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The University of the Pacific, McGeorge School of Law

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Commercial Transactions

Commercial Transactions; personal property leases

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.¹ 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.² Chapter 166 defines a lease as the transfer of the right to possess and use goods in return for consideration.³ A

1. 1989 Nev. Stat. ch. 166, sec. 1, at 340 (enacting NEV. REV. STAT. § ____). See generally Bayer, *Personal Property Leasing: Article 2A of the Uniform Commercial Code*, 43 BUS. LAW. 1491 (1988); Note, *Division 10 of the California Commercial Code: California Personal Property Lease Law Codified*, 20 PAC. L.J. 869 (1989) (comparison of UCC 2A and the codified California version).

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. § ____ 1(j)).

consumer lease is defined as a lease taken for primarily personal or household purposes.⁴ Unlike UCC 2A, Chapter 166 does not include a monetary cap in the definition of a consumer lease.⁵

Under Chapter 166, every non-consumer finance lease contains an implied "hell or high water" clause.⁶ This clause provides that the lessee's obligation to make lease payments is absolute and irrevocable once the goods are accepted.⁷ The hell or high water clause may be eliminated, modified, or substituted with the consent of the party to whom the promise runs.⁸

Chapter 166 subjects personal property leases to all applicable consumer protection or certificate of title statutes.⁹ 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.¹⁰

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.¹¹ A lease contract may be made in any manner which manifests the parties' intent to be bound, even if a term is left open.¹² Course of performance, course of dealing, and trade usage are relevant in determining the meaning of the contract terms.¹³ Generally, any manner of acceptance is valid so long as it

4. *Id.* sec. 6, at 340 (enacting NEV. REV. STAT. § ____ 1(e)).

5. U.C.C. § 2A-103(1)(e) (1987). See generally Huddelson, *Old Wine In New Bottles: UCC Article 2A—Leases*, 39 ALA. L. REV. 615, 668 (1988) (discussion of consumer lease).

6. 1989 Nev. Stat. ch. 166, sec. 50, at 358 (enacting NEV. REV. STAT. § ____). See *id.* sec. 6(g), at ____ (enacting NEV. REV. STAT. § ____.) (definition of finance lease). See Bayer, *supra* note 1, at 1501 (general discussion of "hell or high water" clause).

7. 1989 Nev. Stat. ch. 166, sec. 50, at 358 (enacting NEV. REV. STAT. § ____). See, e.g., *In re O.P.M. Leasing Servs.*, 21 Bankr. 993, 1006 (Bankr. S.D.N.Y. 1982) (court enforcement of "hell or high water" clause).

8. 1989 Nev. Stat. ch. 166, sec. 50, at 358 (enacting NEV. REV. STAT. § ____).

9. *Id.* sec. 7, at 343 (enacting NEV. REV. STAT. § ____). See generally NEV. REV. STAT. §§ 598.005-930 (1987) (consumer protection statutes).

10. 1989 Nev. Stat. ch. 166, sec. 9, at 343 (enacting NEV. REV. STAT. § ____).

11. Compare 1989 Nev. Stat. ch. 166, secs. 16-20, at 345-46 (enacting NEV. REV. STAT. § ____.) (formation of a lease contract) with NEV. REV. STAT. §§ 104.2206-2209 (1987) (formation of a contract for the sale of goods).

12. 1989 Nev. Stat. ch. 166, sec. 16, at 345 (enacting NEV. REV. STAT. § ____). There must be sufficient intent to form an agreement which establishes a reasonable basis for affording a remedy. *Id.* This provision essentially follows the relevant provision for sales contracts. Compare *id.* with NEV. REV. STAT. § 104.2204 (1987) (formation of sales contract).

13. 1989 Nev. Stat. ch. 166, sec. 19, at 346 (enacting NEV. REV. STAT. § ____). See NEV. REV. STAT. § 104.1205 (1987) (definition of course of dealing and trade usage). These provisions are identical to the relevant provisions covering sales contracts. Compare *id.* with NEV. REV. STAT. § 104.2208 (1987) (sales contracts).

is reasonable.¹⁴ A merchant's signed firm offer needs no consideration, and the option remains open for up to three months.¹⁵

The modification of a lease contract does not need consideration.¹⁶ Chapter 166 provides methods for creating, limiting, and prioritizing express and implied warranties.¹⁷ 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.¹⁸ 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.¹⁹ All non-finance leases in which the lessor is a merchant contain an implied warranty of merchantability.²⁰ The benefits of any promise or warranty made by a supplier extend to both the lessor and the lessee.²¹

Under Chapter 166, a lessee has an insurable interest in existing goods when they are identified to the contract.²² The lessor has an insurable interest until the lessee utilizes an option to purchase and the risk of loss passes to the lessee.²³ In a non-finance lease, the lessor bears the risk of loss.²⁴ In a finance lease, the risk of loss passes to the lessee.²⁵

14. 1989 Nev. Stat. ch. 166, sec. 18, at 346 (enacting NEV. REV. STAT. § ____).

15. *Id.* sec. 17, at 346 (enacting NEV. REV. STAT. § ____).

16. *Id.* sec. 20, at 346 (enacting NEV. REV. STAT. § ____). This provision is identical to the relevant provision covering sales contracts *Compare id. with* NEV. REV. STAT. § 104.2209 (1987) (modification of sales contract).

17. 1989 Nev. Stat. ch. 166, secs. 22-28, at 347-49 (enacting NEV. REV. STAT. § ____). A warranty extends to any natural person who is a member of the household or family of the lessee, or their guests. *Id.* sec. 28, at 349 (enacting NEV. REV. STAT. § ____). Any modification, exclusion, or limitation of a warranty effective against the lessee is also effective against any beneficiary of the warranty. *Id.*

18. *Id.* sec. 23, at 347 (enacting NEV. REV. STAT. § ____ 1). This implied warranty does not extend to infringement claims. *Id.* All non-finance leases in which the lessor is a merchant contain an implied warranty that no other person has an infringement claim to the goods. *Id.* sec. 23, at 347 (enacting NEV. REV. STAT. § ____ 2).

19. *Id.* sec. 23, at 347 (enacting NEV. REV. STAT. § ____ 3).

20. *Id.* sec. 24, at 347 (enacting NEV. REV. STAT. § ____ 1). *See id.* sec. 24, at 347 (enacting NEV. REV. STAT. § ____ 2) (criteria for determining when goods are merchantable). All non-finance leases in which the lessor is a merchant contain an implied warranty that the goods are fit for a particular purpose if the lessor knew the lessee relied on the lessor's skill and judgment in selecting the goods. *Id.* sec. 25, at 348 (enacting NEV. REV. STAT. § ____).

21. *Id.* sec. 21, at 346 (enacting NEV. REV. STAT. § ____). *See generally* Rohwer, *Equipment Leases - Warranty Rights and Remedies of Lessees*, 21 PAC. L.J. (1989) (analysis of warranties and remedies available to the equipment lessee under UCC 2A).

22. *Id.* sec. 30, at 349 (enacting NEV. REV. STAT. § ____ 1). The insurable interest arises even if the goods are nonconforming. *Id.*

23. *Id.* sec. 30, at 349 (enacting NEV. REV. STAT. § ____ 3).

24. *Id.* sec. 31, at 349 (enacting NEV. REV. STAT. § ____ 1).

25. *Id.*

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.*

28. *Id.* secs. 39-41, at 352-53 (enacting NEV. REV. STAT. § _____). See also U.C.C. § 2A-307 official comment (1987) (general rule of prioritization is that a creditor of the lessee will take subject to the lease contract). See generally Boss, *Uniform Commercial Code: Article 2A—Leases: Structuring Priorities of Competing Claimants to Leased Property*, 73 MINN. L. REV. 208 (1988) (general discussion of prioritizing competing interests).

29. 1989 Nev. Stat. ch. 166, sec. 44, at 356 (enacting NEV. REV. STAT. § _____ 1).

30. *Id.* sec. 44, at 356 (enacting NEV. REV. STAT. § _____ 2). Whether or not insecurity in a lease between merchants is reasonable will be determined by commercial standards. *Id.* sec. 44, at 356 (enacting NEV. REV. STAT. § _____ 4).

31. *Id.* secs. 45, at 356 (enacting NEV. REV. STAT. § _____) (anticipatory repudiation), 46, at 356 (procedure and effect of retracting repudiation). When a party to an executory contract repudiates before the time for performance, the other party may treat the contract as terminated and sue for damages. *Finnell v. Bromberg*, 79 Nev. 211, 225, 381 P.2d 221, 228 (1963) (citing 17 C.J.S. *Contracts* § 472, at 973).

32. 1989 Nev. Stat. ch. 166, sec. 47, at 357 (enacting NEV. REV. STAT. § _____ 1).

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

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35. *Id.* sec. 13, at 344 (enacting NEV. REV. STAT. § _____.) (statute of frauds). These provisions are identical to the statute of frauds provisions for the sale of goods. *Compare id.* with NEV. REV. STAT. § 104.2201 (1987) (statute of frauds provision for sales contracts). 1989 Nev. Stat. ch. 166, sec. 14, at 345 (enacting NEV. REV. STAT. § 166.) (parol evidence rule). *Compare id.* with NEV. REV. STAT. § 104.2202 (1987) (parol evidence rule for sales contracts).

36. 1989 Nev. Stat. ch. 166, sec. 51, at 358 (enacting NEV. REV. STAT. § _____ 1).

37. *Id.* sec. 52, at 358 (enacting NEV. REV. STAT. § _____.).

38. *Id.* sec. 56, at 359 (enacting NEV. REV. STAT. § _____ 1).

39. *Id.* secs. 58-72, at 360-65 (enacting NEV. REV. STAT. § _____.). *Compare id.* with NEV. REV. STAT. §§ 104.2702-.2709 (1987) (seller's remedies under a sales transaction). 1989 Nev. Stat. ch. 166, secs. 73-81, at 365-69 (enacting NEV. REV. STAT. § _____.). *Compare id.* with NEV. REV. STAT. §§ 104.2711-.2717 (1987) (buyer's remedies under a sales transaction). *See generally* Rohwer, *supra* note 21, at ____.

40. *Id.* sec. 57, at 360 (enacting NEV. REV. STAT. § _____.).

41. *Id.* sec. 78, at 367 (enacting NEV. REV. STAT. § _____.) . *See generally* Peters, *Remedies for Breach of Contracts Relating to the Sale of Goods Under the Uniform Commercial Code: A Roadmap for Article Two*, 73 YALE L.J. 199, 278 (1963) (general discussion of remedies for goods transactions).

42. 1989 Nev. Stat. ch. 166, sec. 77, at 367 (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).