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Commercial Transactions; personal property leases

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Commercial Transactions

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NEV. REV. STAT. § ____. (new); §§ 104.1101, 104.1105, 104.1201, 104.9113, 104.9408 (amended).
AB 297 (Committee on Judiciary); 1989 STAT. Ch. 166
AB 841 (Committee on Judiciary); 1989 STAT. Ch. 348
(AB 1841 Effective June 15, 1989)

INTRODUCTION

Chapter 166 enacts a modified version of the Uniform Commercial Code (UCC) Article 2A, covering personal property leases. The following is a general overview of the most significant provisions of Chapter 166.

GENERAL PROVISIONS

Chapter 166 applies to any transaction which creates a lease, regardless of form. Chapter 166 defines a lease as the transfer of the right to possess and use goods in return for consideration. A

2. 1989 Nev. Stat. ch 166, sec. 5, at 340 (enacting NEV. REV. STAT. § ____.). The general provisions of the Nevada Uniform Commercial Code (Nevada Revised Statutes sections 104.1101-.1208) are applicable to Chapter 166. Id. sec. 2, at 340 (enacting NEV. REV. STAT. § ____.). Since Chapter 166 applies to lease agreements but not security interests, a threshold question is whether a transaction creates a lease or a security interest. U.C.C. § 2A-103 official comment (1987). A number of factors have been used in determining whether a contract creates a lease or a security interest. See, e.g., In re Pacific Sunwest Printing, 6 Bankr. 408, 412 (Bankr. S.D. Cal. 1980); In re Joe Necessary & Son, Inc., 475 F. Supp. 610, 614 (W.D. Va. 1979) (factors distinguishing lease and security interest). See also NEV. REV. STAT. § 104.1201 36 (definition of security interest). See generally Bayer, supra note 1, at 1495 (discussion of lease versus security interest).
3. 1989 Nev. Stat. ch. 166, sec. 6, at 340 (enacting NEV. REV. STAT. § ____.)
consumer lease is defined as a lease taken for primarily personal or household purposes. Unlike UCC 2A, Chapter 166 does not include a monetary cap in the definition of a consumer lease.

Under Chapter 166, every non-consumer finance lease contains an implied "hell or high water" clause. This clause provides that the lessee’s obligation to make lease payments is absolute and irrevocable once the goods are accepted. The hell or high water clause may be eliminated, modified, or substituted with the consent of the party to whom the promise runs.

Chapter 166 subjects personal property leases to all applicable consumer protection or certificate of title statutes. A choice of law agreement made by the parties is enforceable only if the lessee resides in the chosen jurisdiction at the time the lease becomes enforceable or if the goods will be used in that jurisdiction.

FORMATION OF THE LEASE CONTRACT

The provisions governing the formation of lease contracts are essentially the same as the existing statutory provisions governing the formation of sales contracts. A lease contract may be made in any manner which manifests the parties’ intent to be bound, even if a term is left open. Course of performance, course of dealing, and trade usage are relevant in determining the meaning of the contract terms. Generally, any manner of acceptance is valid so long as it

is reasonable. A merchant’s signed firm offer needs no consideration, and the option remains open for up to three months.

The modification of a lease contract does not need consideration. Chapter 166 provides methods for creating, limiting, and prioritizing express and implied warranties. A lease contract contains an implied warranty that the goods are not subject to a claim or interest which arose from an act of the lessor. If the lessee furnished specifications to the lessor, the lease will contain an implied hold-harmless agreement for any infringement which may occur as a result of following the specifications. All non-finance leases in which the lessor is a merchant contain an implied warranty of merchantability. The benefits of any promise or warranty made by a supplier extend to both the lessor and the lessee.

Under Chapter 166, a lessee has an insurable interest in existing goods when they are identified to the contract. The lessee has an insurable interest until the lessee utilizes an option to purchase and the risk of loss passes to the lessee. In a non-finance lease, the lessor bears the risk of loss. In a finance lease, the risk of loss passes to the lessee.
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THIRD PARTIES

A lease is enforceable between the parties, their successors through purchase, and by the parties’ creditors.26 Chapter 166 provides guidelines for the assignment and delegation of any rights and liabilities arising under the lease contract.27 The prioritization of liens and the rights of creditors are also covered by Chapter 166.28

PERFORMANCE

Under Chapter 166, all lease contracts contain an implied promise that neither party will impair or impede the other’s expectancy interest.29 A party to a lease contract may demand further assurances of performance when grounds for reasonable insecurity exist.30 Chapter 166 contains provisions setting forth the aggrieved party’s options in the event of an anticipatory repudiation.31

If the agreed manner of delivery becomes commercially impracticable without the fault of the parties, any available commercially reasonable substitute performance must be tendered and accepted.32 If the manner of payment fails because of a government regulation, any commercially reasonable equivalent may be substituted.33 Delay or nondelivery of goods may be excused if caused by an unforeseen contingency, the nonoccurrence of which was a basic assumption of the contract.34

26. Id. sec. 34, at 350 (enacting Nev. Rev. Stat. §—). 27. Id. sec. 36, at 351 (enacting Nev. Rev. Stat. §—). Assignment and delegation are allowed unless prohibited by a contract term, or if they would materially affect the exchanged performance. Id.
33. Id. sec. 47, at 357 (enacting Nev. Rev. Stat. §— 2). Regulations by foreign governments may also give rise to substitute performance. Id.
34. Id. sec. 48, at 357 (enacting Nev. Rev. Stat. §— 1).

Breach, Default, and Enforcement

Chapter 166 has its own statute of frauds provisions, as well as a parol evidence rule.\(^{35}\) The initial determination of default is determined by the terms of the lease agreement and any governing provisions of Chapter 166.\(^{36}\) Generally, the party in default is not entitled to notice of the default unless the lease agreement or a statute requires notice be given.\(^{37}\) The statute of limitations for an action on a default is four years.\(^{38}\)

Chapter 166 sets forth the remedies available to the parties upon default.\(^{39}\) Market rent will be determined by the formula provided in Chapter 166.\(^{40}\) Damages for non-acceptance or repudiation of the goods include accrued and unpaid rent, and any incidental damages.\(^{41}\) Chapter 166 provides rules concerning the lessor's right to dispose of the goods after a default by the lessee,\(^{42}\) and permits a liquidated damage clause if the amount agreed upon is reasonable in light of the anticipated harm.\(^{43}\)


\(^{37}\) Id. sec. 52, at 358 (enacting Nev. Rev. Stat. § ____).

\(^{38}\) Id. sec. 56, at 359 (enacting Nev. Rev. Stat. § ____).


\(^{40}\) Id. sec. 57, at 360 (enacting Nev. Rev. Stat. § ____).


\(^{43}\) Id. at sec. 54, at 359 (enacting Nev. Rev. Stat. § ____ 1). This provision is the same as the liquidated damages provision for the sale of goods. Compare id. with Nev. Rev. Stat. § 104.2718 (1987) (liquidated damages under a sales transaction). See, e.g., In re Noack, 44 Bankr. 172, 174-5 (Bankr. E.D. Wis. 1984) (effect of a liquidated damage clause upon classifying a contract as a lease or security interest).