

# FIVE CASE STUDIES REGARDING DISTRIBUTOR LEGAL ISSUES

2017 ASA Annual Conference

Workshop N

# CASE STUDY NUMBER ONE

Please read the one-page case study

# CASE STUDY NUMBER ONE: Questions

- Who should win this case? What should the remedy be?
- What did ABC do wrong, if anything?
- What did GHI do wrong, if anything?
  
- What else should ABC have done to protect itself?
- What else should GHI have done to protect itself?

# What did the court decide?

- The court found that:
  - GHI failed to meet its payment obligations under the contract
  - ABC's fraud in the inducement was waived by GHI when GHI continued to operate under the contract after it learned of the fraud
- GHI was ordered to pay the contract damages plus interest
- Later, the case was dismissed because the amount in controversy was not adequate for federal court (technical grounds)
- *SMR Techs., Inc. v. Aircraft Parts Int'l Combs, Inc.*, 141 F. Supp. 2d 923, 933 (W.D. Tenn. 2001), vacated on other grounds, 2004 U.S. Dist. LEXIS 4741, at \*7 (W.D. Tenn. Mar. 23, 2004)

# Some Legal Notes

- **ISSUE:** FAA certification might have been a fundamental assumption to the execution of the Distributor Agreement, and GHI claims that it was induced to enter into the agreement by fraud. Nevertheless, GHI continued to perform under the contract after it realized that the initial representations of FAA certification were false. Conduct, treating the contract as binding after full knowledge of a fraud, is a waiver of the right to avoid the contract on that basis.
- **LESSON:** If you have grounds for termination, then assert them unless the contract allows you to reserve them
- *Do not unwittingly waive your rights!*

# Some Legal Notes

- **ISSUE:** By failing to allege a termination of the contract for material breach, GHI retained an obligation to perform under the contract. But purchasing goods under the contract GHI incurred an obligation to pay for them. Under the contract, there was no right to set-off for the GHI allegations.
- **LESSON:** If the contract specifies procedures for termination, then make use of them – do not merely assume that you have a right to ignore the contract due to the other side's apparent breach
- **NOTE:** *Quantum Meruit* provides a mechanism for recovery even if the contract fails
- *If you want to have rights that you think are common industry practices (like a contra or set-off right) then write them into the contract!*

# CASE STUDY NUMBER TWO

Please read the one-page case study

# CASE STUDY NUMBER TWO: Questions

- Who should win this case? What should the remedy be?
- What did Aggergaard Airlines do wrong, if anything?
- What did Surplus Sam do wrong, if anything?
  
- What else should Aggergaard Airlines have done to protect itself?
- What else should Surplus Sam have done to protect itself?

# What did the court decide?

- The court found that:
  - The ten day period for rejection expired January 22, 2016 so Surplus Sam accepted the structural components
  - Having accepted them, Surplus Sam was obliged to pay for them under the contract terms
- Surplus Sam was liable, but the court held there were genuine issues of material fact as to what was delivered and what the contract required as payment, so retained that issue for trial (the matter later settled)
- *Northwest Airlines v. Aeroservice, Inc.*, 168 F. Supp. 2d 1052

# Practice Note

- The distributor in the Northwest Airlines case bought DC-9 material. Shortly thereafter Northwest Airlines announced that they were retiring the DC-9 fleet
- Realizing that the value of the material hinged on the ability to sell it to support that fleet, the distributor recognized that this negatively impacted value of the inventory
- Bill Tipton had been saying at ASA meetings for three years prior that the DC-9 fleet would be retired and replaced
- *It is vital that you keep abreast of changes in the industry!*

# CASE STUDY NUMBER THREE

Please read the one-page case study

# CASE STUDY NUMBER THREE: Packing Instructions



## PACKING INSTRUCTION 955

OPERATOR VARIATIONS: AM-09, OU-15  
 This instruction applies to UN 2990, Life-saving appliances, self-inflating and UN 3072, Life-saving appliances, not self-inflating on passenger aircraft and Cargo Aircraft Only.

The term "life-saving appliances" applies to articles such as life rafts, life vests, aircraft survival kits or aircraft evacuation slides.  
 The description "Life-saving appliances, self-inflating" (UN 2990) is intended to apply to life-saving appliances that present a hazard if the self-inflating device is activated accidentally.

- Life-saving appliances, may only contain the dangerous goods listed below:
- (a) Division 2.2 gases, must be contained in cylinders which conform to the requirements of the appropriate national authority of the country in which they are approved and filled. Such cylinders may be connected to the appliance. These cylinders may include installed actuating cartridges (cartridges, power devices, or other devices) provided the aggregate quantity of deflagrating (propellant) explosives does not exceed the quantity permitted for the Division 2.2. The cylinders are shipped separately, they must be classified as appropriate for the Division 2.2. They need not be marked, labelled or described as explosive articles;
  - (b) signal devices (Class 1), which may include smoke and illumination signal flares; signal devices; or plastic or fibreboard inner packagings;
  - (c) small quantities of flammable substances, corrosive solids and organic peroxides (Classes 3 and 4.1), which may include a repair kit and not more than 30 strike-anywhere matches. The organic peroxides must be a component of a repair kit and the kit must be packed in strong inner packaging. The strike-anywhere matches must be packed in a cylindrical metal or composition packaging with a screw-type closure to prevent movement;

## PACKING INSTRUCTION 955 (continued)

Life-saving appliances must be disconnected or electrically isolated and protected against short circuits:

- (a) electric storage batteries (Class 8) which must be disconnected or electrically isolated and protected against short circuits;
  - 1. must meet the applicable requirements of 3.9.2.6;
  - 2. must be disconnected or electrically isolated and protected against short circuits; and
- (b) lithium batteries (Class 9):
  - 1. must be disconnected or electrically isolated and protected against short circuits; and
  - 2. must be secured against movement within the appliance.

Life-saving appliances packed in strong rigid outer packagings with a total maximum gross weight of 40 kg, containing no more than 100 mL of dangerous goods other than Division 2.2 compressed or liquefied gases with no subsidiary risk in receptacles with a capacity not exceeding 120 mL, installed solely for the purpose of the activation of the appliance, are not subject to these Regulations when carried as cargo.

UN number	Quantity per package Passenger aircraft	Quantity per package Cargo Aircraft Only
UN 2990, Life-saving appliances, self-inflating, or UN 3072, Life-saving appliances, not self-inflating	No limit	No limit

Life-saving appliances may also include articles and substances, not subject to these Regulations, which are an integral part of the appliance.

- Remember – shipping hazmats without specific documented training is a violation (even if you do everything right)
- ASA's next online hazmat training is scheduled for October 11-12, 2017 – it is a live class that you can attend from the comfort of your own desk chair.
- <http://www.washingtonaviation.com/hazmat.html>

# CASE STUDY NUMBER FOUR

Please read the one-page case study

# CASE STUDY NUMBER FOUR: Questions

- Should Awesome Aero return the payments in response to the Trustee's letter? How should Awesome Aero respond?
- If the trustee files a claim in court, do you think the Court would require Awesome Aero to return the payments?
- **What steps can Awesome Aero take to protect itself against future insolvent customers?**

# What did the court decide?

- The court found that:
  - The payments were within the ordinary course of business and were not subject to avoidance by the Trustee (the payments did not have to be returned to the bankruptcy estate)
  - In reaching this decision the Court weighed five factors to find that the “ordinary course of business” defense applied:
    1. Length of Engagement: the companies had a significant history that predated financial trouble
    2. Similarity of Transfers: The nine payments in question followed the same pattern as prior payments
    3. Manner of Tender: The manner of tender was largely the same, and where the manner of tender differed it was not at the request of the creditor (the supplier who was owed money)
    4. Collection Efforts: The creditor did not take any unusual or aggressive action to suggest that the payments were outside of the ordinary course of business
    5. Advantage in Light of Debtor’s Condition: Creditor did not demand any additional collateral, impose late fees, or pressure for payment in light of Debtor’s financial difficulty
- *Burtch v. Texstars, Inc. (In re AE Liquidation)*, 2013 Bankr. LEXIS 4144 (Bankr. Del. 2013)

# Practice Note

- Make sure to keep accounts receivable up to date; once a company files for bankruptcy it can be very difficult (or impossible) to recover what is owed.
- Do not try to take advantage of a company in financial difficulty to “get ahead” of other creditors (i.e., other suppliers). This could cause an “ordinary course of business” defense to fail, and require you to return payments in the Preference period (usually the 90 days preceding the filing).
  - OR seek a purchase money security interest in the articles at the time they are sold – good for serialized components that can be uniquely identified
  - Take care before extending credit to a company that is approaching insolvency
  - Wait until after bankruptcy filing, and then sell articles
- Distinguish between letters from the Trustee or collection professionals and actual court orders. Consult with an attorney specializing in bankruptcy to determine your rights.
- Move quickly! Bankruptcy actions may have very short deadlines to submit a claim.

# CASE STUDY NUMBER FIVE

Please read the one-page case study

# CASE STUDY NUMBER FIVE: Questions

What should Smiths consider in developing a plan for addressing this situation?

What obligation does Smiths have to take action (if any)?

If Smiths desires to report its findings, then to whom should it report them? To whom can it report them?

What should Smiths do to protect itself from liability?

Does Smiths have any continued operational safety obligations? What can it do to support continued operational safety ?

# Questions?



Please feel free to ask questions

# Thank You

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