NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. CC-05-1258-MaMoPa
SAMEY A. JAWAD, Debtor.	Bk. No. LA 04-33249-BR
MICHAEL R. WHITE & ASSOCIATES, Appellant,	
v.	**M E M O R A N D U M**[1]
SAMEY A. JAWAD, Appellee.	

Argued and Submitted on November 18, 2005
at Los Angeles, California

Filed - May 9, 2006

Appeal from the United States Bankruptcy Court
for the Central District of California

Honorable Barry Russell, Chief Bankruptcy Judge, Presiding.

Before: MARLAR, MONTALI and PAPPAS, Bankruptcy Judges.

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[1]This disposition is not appropriate for publication and may not be cited except when relevant under the doctrines of law of the case, issue preclusion or claim preclusion. See 9th Cir. BAP Rule 8013-1.

A lender entered into a finance lease with the debtor, which required the lender to make two payments to the equipment seller ($17,000.00 upon execution of the lease and $19,805.00 upon completion and delivery of the purchased equipment). As collateral for the transaction, the debtor pledged certain real property. The equipment was never delivered to the debtor, and the transaction was cancelled. The lender never paid the second installment of $19,805.00. Although it has now been repaid $23,744.65 by the debtor on its advance of $17,000, the lender sought to foreclose on the debtor's real property, contending that the debtor still owed the remainder of the lease payment obligations.

To avoid foreclosure, the debtor filed for chapter 13[2] relief and later objected to the lender's claim, and also sought avoidance of the lender's lien. Holding that there was a failure of consideration under the lease, that the lender had been fully compensated for its partial performance, and that the lender's conduct constituted bad faith, the bankruptcy court disallowed the claim and avoided the lien. We AFFIRM.

I.
FACTS

In July 2000, Samey Jawad ("Debtor") (doing business as International Auto) agreed to acquire an air-conditioned modular office building (the "Equipment") from Francine Escobar, Abigail Escobar, Rudy Escobar and Thermal Dynamics (the "Vendors"). To

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[2]Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330 and the Federal Rules of Bankruptcy Procedure, Rules 1001-9036.

finance this acquisition, Debtor entered into a transaction with appellant Michael R. White and Associates ("Lender") whereby Lender would purchase the Equipment and in turn lease it to Debtor.

On July 31, 2000, Debtor and Lender executed a business equipment lease (the "Lease") and a pre-delivery addendum to the Lease (the "Addendum"). The Lease and Addendum required Lender to advance $36,805.00 to purchase the Equipment from Vendors. In exchange, Debtor would pay $1,315.78 monthly to Lender for sixty months (for a total payment of $78,946.80).[3] To secure payment of the Lease, Debtor executed a deed of trust in favor of Lender on certain real property located in Whittier, California (the "Property").

Pursuant to the Addendum, Lender disbursed $17,000 to Vendors upon execution of the Lease. Lender was to disburse the remaining $19,805.00 upon completion and delivery of the Equipment. It did not do so. This is because, as Lender acknowledges, the Equipment was never delivered or installed.

The Lease, a pre-printed form provided by Lender, states that the risk of loss was assumed by Debtor "[u]pon delivery of the Equipment to Lessee [Debtor]." Lease at ¶ 15. Thus, prior to delivery, the risk of loss was borne by Lender. Delivery never occurred.

The Addendum contained language contradictory to the Lease. It provided that Debtor was deemed to have accepted the Equipment upon execution of the Lease and not upon completion or delivery of

[3]In addition to these monthly payments, the Lease provides that Debtor would make an advance payment of $3,026.56. The record is unclear whether Debtor made this advance payment.

the Equipment. The Addendum states in Paragraph 3 that the Lease "shall become effective upon execution and lease payments shall commence . . . notwithstanding that the [E]quipment may not have been completed, delivered, installed or tested by that date" and the Equipment is accepted "AS IS" and "WHERE IS" upon the start date [i.e., the effective or execution date] even without delivery or inspection. The Addendum also contains a waiver of warranties provision in Paragraph 4, which provides that Lessor is not responsible "for construction or completion of the Equipment" or for any breaches by Vendor in providing the Equipment.

When Vendors failed to deliver the Equipment, Debtor notified Lender promptly and Lender did not fund the remaining $19,805.00. Debtor was able to obtain $5,200 from the Vendors, which he then remitted to Lender in two checks (totaling $5,263.14) in November and December 2000. This amount was applied against Lender's first and only advance of $17,000.00.

Nevertheless, in September 2001, deeming Debtor to be in default, Lender prepared a Notice of Default and Election to Sell under Deed of Trust. Lender maintained that Debtor was in default in the amount of $11,610.58 as of September 7, 2001. Debtor then filed his initial Chapter 13 petition in 2002 and scheduled Lender as holding a disputed, secured claim in the amount of $36,505.00. Lender filed a proof of claim for $32,845.52.

Debtor obtained confirmation of a plan proposing to make monthly payments to Lender in the amount of $1,099.89 on a disputed principal amount of $32,843.52 with a 7% interest rate. Debtor explicitly reserved the "right to litigate the legitimacy" of the claim. Lender admits that it received $18,481.51 from

Debtor through the Chapter 13 plan. Therefore, Lender has received at least $23,744.65 from Debtor.[4]

Debtor's initial Chapter 13 case was dismissed because of his failure to complete plan payments. On October 7, 2004, Lender again noticed a Trustee's Sale, indicating that the amount due from Debtor was $27,011.24. In response, Debtor filed his second Chapter 13 case on November 3, 2004.

On December 20, 2004, Lender filed a proof of claim indicating that Debtor owed it $25,222.30 as of the petition date. According to the "Lease Payment Record" appended to the proof of claim, the original loan amount was $35,014.96. Even though the Lease does not provide an interest rate, Lender added a 7% interest rate to the outstanding balance, explaining that it used such rate because that was what was proposed in Debtor's initial Chapter 13 plan. Lender argues that the amount due in its proof of claim reflected a credit for the $19,805.00 which it did not advance (plus charges and interest associated with that amount), but then added approximately $15,000.00 in attorneys' fees to its claim. If Lender's proof of claim were allowed, Lender would receive $48,966.95 for its advance of $17,000.00.

Debtor objected to Lender's proof of claim and requested that the bankruptcy court avoid the lien securing the debt.[5] Debtor

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[4]If Debtor made the initial $3,026.56 advance payment required by the Lease, Lender has actually received $26,771.21.

[5]Debtor did not file an adversary proceeding pursuant to Rule 7001 when it requested avoidance of the lien. Lender objected on this basis. The bankruptcy court raised this issue at the hearing on the claims objection, and Lender's counsel consented to having the claims objection and the lien avoidance claim heard at that time, notwithstanding the absence of an adversary proceeding. Inasmuch as Lender has not raised this procedural issue on appeal,
(continued...)

argued that (1) Lender had assumed contrary positions as to the amount owed, (2) that enforcement of the lease and allowance of the claim would be unconscionable, and (3) that there was a failure of consideration by Lender. In response, Lender argued that the risk of loss for non-delivery of the Equipment was on Debtor and that the court should enforce all of the terms of the Lease.

At the claim objection hearing, the court ruled that Lender's attempted enforcement of the balance of payments due under the Lease was "unconscionable." It reasoned: "I've read all documents very carefully and I think under these circumstances that it would be unconscionable on [sic] the bankruptcy context to allow that claim to survive anymore. I think it's been paid considerably more than ever it was owed at a reasonable rate of interest."

The bankruptcy court thereafter signed an order disallowing the claim and avoiding Lender's lien. The order recites that Debtor "never received adequate consideration under the [Lease]," that Debtor "has paid much more to [Lender] than he was ever obligated to pay," and Lender's claim "was filed in bad faith and is without merit." This appeal followed.

II.
ISSUE

Did the bankruptcy court err in disallowing Lender's claim and avoiding its lien?

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[5](...continued)
it is waived. Golden v. Chicago Title Ins. Co. (In re Choo), 273 B.R. 608, 613 (9th Cir. BAP 2002) (arguments not specifically and distinctly made in an appellant's opening brief are waived).

III.
STANDARD OF REVIEW

This case involves an application of law to undisputed facts. To the extent that questions of fact cannot be separated from questions of law, we review these questions as mixed questions of law and fact, applying a de novo standard. Ratanase v. California Dep't of Health Servs., 11 F.3d 1467, 1469 (9th Cir. 1993); In re Jodoin, 209 B.R. 132, 135 (9th Cir. BAP 1997). A mixed question of law and fact occurs when the historical facts are established, the rule of law is undisputed, and the issue is whether the facts satisfy the legal rule. Pullman-Standard v. Swint, 456 U.S. 273, 289 n.19 (1982); In re Bammer, 131 F.3d 788, 792 (9th Cir. 1997).

Whether a contract is unconscionable is a question of law which is reviewed de novo. Ting v. AT&T, 319 F.3d 1126, 1135 (9th Cir. 2003), cert. denied, 124 S.Ct. 53 (2003). Interpretation of a contract is reviewed de novo. Flores v. American Seafoods Co., 335 F.3d 904, 910 (9th Cir. 2003).

The BAP can affirm on any basis supported by the record. In re Woolsey, 117 B.R. 524, 530 (9th Cir. BAP 1990); In re Davis, 177 B.R. 907, 912 (9th Cir. BAP 1995).

IV.
DISCUSSION

Pursuant to section 502(b)(1), a bankruptcy court may disallow a claim to the extent it is "unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured . . . ." 11 U.S.C. § 502(b)(1). To the extent a lien secures a claim that has been disallowed pursuant to

section 502(b)(1), that lien is void. 11 U.S.C. § 506(d)(1).

In deciding whether the court erred in disallowing Lender's claim and voiding its lien, we apply state law. Cossu v. Jefferson Pilot Securities Corp. (In re Cossu), 410 F.3d 591, 595 (9th Cir. 2005) ("The validity of a creditor's claim is determined by the rules of state law . . . ."); see also In re Jones, 72 B.R. 25, 26 (Bankr. C.D. Cal. 1987) ("State substantive law is applied to determine the existence and validity of a claim, unless the Bankruptcy Code provides otherwise.").

A. The Risk of Loss Was Improperly Shifted to Debtor

The Lease is a finance lease under the Uniform Commercial Code, because the lessor (here, Lender) is strictly acting as a financing entity (as opposed to the vendor or supplier of goods). Therefore, the lessee (here, Debtor) generally must look to a third party (the vendor) if the goods are defective or otherwise unsuitable for intended use. The lessee (as opposed to the lessor) bears the risk of loss once the goods are tendered for delivery. 2 White & Summers, Uniform Commercial Code § 13-3(4th ed) (updated by 2005 Pocket Part).

The Uniform Commercial Code ("UCC") accords very few protections to a lessee under a finance lease. Perhaps recognizing the harms inherent in a commercial setting that permits a party to have all of the protections of a lessor (ownership of leased property as opposed to a security interest) without any attendant burdens (such as honoring warranties and ensuring performance of the leased goods), the UCC provides that finance lease lessors retain the risk of loss until delivery.

Unlike in ordinary leases where the lessor retains the risk of loss throughout the lease term, risk of loss switches to the finance lease lessee upon acceptance of the leased goods.[6] Under the UCC, acceptance occurs only after the lessee has had a reasonable opportunity to inspect the goods.[7]

The Lease, at Paragraph 15, conformed to the UCC in that the risk of loss was on the Lender prior to delivery. If the Lease controls, the risk of loss did not pass to Debtor because the Equipment was never delivered. Thus, while Debtor was obligated to compensate Lender for amounts advanced to the Vendors, Debtor was not responsible to pay the balance due under the finance lease. This is consistent with section 10219(a) and (b)(3) of the California Commercial Code.

The Addendum, however, contains terms that appear to be inconsistent with the Lease, although no provision of the Addendum directly contradicts or voids the risk of loss provision stated in Paragraph 15 of the Lease. The Addendum provides that Debtor was

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[6]Under California law governing finance leases, the lender/lessor retains risk of loss until delivery. See Cal. Comm. Code § 10219(a) and (b)(3) (the risk of loss in finance lease passes to the lessee "on tender of delivery" while risk of loss in regular leases never passes to the lessee). All parties agree that delivery did not occur here.

[7]California law contains a "hell or high water" provision which greatly protects the interests of lenders/lessors in finance leases. Section 10407 of the California Commercial Code states that "[i]n the case of a finance lease that is not a consumer lease, the lessee's promises under the lease contract become irrevocable and independent upon the lessee's acceptance of the goods." Cal. Comm. Code § 10407(1) (emphasis added). California Commercial Code section 10515 provides that acceptance occurs when the lessee "has had a reasonable opportunity to inspect the goods and the lessee signifies or acts with respect to the goods in a manner that signifies to the lessor or supplier that the goods are conforming or that the lessee will take or retain them in spite of their nonconformity. . . ." Cal. Comm. Code § 10515(1)(a).

deemed to have accepted the Equipment upon execution of the Lease and not upon completion or delivery of the Equipment. This is contrary not only to section 10515(a) of the California Commercial Code) but also to Paragraph 15 of the Lease itself. The Addendum states in Paragraph 3 that the Lease "shall become effective upon execution and lease payments shall commence . . . notwithstanding that the [E]quipment may not have been completed, delivered, installed or tested by that date" and the Equipment is deemed to have been accepted "AS IS" and "WHERE IS" upon the start date [i.e., the effective or execution date] even without delivery or inspection. The Addendum also contains a waiver of warranties provision in Paragraph 4, which provides that Lessor is not responsible "for construction or completion of the Equipment" or for any breaches by Vendor in providing the Equipment. Notably, however, the Addendum does not specifically state that the risk of loss passed to Debtor even before acceptance of the Equipment.

The Addendum's "deemed acceptance" clause effectively negates the Lease's risk of loss provision (as well as the risk of loss as allocated by the UCC and California law). While parties are able to contract around some statutory provisions, they may not do so unreasonably.

> The effect of provisions of this code may be varied by agreement, except as otherwise provided in this code and except that the obligations of good faith, diligence, reasonableness and care prescribed by this code may not be disclaimed by agreement but the parties may by agreement determine the standards by which performance of such obligations is to be measured if such standards are not manifestly unreasonable.

Cal. Comm. Code § 1102(3). Shifting risks in a one-sided manner is unreasonable. See A&M Produce Co. v. FMC Corp., 135 Cal. App.

3d 473, 487, 186 Cal. Rptr. 114, 122 (1982) (disclaimer of warranties in contract was an unconscionable and unenforceable shifting of risks under the Uniform Commercial Code; "a contractual term is substantively suspect if it reallocates the risks of the bargain in a objectively unreasonable or unexpected manner").

In the Addendum, the Lender negated the few protections accorded to Debtor by law and the Lease itself, thereby rendering the inconsistent and one-sided "deemed acceptance" clause unenforceable under case law interpreting the UCC. Other finance lessors who have attempted to improve their position in a manner inconsistent with the acceptance provisions of the UCC have not been successful. Most of the courts facing clauses providing that acceptance occurs upon signature without a reasonable opportunity to inspect have refused to enforce them. See, e.g., JAZ, Inc. v. Foley, 104 Hawai'i 148, 85 P.3d 1099, 1104 (2004) (applying provisions identical to California Commercial Code sections 10407 and 10515, the court held that a written acceptance clause was ineffective because there must be a tender or delivery of goods for the risk of loss to pass to the lessee in the case of a finance lease).

Lender cites one case with a contrary holding: Stewart v. United States Leasing Corp., 702 S.W.2d 288 (Tex. App. 1985). As the Foley court notes, Stewart is unpersuasive and is inconsistent with the majority line of cases:

> Other cases dealing with signing an acceptance certificate before delivery are contrary to Stewart. In Colonial Pacific Leasing Corp. v. J.W.C.J.R. Corp., 977 P.2d 541 (Utah Ct. App. 1999), the Utah Court of Appeals

> stated that taking possession of the goods, signing a form acceptance before receipt of goods, and making a lease payment are not determinative of acceptance. Id. at 545. In Moses v. Newman, 658 S.W.2d 119 (Tenn. Ct. App. 1983), the Tennessee Court of Appeals held acceptance had not occurred despite purchaser's possession of the goods because affording a purchaser a reasonable opportunity to inspect does not imply possession. Id. at 121-22. In Tri-Continental Leasing Corp. v. Law Office of Richard W. Burns, 710 S.W.2d 604 (Tex. Ct. App. 1985), the Texas Court of Appeals held that there was no acceptance because the buyer must have a reasonable opportunity to inspect the goods. Id. at 608. In Information Leasing Corp. v. GDR Investments, Inc., 152 Ohio App.3d 260, 787 N.E.2d 652 (2003), the Ohio Court of Appeals held that merely signing an acceptance certificate is not acceptance because the requirement of a reasonable time for inspection cannot be circumvented. Id. at 655-56. Under these cases, signing an acceptance certificate before delivery does not mean a lessee has accepted the goods. The lessee must have a reasonable time for inspection, which requires that lessee have actual possession of the goods.

Foley, 85 P.3d at 1104 (emphasis added). We also decline to hold that mere execution of an "acceptance" deprives the lessee of the right to reject the goods even before their receipt.

Under this case law, the bankruptcy court's decision not to allow Lender's claim was correct. The Addendum's efforts to impose a "deemed acceptance" (and thus a "deemed" disavowal of the express risk of loss provision of the Lease and of California law) upon Debtor is unenforceable. Therefore, the risk of loss provision (Paragraph 15) of the Lease and sections 10219, 10407 and 10515 of the California Commercial Code control and the risk of loss never passed to Debtor since the Equipment was never delivered or accepted. Debtor therefore was not required to pay for goods that he never received, and for which Lender also never paid.

B. The Addendum Terms Were Substantively Unconscionable

Notwithstanding the protections accorded to it as a finance lease lender/lessor, Lender here attempted to allocate disproportionately the risk of loss to Debtor, and enforce it to his detriment. Section 1670.5 of the California Civil Code allows a court to refuse to enforce a contract if any clause is unconscionable. Moreover, "[e]very contract or duty within this code imposes an obligation of good faith in its performance or enforcement." Cal. Comm. Code § 1203. "In California, a contract or clause is unenforceable if it is both procedurally and substantively unconscionable." Ting, 319 F.3d at 1148. A "principle of equity applicable to all contracts generally . . . is that a contract or provision, even if consistent with the reasonable expectations of the parties, will be denied enforcement if, considered in its context, it is unduly oppressive or unconscionable." Perdue v. Crocker Nat'l Bank, 38 Cal.3d 913, 925, 216 Cal.Rptr. 345, 702 P.2d 503 (1985).

To determine if a contract is unconscionable, California courts apply a sliding scale: "'the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa.'" Ting, 319 F.3d at 1148. quoting Armendaiz v. Found. Health Psychcare Servs., Inc., 24 Cal. 4th 83, 99 Cal. Rptr. 2d 745, 6 P.3d 669, 690 (2000).

"A contract is procedurally unconscionable if it is a contract of adhesion, i.e., a standardized contract, drafted by the party of superior bargaining strength, that relegates to the subscribing party only the opportunity to adhere to the contract

or reject it." Ting, 319 at 1148. Substantive unconscionability "focuses on the one-sidedness of the contract terms." Id. at 1149.

Here, the terms of the Addendum are unduly one-sided, and stripped the finance lessee of the few basic protections provided by law. They are also inconsistent with the Lease itself and the UCC. Because the Addendum terms are substantively unconscionable, the sliding scale does not require evidence of procedural unconscionability. Id. Nonetheless, the record does contain at least some evidence of procedural unconscionability in that the Lease and Addendum were pre-printed contracts supplied by Lender; moreover, the record contains no evidence that Debtor was in a position to negotiate the terms, including the "deemed acceptance" clause. Therefore, the bankruptcy court did not err in concluding that allowance of the claim would be unconscionable, and was correct in disallowing it.

C. The Requested Damages Were Unreasonable Under California Law

Section 1103 of the California Commercial Code states that the principles of law and equity shall supplement the provisions of the UCC. Section 3359 of the California Civil Code prohibits a court from awarding unreasonable or oppressive damages, even if a contract calls for such damages. California Civil Code section 3359 provides: "Damages must, in all cases, be reasonable, and where an obligation of any kind appears to create a right to unconscionable and grossly oppressive damages, contrary to substantial justice, no more than reasonable damages can be recovered."

Here, Lender advanced a total of $17,000 and was repaid at least $23,744.65 by Debtor. Yet, Lender filed a proof of claim for $25,222.30 which, according to Lender, included approximately $15,000 in attorneys' fees. The bankruptcy court correctly held that Lender's recovery of further lease damages under these facts was unconscionable. As a result, the bankruptcy court also did not err in denying Lender's claim for recovery of attorneys' fees for pursuing its claim. 11 U.S.C. § 506(b) (secured creditor only entitled to reasonable attorneys' fees).

V.
CONCLUSION

For the foregoing reasons, we AFFIRM.[8]

MONTALI, Bankruptcy Judge, dissenting:

I believe the majority is refusing to honor the sanctity of contract and is rewriting the Lease to relieve Debtor of a bad bargain. That is not the proper role for a trial or appellate court. The majority treats the Lease as sacred and the Addendum as an inconsistent undermining of the Lease. The Lease and Addendum were executed at the same time and must be considered together as the agreement of the parties. The documents were executed when Debtor needed the Equipment and Lender was willing

[8]Because we conclude that the bankruptcy court did not err in finding that Lender's recovery of the full amount of its claim would be unconscionable, we express no opinion concerning the bankruptcy court's decision to disallow Lender's claim because it was "filed in bad faith."

to advance the costs, with an appropriate shifting of the risks. The majority should not reverse that negotiated balance of rights and obligations.

The Lease is a finance lease under Article 2A of the Uniform Commercial Code (adopted at Cal. Comm. Code § 10101 et seq). A finance lease involves three parties: the lessor (Lender), the lessee (Debtor) and the supplier (Vendors). See Cal. Comm. Code § 10103. The lessor retains title to the leased property and provides the financing. Because the lessor is not the supplier, it is not responsible for the fitness or merchantability of the property. See Cal. Comm. Code § 10209. The lessee's obligation to pay rent under a finance lease is "irrevocable and independent upon the lessee's acceptance of the goods." Cal. Comm. Code § 10515(1)(a). This is known as the "hell or high water" clause of the Uniform Commercial Code:

> The lessee under the statute must pay the finance lessor – come hell or high water. After all, the parties have actually entered into a financing transaction in which the lessor is really lending money and dealing largely in paper rather than goods. Put another way, the lessor as lender has no interest in how the lessee as debtor chooses to spend the money for goods. If the lessee should order [property] which is unsuitable or defective, this is not the lessor's problem. The lessor's responsibility is merely to provide the money, not to instruct the lessee like a wayward child concerning a suitable purchase. . . . This deprives the finance lessee of the argument that any defects in the goods as supplied by the supplier or manufacturer are somehow attributable to the lessor and in some way grant the lessee a right of setoff or of cancellation as against the finance lessor.

James J. White and Robert S. Summers, Uniform Commercial Code § 13-3 (4th ed.) (updated by 2005 Pocket Part).

Here, Debtor signed an Addendum agreeing that acceptance occurred upon execution and prior to delivery. Therefore, the

"hell or high water" provisions of the Lease and the Uniform Commercial Code came into play and Debtor is responsible for payments due under the Lease, even absent delivery. The majority seeks to relieve Debtor of his agreement by holding that the "deemed acceptance" clause of the Addendum is unconscionable or somehow otherwise unenforceable. This is not supported by the record.

First, there is insufficient evidence to support a finding that the Lease or its "deemed acceptance" clause is unconscionable. As the majority notes, "a contract or clause is unenforceable if it is both procedurally and substantively unconscionable." Ting v. AT&T, 319 F.3d 1126, 1148 (9th Cir. 2003). "A contract is procedurally unconscionable if it is a contract of adhesion, i.e., a standardized contract, drafted by the party of superior bargaining strength, that relegates to the subscribing party only the opportunity to adhere to the contract or reject it." Ting, 319 at 1148. I have searched in vain for evidence in the record of a lack of good faith by Lender, of any "unduly one-sided" stripping of Debtor's protection, of a contract of adhesion, or of Lender's superior bargaining strength. At a minimum, we should reverse and remand for further development of this issue.

I look at this from a practical point of view: Debtor, who selected the Vendors, wants the Equipment and does not have the money. Lender, who is providing the money for Debtor to get the Equipment, is asked to provide the funds prior to delivery. Why would it not shift the risk? If Lender has to commit $17,000 for Debtor's benefit, Debtor should bear the risk. The economics of

the deal are exactly like a third party purchase money finance, except it was styled as a lease here.

Unlike the majority, I would adopt the reasoning of the court in Stewart v. United States Leasing Corp., 702 S.W.2d 288, 290 (Tex. App. 1985), that parties who sign a "deemed acceptance" clause are bound by such clauses. Stewart, 702 S.W.2d at 290. The Stewart court noted that the lessee's execution of the acceptance certificate prior to actual delivery was part of the consideration for the lessor's agreement to provide financing. The same is true here; the parties agreed on the terms for the financing and Debtor must live by those terms.

I understand that the terms may seem unfair. The bankruptcy court even queried:

> Why would any sane person enter into an agreement as you say it is? You sign it. It doesn't matter if you get the stuff and even if you don't get it you'll pay for it for years rent [sic]. Why would anybody ever enter into that kind of agreement?

The answer is (1) this is a financing lease under the Uniform Commercial Code that statutorily grants lessors multiple protections and (2) Debtor did agree to accept the goods prior to delivery. Otherwise the Vendors would not have to deliver them. While it may seem unfair, it is the contract. This court should not rewrite it.

The majority also emphasizes that the "deemed acceptance" clause in the Addendum is contrary to the Lease itself. I believe that this demonstrates why it should be enforced. Hand-written or typed terms that differ from a pre-printed form govern. See Cal. Civ. Code § 1651; Fid. & Deposit Co. v. Charter Oak Fire Ins. Co., 66 Cal. App. 4th 1080, 1087, 78 Cal. Rptr. 2d 429, 433 (1998)

("Where a contract is partly written or printed under the special direction of the parties, and the remainder is copied from a form prepared without reference to the particular contract in question, the parts which are original control those which are not.").

I have reviewed the transcript of the hearing and believe that the bankruptcy court started with an incorrect assumption, viz. that Debtor received nothing and, having paid Lender more than $23,000, that enough was enough. I believe the court failed to appreciate that the commercial realities are such that the parties were free to shift the risk of the vendor's breach, and Lender in fact parted with $17,000 which it was entitled to recover, either as a finance lessor or as an oversecured creditor, inasmuch as Lender held a lien on Debtor's residence. It is not "unconscionable" to do what the law permits.

In addition to disagreeing with the majority's conclusion that Lender improperly shifted the risk of loss, I also disagree that the record shows that Lender's claim was unreasonable. If Lender was an oversecured creditor (as the record appears to suggest) and its attorneys' fees were provided for in the Lease (which was the case), it is entitled to its reasonable attorneys' fees and costs. Hassen Imp. P'ship v. KWP Financial VI (In re Hassen Imp. P'ship), 256 B.R. 916, 925 (9th Cir. BAP 2000). 11 U.S.C. § 506(c). While there was some confusion in the way Lender presented its claim in Debtor's prior Chapter 13 case, the evidence does include an accounting which was unchallenged and which properly credits Debtor with amounts not advanced by Lender. The accounting also includes attorneys' fees, and the court never considered the reasonableness of those fees. Therefore, we should

reverse and enforce the terms of the Lease and Addendum, directing the bankruptcy court to make a determination of whether Lender was oversecured and, if so, to fix its reasonable attorneys' fees and costs. The court might -- on remand -- conclude that the total claimed by Lender was unreasonable, but that conclusion should only follow a full review of the accounting and consideration of the reasonableness of the claimed attorneys' fees.

For the foregoing reasons, I respectfully DISSENT.