LONG-TERM VENDING MACHINE CONTRACTS: MORE THAN JUST A QUARTER CAN GET STUCK FOLLOWING RECENT COURT DECISION

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Although vending machines are a welcome source of income for some associations, the well-informed board of trustees will be careful to avoid entering into long-term contracts with vending machine suppliers after a recent court decision. In C.I.C. Corp. v. Ragtime, Inc., 319 N.J.Super. 662 (App.Div. 1999), the New Jersey Appellate Division clarified that the property owner who requested the removal of vending machines prior to the end of the contract was responsible to pay the expected profit of the vending machines, despite the fact that the vending machine owner made no effort to re-lease the machines.

A go-go bar owner had a contract with a vendor to provide vending machines to the bar. The machines included a cigarette machine, juke box, pool table and a pinball machine. The arrangement which had been in place for more than 15 years was that the bar owner and the vendor would split the proceeds derived from the operation of the machines.

In October 1994, they executed a five year contract extension. One month later, the bar owner requested that the machines be removed and paid back an advance received from the vendor. A dispute arose because the vendor believed that the removal would be temporary. He testified that the bar owner was going to renovate the go-go bar into a family restaurant. The bar owner not only did not renovate, but he purchased his own replacement machines for the go-go bar.

The vendor sued and requested the present value of his expected profit because of the breach of contract by the bar owner. At trial, it was established that the net lost monthly revenue to the vendor was $700 and therefore that his loss over the remaining 59 months of the term of the contract was $41,000.

The bar owner argued that the vendor was required under law to lease the same machines to another customer, and that only the lost revenue from the time of the breach to the re-rental of the machines should be the measure of damages. He argued that the vendor had the duty to mitigate its damages. The vendor disagreed and argued that because of the nature of its business, no such duty applied. Rather, they argued that this was a “lost volume” case and that if they could have entered into the second contract with a third party, they should have been entitled to the benefit of both contracts. They also argued that the later transaction is not a substitute for the one lost to the breach by the plaintiff. In other words, if the vendor had a warehouse full of machines and could have placed as many as it could have found customers for, they should not lose the volume of this deal.

A jury found in favor of the vendor, but awarded only $1.00 in damages.

The Appellate Division reversed the trial court's decision and held that the "lost volume rule" as set forth in the Restatement (Second) of Contracts applied to the case and permitted the vendor to receive the expected profit from the machines for the life of the contract and did not require him to seek to re-lease the machines.

The court reaffirmed the Restatement (Second) of Contracts § 347 comment f (1981) which states:

> *Whether a subsequent transaction is a substitute for the broken contract sometimes raises difficult questions of fact. If the injured party could and would have entered into the subsequent contract, even if the contract had not been broken, and could have had the benefit of both, he can be said to have "lost volume" and the subsequent transaction is not a substitute for the broken contract. The injured party's damages are then based on the net profit that he has lost as a result of the broken contract. Since entrepreneurs try to operate at optimum capacity, however, it is possible that an additional transaction would not have been profitable and that the injured party*

would not have chosen to expand his business by undertaking it had there been no breach. It is sometimes assumed that he would have done so, but the question is one of fact to be resolved according to the circumstances of each case.

Also, the court cited *Restatement, supra, §350 comment d, (1981):*

> *The mere fact that an injured party can make arrangements for the disposition of the goods or services that he was to supply under the contract does not necessarily mean that by doing so he will avoid the loss. If he would have entered into both transactions but for the breach, he has "lost volume" as a result of the breach. See Comment f to §347. In that case the second transaction is not a "substitute" for the first one.*

The Ragtime court also explained its rationale by reference to the case of Locks v. Wade, 36 N.J. Super. 128 (App.Div. 1955), which held that:

> *Where, as here, a plaintiff lessor agrees to lease an article of which the supply in the market is for practical purposes not limited, then the law would be depriving him of the benefit of his bargain if on the breach of the agreement, it required his claim against the lessee to be reduced by the amount he actually did or reasonably could realize on a reletting of the article. For if there had been no breach and another customer had appeared, the lessor could as well have secured another such article and entered into a second lease. In case of the breach of the first lease, he should have the benefit of both bargains or not-in a situation where the profit on both would be the same-be limited to the profit on the second of them.*

For community associations, the moral is to ensure that vending machine contracts are limited to as short a duration as possible. Otherwise, the association runs the risk of liability for damages which may not be expected or realized.

(1023 words)