

SELL, RENT OR LEASE?

By Paul A. Rianda, Esq.

Whether you sell, rent or lease equipment, there are a number of things you can do to maximize your ability to collect lease or rental payments from the merchant while at the same time minimizing your liability for faulty equipment. In this article I will examine the contractual relationships that are created when you provide equipment to a merchant and how you can make those contracts work in your favor.

Leasing Equipment:

The most common way to provide a merchant with equipment, at least in the past, has been a leasing arrangement whereby the salesperson utilizes a third party leasing company to lease the credit card processing terminal and peripheral items to the merchant. However, in most of these transactions, the salesperson who leases the equipment to the merchant is not a party to any of the contracts signed by that merchant.

The first of the typical contracts for the transaction is a lease entered into between the leasing company and the merchant. The salesperson is typically not a party to this contract. A merchant account is then established between the merchant and the bank providing the account. Again, generally, the bank, possibly the ISO and the merchant are the only parties to the merchant agreement. This leaves the salesperson in a precarious position. He/she is not a party to any of the contracts that could serve to minimize his/her potential liability to the merchant for faulty equipment, acts of the processing bank or other issues that could arise. In addition, because the salesperson is not a party to the contracts, he/she does not have the right to collect any payments from the merchant in the event of default on the lease.

In order to provide legal protection to the salesperson, in addition to the standard lease and merchant account agreements, it is prudent to have the merchant enter into a short agreement with the salesperson. I know what you are thinking, a typical transaction to provide a merchant with credit card processing services already includes more paperwork than you usually have to sign to get a home mortgage. However, it is important for you to protect yourself from potential claims by the merchant and also give you the ability to collect from that merchant if indeed there are any issues with the lease.

There are a number of different types of legal provisions you can incorporate into such an agreement in order to protect yourself and provide you with some flexibility to collect from the merchant in the future. For instance, an important part of any such agreement is a warranty and damages limitation that would clearly set forth to the merchant that you are not liable to him/her for any potential claims because of faulty equipment, problems with credit card processing services and similar claims. While you understand that the equipment the merchant is using is provided to you by a third party equipment provider, the merchant may think you are the one who manufactured and distributed the equipment, leaving the merchant looking to you for a remedy if the equipment fails.

Another issue is collecting from the merchant if he/she defaults on the lease and the lease is charged back to you. As you are not a party to the lease contract, you have no legal right to collect on

the lease unless you receive an assignment of the lease from the leasing company. Many people overlook this issue and just go ahead and try to collect directly from the merchant in spite of the fact that they have no legal right to do so. This could result in a situation whereby if you do sue a merchant for failing to pay on a lease, the merchant could have an absolute defense to the action since you are not a party to the lease.

To avoid this problem, make sure that you receive a clear assignment of the lease from the leasing company in the event of the merchant's default. A lease assignment is a simple one-page form that has to be signed by the leasing company. Once you have the valid assignment of the lease from the leasing company, you can legally collect on the lease. Another way you can legally collect from the merchant is by having the merchant acknowledge in writing that in the event of default, you are entitled to collect the lease payments directly from the merchant. Such a provision can also be included as part of the contract between yourself and the merchant.

Equipment Rental:

Merchants are more and more reluctant to sign long-term leases and therefore short-term rental arrangements are becoming more popular in the industry. Most "feet on the street" sales people deal with merchants in their local area in face to face transactions and as with the leasing transaction, having a well-written rental agreement is important to minimize your liability and allow you to collect on the rental contract.

A short, well written rental agreement should include the warranty and damage limitations mentioned above, as well as financial provisions that set forth any penalties for failing to pay the monthly rental charges for a specified time period. In addition, there should be penalties in the agreement for the failure to return the equipment in the event the rental agreement is terminated. Having such a contract with these provisions would make it much easier and cleaner to sue the merchant in the event that you needed to do so. All you would need to do is go down to your local small claims court and file a suit against the merchant for breach of the contract. Small claims court is a less formal, relatively quick and inexpensive way for you to collect from merchants who are unwilling or unable to pay you.

Of course, in the agreement you also need to make sure that you obtain the merchant's authorization to allow you to debit their account for the monthly payment due. Be it by credit card or ACH, you need to comply with the appropriate rules to make sure that you obtain a void check or other authorization as necessary to make the recurring charges to the merchant.

Selling Equipment:

Even if you are outright selling the equipment, it is good practice to get the merchant to sign an agreement like the ones mentioned above. A contract for the sale of the equipment would only need to be a short agreement containing the warranty and damage limitations along with any other limitations of liability that you are able to negotiate to keep your risk of any claims from the merchant at a minimum.

In any event, whether you sell, rent or lease, with the appropriate agreements it is possible to minimize your liability while at the same time keeping the merchant happy. In the future, I hope to continue to provide you with topical information about legal issues in the industry. If you have any particular issues that you would like me to address, please let me know and I will try to incorporate them into the future articles.

* Paul A. Rianda, Esq. is a partner in the Southern California law firm of Kring and Chung, LLP, and has worked in and with the bankcard industry for the past 8 years. For more information about this article or any other matters, please contact Mr. Rianda at (949) 261-7700 or via email at prianda@kringandchung.com.

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