

**ELA**

**Credit and Collections Management  
Conference**

**June 15, 2004**

**(Bawldymore/Bawlmer -Ahr Fair City Hon)**

**Damages Available Under UCC-2A**



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**Thank you for visiting Bawlmer, hon!  
The real Baltimore, where people  
drop the "T" in their hometown  
name, do their dishes in the "zinc,"  
have pastoral scenes painted on  
their window screens and, in the  
hot summertime, sit on the Marble  
front stoops of their rowhouses praying  
for a cool breeze.**



**Best of all, in the right restaurants, you can still see waitresses with beehive hairdos, who wait on you cheerfully and call you "hon" with affection.**



# The Law **Uniform Commercial Code**

- **Article 1 – General**
- **Article 2 – Sales**
- **Article 2A – Leases**
- **Article 9 – Secured Transactions**



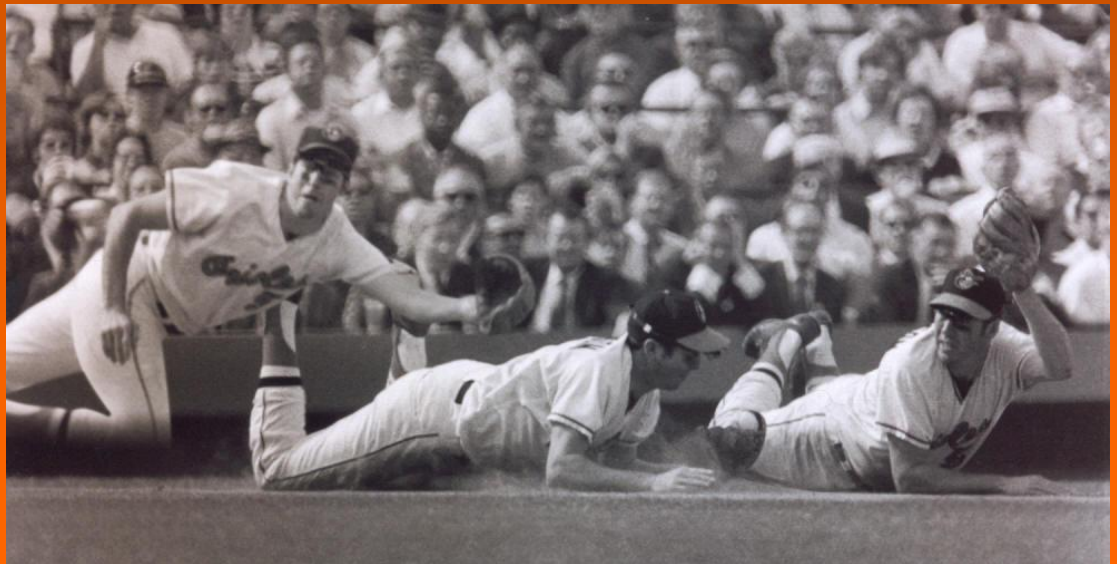
# Article 2A – Leases

- Freedom of Contract
- “Finance Lease” Concept
- Enforceability and Remedies



# **Most Significant Collection Advantage of UCC-2A “Finance Lease”**

**Automatically “Hell or High  
Water”**



# In re *Montgomery Ward*, Third Circuit in 2003

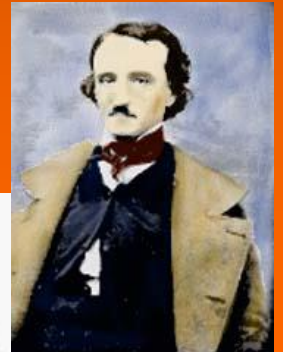
## Illinois Law

### 1995 Master Lease Agreement for Computer Equipment

Sch. 1	Cost	\$ 6,070,923
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Sch. 1	DPV of Rent	\$ 4,697,875
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Sch. 1	Casualty Value (0 months)	\$ 6,981,562
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# In re *Montgomery Ward*, Third Circuit in 2003

**Liquated Damages or Casualty Value**

**Lessor's CFO testimony:**

**CV includes:**

PV of unpaid unit  
+  
PV of residual  
+  
Same profit



# In re *Montgomery Ward*, Third Circuit in 2003

**“the recovery of the specified  
Casualty Values would place  
[Lessor] in a far better position  
than its actual damages, . . . ”**



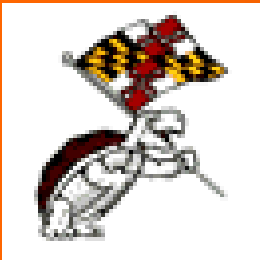
# In re *Montgomery Ward*, Third Circuit in 2003

**“actual damages, [are] the  
current equivalent of what the  
Lease would have generated in  
the ordinary course - -”**

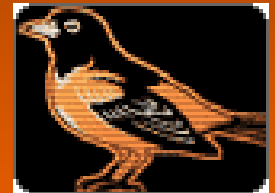


# In re *Montgomery Ward*, Third Circuit in 2003

**“sum of the present value of future  
rentals to the end of the lease”**



**PLUS**



**“the present value of the remainder  
interest in the property at the end  
of the lease”**

## In re *Montgomery Ward*, Third Circuit in 2003

**“Lessor deliberately chose to establish a lease pricing structure that substituted a lower (and therefore more attractive to a lessee) monthly rental, with the potential for recoupment of its investment plus a profit through a hoped-for (but in no way assured) course of events after the lease ran its course . . . ”**

# In re *Montgomery Ward*, Third Circuit in 2003

## **The Court Awarded Damages**

- Unpaid rent
- PV at time of breach of remaining payments
- PV at time of breach of residual value as estimated at lease commencement

# In re *Montgomery Ward*, Third Circuit in 2003

## Conclusions

- Bankruptcy
- Too Aggressive CD Formula
- Precise Calculations in Evidence



# *Wells Fargo Bank v. Taca International Airlines*, S.D. N.Y. 2003

**New York Law UCC Article 2A**

**Lease Agreements – 1998-2000  
(5 aircraft)**

**Lessor Demand:**

Unpaid rent to demand, plus interest

Plus

PV of difference between lease contract rent  
and FMV rent

# *Wells Fargo Bank v. Taca International Airlines*, S.D. N.Y. 2003

## **Lease specifies**

“single appraiser of Lessor’s choosing” to determine FMV of future rent.

“Taca is bound [by single appraiser]”



# *Wells Fargo Bank v. Taca International Airlines*, S.D. N.Y. 2003

## Conclusions

- No bankruptcy
- “Reasonable CD formula”
- Efficient Appraiser
- Summary Judgment Granted



# *Winthrop Resources v. Eaton Hydraulics,* Eighth Circuit in 2004

## Minnesota Law

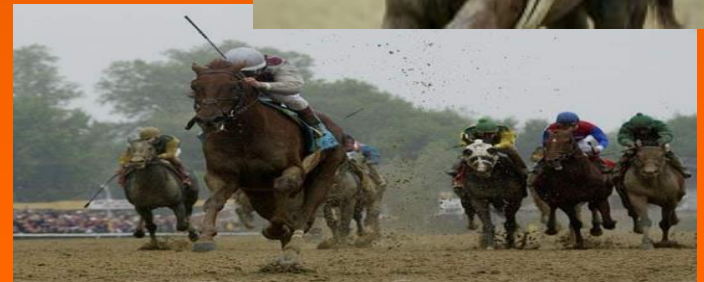
### 1997 Master Lease for Computer Equipment

#### Lessor claimed damages:

- Unpaid rent, taxes, late fees

#### Plus The **GREATER** of

- Accelerated rent remaining
- OR
- Casualty Loss Value



# *Winthrop Resources v. Eaton Hydraulics*, Eighth Circuit in 2004

## **Minnesota common law allows LD's**

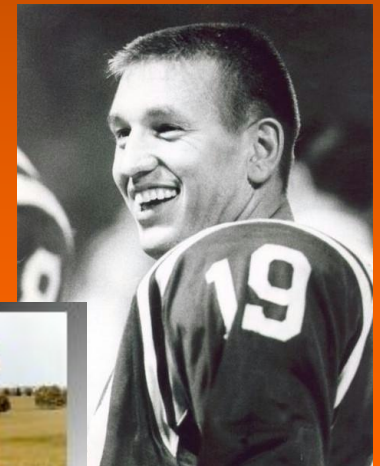
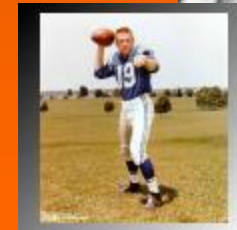
1. Fixed amount is a reasonable forecast of harm by breach.
2. Harm is difficult to estimate.



# *Winthrop Resources v. Eaton Hydraulics*, Eighth Circuit in 2004

## **Dicta:**

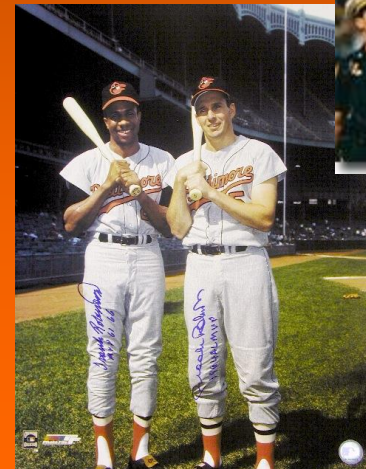
“That the CLV percentage at this end may be four or five times the fair-market value of the equipment does not render this CLV clause a penalty clause.”



# *Winthrop Resources v. Eaton Hydraulics,* Eighth Circuit in 2004

## Conclusions

- No bankruptcy
- Eaton's own lease CLV
- Few details



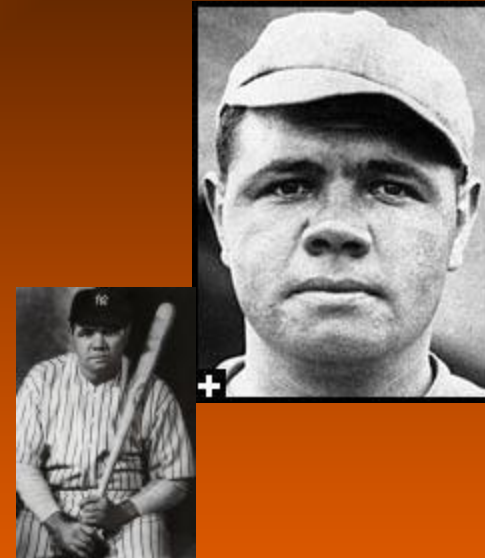
## *ePlus Group v. Panoramix*, SDNY in 2003

Virginia UCC Art. 2A Law

1999 Master Lease for Computer  
Equipment

### **Lessor's demand:**

- Unpaid rent \$ 106,463
- Late fees \$ 3,285
- Casualty value \$1,198,194



# *ePlus Group v. Panoramic*, SDNY in 2003

## **Contrast UCC 2A-504**

**UCC 2-718 Liquidated Damage**

**Plus common law**

**Eliminated elements**

1. Difficulty of proof of loss
2. Nonfeasible other adequate remedy
3. Not unreasonably large (compare tax benefits)



# *ePlus Group v. Panoramic,* SDNY in 2003

## UCC 2A-504

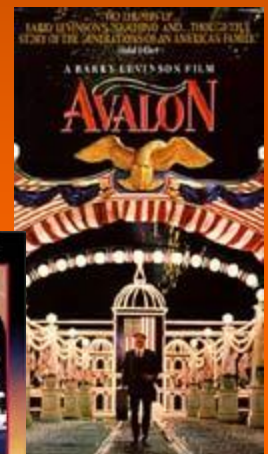
Damages for default, or any other act or omission including tax benefits



# *ePlus Group v. Panoramic,* SDNY in 2003

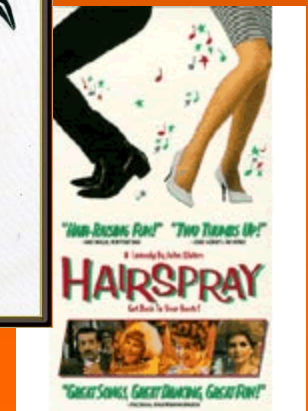
## UCC 2A-504

. . . May be liquidated but only by an amount or formula that is reasonable



## *ePlus Group v. Panoramix*, SDNY in 2003

“Plaintiff has failed to show in the Motion that the liquidated damages clause in the Master Lease is reasonable under Section 2A-504.”



## *ePlus Group v. Panoramic,* SDNY in 2003

At least two ways to prove unreasonable.

1. Rate set for CV

- ePlus CV is three times lease payments

- ePlus CV is substantially above FMV of equipment

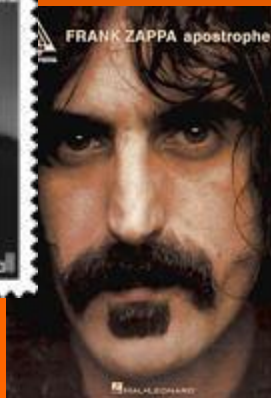
2. Formula to credit proceeds of equipment disposition

- ePlus allowed no credit unless it exceeded CV

# *ePlus Group v. Panoramix*, SDNY in 2003

“Defendant Lessees may be able to show a  
windfall . . .”

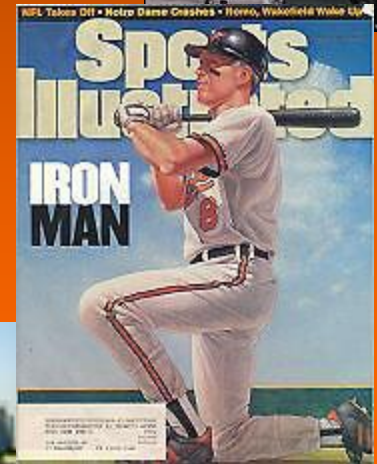
Summary for Damages Judgment Denied



# *ePlus Group v. Panoramic,* SDNY in 2003

## Conclusions

- No bankruptcy
- UCC 2A-504
- Lessor must prove reasonable!



# Conclusions From Case Law

## 1. UCC 2A-102

“This Article applies to any transaction, regardless of form, that creates a lease”

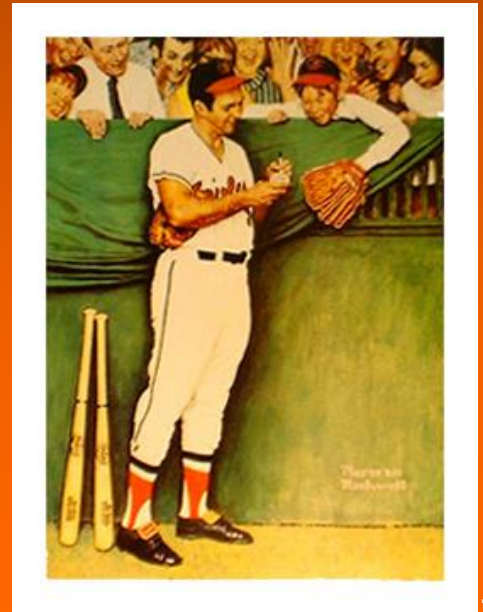
## 2. Bankruptcy problem

- sophistication
- home court



# Conclusions From Case Law

3. In Court, the Lessor must prove that LD reasonable.
4. The LD that gets too much.



# Practical Developments

1. Some Lessors look longingly at traditional language and consider return.
2. Practical non-judicial settlement starter:  
= CV + rent – disposition proceeds
3. The UCC 2A formula prompts “reasonable” + professionals.

# Practical Developments



Will the lessor switch back to simpler traditional language?

What is your Lessor's focus?

Negotiation Settlements	80%
Courthouse Steps:	20%

**Crab cakes I Love!!  
What's the secret  
ingredient in  
Baltimore crab cakes?**



**The secret ingredient is fresh Maryland Jumbo Lump crabmeat. No more than 20% filler. Some egg, parsley, salt and pepper. A little butter on top. Go real easy on the spices. Some add Worcestershire or Mustard. I don't 'cause they mask the delicate flavor of the crab. Broil it. Sauté it. But don't deep fry it.**