sale, and storage fees with any remaining proceeds to be credited toward the amount owing Lessor by Lessee based on Lessee's default under the Lease.

Said vehicles will be sold after April 13, 1988, for the highest and best price in an "AS IS" condition. Said vehicles are currently and will continue to be located, at the time of said sale, at Nate Wade Subaru, 1207 South Main Street, Salt Lake City, Utah, and will be sold in the same manner and fashion as other used vehicles located at Nate Wade Subaru.

DATED this 4th day of April, 1988.

LMV LEASING, INC.

By


Edward T. McCracken

Title

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