

UPDATE ON NEW YORK'S NOTICE REQUIREMENT FOR AUTOMATIC LEASE RENEWALS

As we previously addressed in our May 2002 Alert, many leases of personal property and contracts for service, maintenance or repairs contain an automatic renewal provision that provides, in effect, that the lease or contract will automatically renew for a specified term unless the lessee or party receiving the service, maintenance or repairs sends notice prior to the expiration of the lease or contract of their intention not to renew. **Such provisions are unenforceable under New York law** unless the lessor or service provider sends by certified mail or serves personally, written notice to the lessee or the party receiving the service, maintenance or repairs, calling that party's attention to the existence of such a provision. The notice must be received **at least 15, but not more than 30 days** prior to the time the lessee or party receiving the service, maintenance or repairs is required to give notice of their intention not to renew. The New York law was amended in 1999, but has been on the books in one form or another since 1953.

Many of our clients have inquired as to whether a lessor or service provider can avoid the impact of New York's notice statute by use of a choice of law provision in their contract documents. Although no reported decisions had addressed the issue, it was our belief that since the statute was regulatory in nature, designed to provide protection to New York businesses, that New York courts would likely exclude the automatic renewal provision from the contractual choice of law clause, thereby making New York's notice statute applicable to all leases and service contracts with New York residents.

Recently, a trial level court in New York in the case of Andin International v. Matrix Funding issued a decision which did just that. Notwithstanding a Utah choice of law clause in an equipment lease agreement, the Court stated that the New York notice statute is applicable "[i]n view of the public policy purpose behind the section." Although decisions of the trial level courts are not binding authority on other courts within the State, we believe that the Judge's analysis is indicative of how other New York courts are likely to rule if faced with the same issue. Even in a commercial setting, the Court was concerned with the legislative intent of "protecting" New York businesses when it quoted from the Legislative History of the original 1953 enactment of the predecessor to the current New York notice law. We repeat the language here because *you cannot make these things up*:

This bill seeks to protect all businessmen from fast talking sales organizations armed with booby traps which they plant in business contracts involving equipment rentals***Undoubtedly, many unsuspecting small businessmen are taken in by such evil practices which - taken collectively - are costing those who cannot afford it many thousands of dollars yearly.

Although the New York legislative's characterization of leasing practices in the 1950's may seem overly harsh today, the court was clear on its resolution of the issue. The use of a choice of law provision to circumvent the statute's reach will not be enforced and compliance with the statute was necessary notwithstanding a Utah choice of law.

CONCLUSION

Although compliance with statutory notice of renewal provisions adds another layer of administrative burden to equipment lessors and service providers, the lost revenue and increased collection costs associated with non-compliance may be substantial. As always, attention to detail in contract administration and statutory compliance can prove to be an effective cost cutting measure, well worth the initial investment in putting a compliance plan in place.

Moritt Hock Hamroff & Horowitz LLP is a broad based corporate law firm with 30 lawyers and a staff of paralegals. The firm has extensive experience in litigation; creditors' rights and bankruptcy; real estate law; tax & trusts and estates; direct marketing, advertising & new media; intellectual property & unfair competition; general corporate, securities, financial services, secured lending & leasing.

This Alert was written by Robert M. Tils and Marc L. Hamroff, partners with the firm. Mr. Tils' practice concentrates in commercial litigation, creditors' rights and equipment leasing. Mr. Hamroff heads up the firm's financial services group which includes, among others, its creditors' rights and equipment leasing practice areas.

Any questions concerning the matters raised in this Alert should be addressed to Robert M. Tils or Marc L. Hamroff. They can be reached at (516) 873-2000 or by e-mail at rtils@mhhlaw.com and mhamroff@mhhlaw.com.