

**REPORT OF THE  
JOINT SUBCOMMITTEE STUDYING**

**Modifications  
To The  
Uniform Commercial Code**

**TO THE GOVERNOR AND  
THE GENERAL ASSEMBLY OF VIRGINIA**



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**Report of the  
Joint Subcommittee Studying  
Modifications to the Uniform Commercial Code  
To  
The Governor and the General Assembly of Virginia  
Richmond, Virginia  
January, 1991**

TO: Honorable L. Douglas Wilder, Governor of Virginia,  
and  
The General Assembly of Virginia

**I. INTRODUCTION**

Since January 1, 1966, when the Uniform Commercial Code (Titles 8.1 through 8.10 of the Code of Virginia) became effective, some of its concepts and language have become outdated and some in need of modernization. Also, since that time, there has arisen a need for comprehensive laws to recognize new developments in commercial law. The National Conference of Commissioners on Uniform State Laws and American Law Institute have offered their addition of Title 8.2A (Leases). This modification to the Uniform Commercial Code is being offered in an attempt to recognize the need to modernize the Uniform Commercial Code and to codify a comprehensive law to recognize new developments.

A Joint Subcommittee was established pursuant to House Joint Resolution No. 59 of the 1988 General Assembly to study and review modifications of the Uniform Commercial Code (U.C.C.). The study and Subcommittee were continued by the 1989 General Assembly with its adoption of House Joint Resolution No. 284 and by the 1990 General Assembly with its adoption of House Joint Resolution No. 15. Delegates George H. Heilig, Jr. of Norfolk, Clifton A. Woodrum of Roanoke, William R. Finney of Franklin, and William S. Moore, Jr. of Portsmouth were the members of the House and Delegates appointed to serve on the Subcommittee; and Senator William E. Feas of Accomac and Senator Moody E. Stallings of Virginia Beach were the members of the Senate of Virginia appointed to serve on the Subcommittee. See Appendix 1 of this report.

**II. EXECUTIVE SUMMARY**

During the 1988 and 1989 Interim, the Joint Subcommittee received testimony on proposed reviews to five areas of the Uniform Commercial Code, all of which were offered by the National Conference of Commissioners on Uniform State Laws. House Document No. 48 reports on the Joint Subcommittee's findings and recommendations covering that two-year period. In 1990, the Virginia Commissioners to the conference proposed that a new Article be added to the existing Articles of the U.C.C. to cover commercial law in the area of Leases (Article 2A or Title 8.2A of the Code of Virginia).

In 1990, the Joint Subcommittee received testimony from Mr. Carlyle C. Ring, Jr., one of Virginia's Commissioners to the National Conference of Commissioners on Uniform State Laws, and John W. Edmonds III, Esquire, representing the Virginia Bankers Associations. The Joint Subcommittee also received correspondence from the business law sections of the Virginia State Bar and the Virginia Bar Association. All were in favor of the addition to the U.C.C. of a new Article 2A (Title 8.2A) on Leases. The Joint Subcommittee found a need to codify a comprehensive law with respect to leases of goods which addresses a type of business transaction, the leasing of goods, that has long existed. It found that under present law, transactions of this type are governed partly by common law principles relating to personal property, partly by principles relating to real estate leases, and partly by reference to Titles 8.2 and 8.9, dealing with sales and secured transactions, respectively. It also found that the legal rules and concepts derived from these sources imperfectly fit a transaction that involves personal property or goods rather than realty, and a lease rather than either a sale or a security interest as such.

New Article 2A as recommended by the Joint Subcommittee will apply to transactions involving a consumer's rental of automobiles or do-it-yourself equipment and to leases of such items as commercial aircraft and industrial machinery. It recognizes the difference between consumer and business leasing, while resting upon concepts that apply generally to any leasing of goods transaction.

The scope to the new title is limited to leases; leases intended as security interests are not included, i.e., security interests disguised as leases, since they are addressed in Title 8.9. The lessor is not required to file a financing statement against the lessee or take any other action to protect the lessor's interest in the goods. All of the express and implied warranties of Title 8.2 on sales were included, but revised to reflect differences in lease transactions. This new title provides for leasing transactions involving goods subject to certificate of title statutes to be subject to them. To avoid conflict with consumer protection statutes, this new title makes its provisions subject to such statutes. Many consumer protections have been incorporated in the new title. Finance leases are defined and addressed under the new title. Sale and leaseback transactions having become common are treated under the new title, and a balanced position as to creditor's rights is advanced where the buyer retains possession of goods pursuant to a lease contract if the buyer bought for value and in good faith. The new title not only provides for lessor's remedies upon default by the lessee but also for lessee's remedies upon default by the lessor. Finally, the bill, consistent with the common-law emphasis upon freedom to contract, has created a liquidation of damages rule that allows flexibility with respect to leases of goods.

### **III. WORK AND DELIBERATIONS OF THE SUBCOMMITTEE**

Although the Joint Subcommittee received information and testimony on Articles 2A and 3, this document shall limit its report to that information and testimony received on Article 2A. The Joint Subcommittee received information concerning the need to revise Article 3 due to the enactment of Article 4A, however, there was not enough time to thoroughly review the

revised version of Article 3. The Joint Subcommittee also learned that work is still being done on revised Article 3 and conforming amendments to Articles 1 and 4 of the U.C.C. The Subcommittee made the proposed addition of Article 2A, its only substantive recommendation. The Subcommittee is mindful that should it include written information and materials received on Article 3, confusion may be created at a later date if the current proposed modifications relating to that Article were amended or modified.

## Article 2A

The leasing of items of personal property ranging from hand-held equipment, automobiles to commercial aircraft is big business in this country, with an estimated dollar volume reaching \$150 billion. Yet the laws governing leasing have not kept pace with the intricacies of today's leasing arrangements, resulting in considerable uncertainty for lessors and lessees alike. To fill this gap, the National Conference of Commissioners on Uniform State Laws approved a new article to the Uniform Commercial Code. Article 2A provides for the fundamentals of the leasing contract, including the formation of the contract, provisions for express and implied warranties, and damages for breach of a leasing contract, but at the same time, provides enough flexibility to preserve the fundamental right to contract. The changes in leasing transactions in recent years make it clear that modernization is long overdue. States now depend on the common law to resolve disputes over lease contracts. This creates great uncertainty, particularly for companies that conduct business in more than one state, since case law conflicts from state to state.

Under present law, transactions of this type are governed partly by common law principles relating to personal property, partly by principles relating to real estate leases, and partly by reference to Articles 2 and 9 of the Uniform Commercial Code, dealing with Sales and Secured Transaction, respectively. The legal rules and concepts derived from these sources imperfectly fit a transaction that involves personal property rather than realty, and a lease rather than either a sale or a security interest as such. A statute directly addressing the personal property lease is, therefore, appropriate.

The Commissioners on Uniform State Laws and the American Law Institute, both sponsors of the Uniform Commercial Code, are of the opinion that since leases are an important part of business and commercial law, they should be governed by the Uniform Commercial Code. Further, the leasing business is interstate in character, and uniformity is as important to the conduct of leasing transactions as it is to sales transactions. Article 2A gives leasing transactions an important underpinning in the law. Because of the broad similarities between lease and sales transactions, that underpinning is largely derived from the sales article of the U.C.C. (Article 2).

Article 2A is a uniform state law on leasing, with standardized provisions on warranties and remedies that are variable by agreement between the lessor and lessee. With regard to remedies, the proposed Article allows room for the development and application of a state's consumer protection laws and products liability law. The proposed legislation is drafted so that it does not conflict with state certificate of title statutes.

The Joint Subcommittee learned that other states have adopted this Article and essentially in its uniform form. California enacted Article 2A with significant amendments. Those amendments were under consideration in other states. In New York, there was a Commission studying Article 2A and the California amendments. Because there had been several amendments offered to Article 2A by several states and because these amendments were under review by the Conference, the Joint Subcommittee in 1989 felt it would be best at that time not to recommend the adoption of Article 2A. They decided at that time that it would be better to ask the business sections of the two bar associations in Virginia to make specific recommendations to the Joint Subcommittee. An ad hoc subcommittee composed of representatives of the bar associations and interest groups met during 1989 and 1990 and made their recommendations in the form of legislative changes to the Joint Subcommittee. Also, the Conference made several changes to the legislation which were reviewed by the ad hoc group, and have been drafted into the bill. See Appendix 2 for the proposed legislation with comments.

#### **IV. RECOMMENDATIONS OF THE SUBCOMMITTEE**

**THE JOINT SUBCOMMITTEE RECOMMENDS THAT LEGISLATION BE DRAFTED FOR INTRODUCTION IN THE 1991 SESSION OF THE GENERAL ASSEMBLY WHICH WILL ADD ARTICLE 2A TO THE UNIFORM COMMERCIAL CODE TO PROVIDE A COMPREHENSIVE AND UNIFORM BODY OF LAW GOVERNING LEASES.**

The Joint Subcommittee recognizes that the major interest groups participated in the drafting of Article 2A, and that the final version of this proposed review to the Uniform Commercial Code reflects the compromises which are necessary to achieve the support of those groups. The Joint Subcommittee notes that one of the key public benefits of Article 2A is that it creates a uniform body of law governing the rights and obligations of persons involved in the leasing of goods. The new article permits a degree of flexibility by allowing provisions to be varied by agreement in order to accommodate the needs of different lessors and lessees of goods.

In making this recommendation, the Joint Subcommittee also found that the public gains from the certainty created by Article 2A. One by-product of such certainty is the ability to identify whether a transaction is a lease or a security interest disguised as a lease, when to file a financing statement or take other action to perfect an interest in goods against third parties. This, in turn, permits parties to implement procedures to control risk.

Another advantage of Article 2A is that the lessor will know when he is deemed to have made warranties to the lessee. The legislation also addresses what remedies are available to the lessor upon the lessee's default and the remedies available to the lessee upon the lessor's default which is a significant departure from Article 9 (Title 8.9 of the Code of Virginia) on Secured Transactions, which provides remedies only for the secured party upon default by the debtor. This difference, the Joint Subcommittee found, was compelled by the bilateral nature of the obligations between the parties to a lease.

## V. CONCLUSION

The Joint Subcommittee believes that Article 2A of the Uniform Commercial Code is essential law. With the number of leasing transactions increasing every year and because of the complexity of leasing agreements, the members believe that there is a need to provide uniform standards and this depends upon the enactment of this bill. The Joint Subcommittee found that there was no significant or organized opposition expressed to the proposed Article 2A.

The Joint Subcommittee expresses its appreciation to those interest groups who have worked long and hard on those issues described in this report.

Respectfully submitted,

George H. Heilig, Jr., (Chairman)  
William E. Fears, (Vice Chairman)  
Clifton A. Woodrum  
Willard R. Finney  
William S. Moore, Jr.  
Moody E. Stallings, Jr.

## **VI. APPENDICES**

1. House Joint Resolution No. 15 of 1990.
2. Proposed Legislation on Article 2A, with Comments.
3. Draft Legislation on Article 2A.

1990 SESSION

LD4007484

APPENDIX 1

HOUSE JOINT RESOLUTION NO. 15

Offered January 11, 1990

Continuing the Joint Subcommittee Studying Modifications of the Uniform Commercial Code.

Patrons—Heilig, Moore, Woodrum, Finney and Marks; Senators: Fears and Stallings

Referred to the Committee on Rules

WHEREAS, the 1988 and 1989 Sessions of the General Assembly, pursuant to House Joint Resolutions 59 and 248, established and continued, respectively, a joint subcommittee to review modifications of the Uniform Commercial Code (U.C.C.); and

WHEREAS, the joint subcommittee has received testimony on adding Article 2A (Leases) and Article 4A (Wire Transfers) and testimony on modifying Article 6 (Bulk Sales); and

WHEREAS, the joint subcommittee is recommending legislation to the 1990 General Assembly to enact Article 4A, but has been unable to complete its work on the other two articles due to new developments nationwide; and

WHEREAS, the joint subcommittee believes there is a great interest in the revisions being suggested to the remaining two articles, the modifications they will bring to the Uniform Commercial Code and private industry, and the need to more thoroughly address in detail these suggested changes; now, therefore, be it

RESOLVED by the House of Delegates, the Senate concurring, That the joint subcommittee established in 1988 and continued in 1989 to review modifications to the Uniform Commercial Code be continued. The membership of the joint subcommittee shall remain the same and any vacancies that occur shall be filled in the same manner as provided in House Joint Resolution 59 of 1988.

The joint subcommittee shall complete its work in time to submit its recommendations to the Governor and the 1991 Session of the General Assembly as provided in the procedures of the Division of Legislative Automated Systems for the processing of legislative documents.

The indirect costs of this study are estimated to be \$7,250; the direct costs of this study shall not exceed \$3,250.

Official Use By Clerks

Agreed to By
The House of Delegates
without amendment
with amendment
substitute
substitute w/amdt

Agreed to By The Senate
without amendment
with amendment
substitute
substitute w/amdt

Date:

Date:

Clerk of the House of Delegates

Clerk of the Senate

## APPENDIX 2

12/17/90

### PART 1. GENERAL PROVISIONS

#### § 2A-101. SHORT TITLE.

This Article shall be known and may be cited as the Uniform Commercial Code - Leases.

#### OFFICIAL COMMENT

##### Rationale for Codification:

There are several reasons for codifying the law with respect to leases of goods. An analysis of the case law as it applies to leases of goods suggests at least three significant issues to be resolved by codification. First, what is a lease? It is necessary to define lease to determine whether a transaction creates a lease or a security interest disguised as a lease. If the transaction creates a security interest disguised as a lease, the lessor will be required to file a financing statement or take other action to perfect its interest in the goods against third parties. There is no such requirement with respect to leases. Yet the distinction between a lease and a security interest disguised as a lease is not clear. Second, will the lessor be deemed to have made warranties to the lessee? If the transaction is a sale the express and implied warranties of Article 2 of the Uniform Commercial Code apply. However, the warranty law with respect to leases is uncertain. Third, what remedies are available to the lessor upon the lessee's default? If the transaction is a security interest disguised as a lease, the answer is stated in Part 5 of the Article on Secured Transactions (Article 9). There is no clear answer with respect to leases.

There are reasons to codify the law with respect to leases of goods in addition to those suggested by a review of the reported cases. The answer to this important question should not be limited to the issues raised in these cases. Is it not also proper to determine the remedies available to the lessee upon the lessor's default? It is, but that issue is not reached through a review of the reported cases. This is only one of the many issues presented in structuring, negotiating and documenting a lease of goods.

##### Statutory Analogue:

After it was decided to proceed with the codification project, the drafting committee of the National Conference of Commissioners on Uniform State Laws looked for a statutory analogue, gradually narrowing the focus to the Article on Sales (Article 2) and the Article on Secured Transactions (Article 9). A review of the literature with respect to the sale of goods reveals that Article 2 is predicated upon certain assumptions: Parties to the sales transaction frequently are without counsel; the agreement of the parties often is oral or evidenced by scant writings; obligations between the parties are bilateral; applicable law is influenced by the need to preserve freedom of contract. A review of the literature with respect to personal property security law reveals that Article 9 is predicated upon very different assumptions: Parties to a secured transaction regularly are represented by counsel; the agreement of the parties frequently is reduced to a writing, extensive in scope; the obligations between the parties are essentially unilateral; and applicable law seriously limits freedom of contract.

The lease is closer in spirit and form to the sale of goods than to the creation of a security interest. While parties to a lease are sometimes represented by counsel and their agreement is often reduced to a writing, the obligations of the parties are bilateral and the common law of leasing is dominated by the need to preserve freedom of contract. Thus the drafting committee concluded that Article 2 was the appropriate statutory analogue.

##### Issues:

The drafting committee then identified and resolved several issues critical to codification:

**Scope:** The scope of the Article was limited to leases (Section 2A-102). There was no need to include leases intended as security, i.e., security interests disguised as leases, as they are adequately treated in Article 9. Further, even if leases intended as security were included, the need to preserve the distinction would remain, as policy suggests treatment significantly different from that accorded leases.

**Definition of Lease:** Lease was defined to exclude leases intended as security (Section 2A-103(1)(j)). Given the litigation to date a revised definition of security interest was suggested for

inclusion in the Act. (Section 1-201(37)). This revision sharpens the distinction between leases and security interests disguised as leases.

**Filing:** The lessor was not required to file a financing statement against the lessee or take any other action to protect the lessor's interest in the goods (Section 2A-301). The refined definition of security interest will more clearly signal the need to file to potential lessors of goods. Those lessors who are concerned will file a protective financing statement (Section 9-408).

**Warranties:** All of the express and implied warranties of the Article on Sales (Article 2) were included (Sections 2A-210 through 2A-216), revised to reflect differences in lease transactions. The lease of goods is sufficiently similar to the sale of goods to justify this decision. Further, many courts have reached the same decision.

**Certificate of Title Laws:** Many leasing transactions involve goods subject to certificate of title statutes. To avoid conflict with those statutes, this Article is subject to them (Section 2A-104(1)(b)).

**Consumer Leases:** Many leasing transactions involve parties subject to consumer protection statutes. To avoid conflict with those statutes this Article is subject to them (Section 2A-104(1)(a) and (d)). Further, certain consumer protections have been incorporated in the Article.

**Finance Leases:** Certain leasing transactions

substitute the seller of the goods for the lessor as the party responsible to the lessee with respect to warranties and the like. The definition of finance lease (Section 2A-103(1)(g)) was developed to describe these transactions. Various sections of the Article implement the substitution of the seller for the lessor, including Sections 2A-209 and 2A-407. No attempt was made to fashion a special rule where the finance lessor is an affiliate of the seller of goods; this is to be developed by the courts, case by case.

**Sale and Leaseback:** Sale and leaseback transactions are becoming increasingly common. A number of state statutes treat transactions where possession is retained by the seller as fraudulent per se or prima facie fraudulent. That position is not balanced and thus is changed by the Article "if the buyer bought for value and in good faith" (Section 2A-308(3)).

**Remedies:** The Article has not only provided for lessor's remedies upon default by the lessee (Sections 2A-523 through 2A-531), but also for lessee's remedies upon default by the lessor (Sections 2A-508 through 2A-522). This is a significant departure from Article 9, which provides remedies only for the secured party upon default by the debtor. This difference is compelled by the bilateral nature of the obligations between the parties to a lease.

**Damages:** Many leasing transactions are predicated on the parties' ability to stipulate an appropriate measure of damages in the event of default. The rule with respect to sales of goods (Section 2-718) is not sufficiently flexible to

accommodate this practice. Consistent with the common law emphasis upon freedom to contract, the Article has created a revised rule that allows greater flexibility with respect to leases of goods (Section 2A-504(1)).

**History:**

This Article is a revision of the Uniform Personal Property Leasing Act, which was approved by the National Conference of Commissioners on Uniform State Laws in August, 1985. However, it was believed that the subject matter of the Uniform Personal Property Leasing Act would be better treated as an article of this Act. Thus, although the Conference promulgated the Uniform Personal Property Leasing Act as a Uniform Law, activity was modest to allow time to restate the Uniform Personal Property Leasing Act as Article 2A.

In August, 1986 the Conference approved and recommended this Article (including conforming amendments to Article 1 and Article 9) for promulgation as an amendment to this Act. In December, 1986 the Council of the American Law Institute approved and recommended this Article (including conforming amendments to Article 1 and Article 9), with official comments, for promulgation as an amendment to this Act.

In March, 1987 the Permanent Editorial Board for the Uniform Commercial Code approved and recommended this Article (including conforming amendments to Article 1 and Article 9), with official comments, for promulgation as an amendment to this Act. In May, 1987 the American Law Institute approved and recommended this Article (including conforming

amendments to Article 1 and Article 9), with official comments, for promulgation as an amendment to this Act. In August, 1987 the Conference confirmed its approval of the final text of this Article.

#### Relationship of Article 2A to Other Articles:

The Article on Sales provided a useful point of reference for codifying the law of leases. Many of the provisions of that Article were carried over, changed to reflect differences in style, leasing terminology or leasing practices. Thus, the official comments to those sections of Article 2 whose provisions were carried over are incorporated by reference in Article 2A, as well; further, any case law interpreting those provisions should be viewed as persuasive but not binding on a court when deciding a similar issue with respect to leases. Any change in the sequence that has been made when carrying over a provision from Article 2 should be viewed as a matter of style, not substance. This is not to suggest that in other instances Article 2A did not also incorporate substantially revised provisions of Article 2, Article 9 or otherwise where the revision was driven by a concern over the substance; but for the lack of a mandate, the drafting committee would have made the same or a similar change in the statutory analogue. Those sections in Article 2A include Sections 2A-104, 2A-105, 2A-106, 2A-108(2) and (4), 2A-109(2), 2A-208, 2A-214(2) and (3)(a), 2A-216, 2A-303, 2A-306, 2A-503, 2A-504(3)(b), 2A-506(2), and 2A-515. For lack of relevance or significance not all of the provisions of Article 2 were incorporated in Article 2A.

This codification was greatly influenced by the fundamental tenet of the common law as it has developed with respect to leases of goods: freedom of the parties to contract. Note that, like all other Articles of this Act, the principles of construction and interpretation contained in Article 1 are applicable throughout Article 2A (Section 2A-103(4)). These principles include the ability of the parties to vary the effect of the provisions of Article 2A, subject to certain limitations including those that relate to the obligations of good faith, diligence, reasonableness and care (Section 1-102(3)). Consistent with those principles no negative inference is to be drawn by the episodic use of the phrase "unless otherwise agreed" in certain provisions of Article 2A. Section 1-102(4). Indeed, the contrary is true, as the general rule in the Act, including this Article, is that the effect of the Act's provisions may be varied by agreement. Section 1-102(3). This conclusion follows even where the statutory analogue contains the phrase and the correlative provision in Article 2A does not.

#### § 2A-102. SCOPE.

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

#### OFFICIAL COMMENT

Uniform Statutory Source: Section 9-102(1). Throughout this Article, unless otherwise stated, references to "Section" are to other sections of this Act.

Changes: Substantially revised.

Purposes: This Article governs transactions as diverse as the lease of a hand tool to an individual for a few hours and the leveraged lease of a complex line of industrial equipment to a multi-national organization for a number of years.

To achieve that end it was necessary to provide that this Article applies to any transaction, regardless of form, that creates a lease. Since lease is defined as a transfer of an interest in goods (Section 2A-103(1)(j)) and goods is defined to include fixtures (Section 2A-103(1)(h)), application is limited to the extent the transaction relates to goods, including fixtures. Further, since the definition of lease does not include a sale (Section 2-106(1)) or retention or creation of a security interest (Section 1-201(37)), application is further limited; sales and security interests are governed by other Articles of this Act.

Finally, in recognition of the diversity of the transactions to be governed, the sophistication of many of the parties to these transactions, and the common law tradition as it applies to the bailment for hire or lease, freedom of contract has been preserved. DeKoven, Proceedings After Default by the Lessee Under a True Lease of Equipment, in 1C P. Coogan, W. Hogan, D. Vagts, Secured Transactions Under the Uniform Commercial Code, §§ 29B.02-2! (1986). Thus, despite the extensive regulatory scheme established by this Article, the parties to a lease will be able to create private rules to govern their transaction. Sections 2A-103(4) and 1-102(3). However, there are special rules in this Article governing consumer leases, as well as other state and federal statutes, that may further limit freedom of contract with respect to consumer leases.

A court may apply this Article by analogy to any transaction, regardless of form, that creates a lease of personal property other than goods, taking into account the expressed intentions of the parties to the transaction and any differences between a lease of goods and a lease of other property. Such application has precedent as the provisions of the Article on Sales (Article 2) have been applied by analogy to leases of goods. E.g., Hawkland, *The Impact of the Uniform Commercial Code on Equipment Leasing*, 1972 Ill. L.F. 446; Murray, *Under the Spreading Analogy of Article 2 of the Uniform Commercial Code*, 39 Fordham L. Rev. 447 (1971). Whether such application would be appropriate for other bailments of personal property, gratuitous or for hire, should be determined by the facts of each case. See *Mieske v. Bartell Drug Co.*, 92 Wash. 2d 40, 46-48, 593 P.2d 1308, 1312 (1979).

Further, parties to a transaction creating a lease of personal property other than goods, or a bailment of personal property may provide by agreement that this Article applies. Upholding the parties' choice is consistent with the spirit of this Article.

**Cross References:**

Sections 1-102(3), 1-201(37), Article 2, esp. Section 2-106(1), and Sections 2A-103(1)(h), 2A-103(1)(j) and 2A-103(4).

**Definitional Cross Reference:**

"Lease". Section 2A-103(1)(j).

**§ 2A-103. DEFINITIONS AND INDEX OF DEFINITIONS.**

(1) In this Article unless the context otherwise requires:

(a) "Buyer in ordinary course of business" means a person who in good faith and without knowledge that the sale to him or her is in violation of the ownership rights or security interest or leasehold interest of a third party in the goods, buys in ordinary course from a person in the business of selling goods of that kind but does not include a pawnbroker. "Buying" may be for cash or by exchange of other property or on secured or unsecured credit and includes receiving goods or documents of title under a pre-existing contract for sale but does not include a transfer in bulk or as security for or in total or partial satisfaction of a money debt.

(b) "Cancellation" occurs when either party puts an end to the lease contract for default by the other party.

(c) "Commercial unit" means such a unit of goods as by commercial usage is a single whole for purposes of lease and division of which materially impairs its character or value on the market or in use. A commercial unit may be a single article, as a machine, or a set of articles, as a suite of furniture or a line of machinery, or a quantity, as a gross or carload, or any other unit treated in use or in the relevant market as a single whole.

(d) "Conforming" goods or performance under a lease contract means goods or performance that are in accordance with the obligations under the lease contract.

(e) "Consumer lease" means a lease that a lessor regularly engaged in the business of leasing or selling makes to a lessee who is an individual and who takes under the lease primarily for a personal, family, or household purpose.

(f) "Fault" means wrongful act, omission, breach, or default.

(g) "Finance lease" means a lease with respect to which:

(i) The lessor does not select, manufacture, or supply the goods;

(ii) The lessor acquires the goods or the right to possession and use of the goods in connection with the lease; and (iii) One of the following occurs:

(A) The lessee receives a copy of the contract by which the lessor acquired the goods or the right to possession and use of the goods before signing the lease contract; (B) The lessee's approval of the contract by which the lessor acquired the goods or the right to possession and use of the goods is a condition to effectiveness of the lease contract

(C) The lessee, before signing the lease contract, receives an accurate and complete statement designating the promises and warranties, and any disclaimers of warranties, limitations

or modifications of remedies, or liquidated damages, including those of a third party, such as the manufacturer of the goods, provided to the lessor by the person supplying the goods in connection with or as part of the contract by which the lessor acquired the goods or the right to possession and use of the goods; or

(D) If the lease is not a consumer lease, the lessor, before the lessee signs the lease contract, informs the lessee in writing (a) of the identity of the person supplying the goods to the lessor, unless the lessee has selected that person and directed the lessor to acquire the goods or the right to possession and use of the goods from that person, (b) that the lessee is entitled under this Article to the promises and warranties, including those of any third party, provided to the lessor by the person supplying the goods in connection with or as part of the contract by which the lessor acquired the goods or the right to possession and use of the goods, and (c) that the lessee may communicate with the person supplying the goods to the lessor and receive an accurate and complete statement of those promises and warranties, including any disclaimers and limitations of them or of remedies.

(h) "Goods" means all things that are movable at the time of identification to the lease contract, or are fixtures (Section 2A-309), but the term does not include money, documents, instruments, accounts, chattel paper, general intangibles, or minerals or the like, including oil and gas, before extraction. The term also includes the unborn young of animals.

(i) "Installment lease contract" means a lease contract that authorizes or requires the delivery of goods in separate lots to be separately accepted, even though the lease contract contains a clause "each delivery is a separate lease" or its equivalent.

(j) "Lease" means a transfer of the right to possession and use of goods for a term in return for consideration, but a sale, including a sale on approval or a sale or return, or retention or creation of a security interest is not a lease. Unless the context clearly indicates otherwise, the term includes a sublease.

(k) "Lease agreement" means the bargain, with respect to the lease, of the lessor and the lessee in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance as provided in this Article. Unless the context clearly indicates otherwise, the term includes a sublease agreement.

(l) "Lease contract" means the total legal obligation that results from the lease agreement as affected by this Article and any other applicable rules of law. Unless the context clearly indicates otherwise, the term includes a sublease contract.

(m) "Leasehold interest" means the interest of the lessor or the lessee under a lease contract.

(n) "Lessee" means a person who acquires the right to possession and use of goods under a lease. Unless the context clearly indicates otherwise, the term includes a sublessee.

(o) "Lessee in ordinary course of business" means a person who in good faith and without knowledge that the lease to him or her is in violation of the ownership rights or security interest or leasehold interest of a third party in the goods leases in ordinary course from a person in the business of selling or leasing goods of that kind but does not include a pawnbroker. "Leasing" may be for cash or by exchange of other property or on secured or unsecured credit and includes receiving goods or documents of title under a pre-existing lease contract but does not include a transfer in bulk or as security for or in total or partial satisfaction of a money debt.

(p) "Lessor" means a person who transfers the right to possession and use of goods under a lease. Unless the context clearly indicates otherwise, the term includes a sublessor.

(q) "Lessor's residual interest" means the lessor's interest in the goods after expiration, termination, or cancellation of the lease contract.

(r) "Lien" means a charge against or interest in goods to secure payment of a debt or performance of an obligation, but the term does not include a security interest.

(s) "Lot" means a parcel or a single article that is the subject matter of a separate lease or delivery, whether or not it is sufficient to perform the lease contract.

(t) "Merchant lessee" means a lessee that is a merchant with respect to goods of the kind subject to the lease.

(u) "Present value" means the amount as of a date certain of one or more sums payable in the future, discounted to the date certain. The discount is determined by the interest rate specified by the parties if the rate was not manifestly unreasonable at the time the transaction was entered into; otherwise, the discount is determined by a commercially reasonable rate that takes into account the facts and circumstances of each case at the time the transaction was entered into.

(v) "Purchase" includes taking by sale, lease, mortgage, security interest, pledge, gift, or any other voluntary transaction creating an interest in goods.

(w) "Sublease" means a lease of goods the right to possession and use of which was acquired by the lessor as a lessee under an existing lease.

(x) "Supplier" means a person from whom a lessor buys or leases goods to be leased under a finance lease.

(y) "Supply contract" means a contract under which a lessor buys or leases goods to be leased.

(z) "Termination" occurs when either party pursuant to a power created by agreement or law puts an end to the lease contract otherwise than for default.

(2) Other definitions applying to this Article and the sections in which they appear are:

"Accessions". Section 2A-310(1).

"Construction mortgage". Section 2A-309(1)(d).

"Encumbrance". Section 2A-309(1)(e).

"Fixtures". Section 2A-309(1)(a).

"Fixture filing". Section 2A-309(1)(b).

"Purchase money lease". Section 2A-309(1)(c).

(3) The following definitions in other Articles apply to this Article:

"Account". Section 9-106.

"Between merchants". Section 2-104(3).

"Buyer". Section 2-103(1)(a).

"Chattel paper". Section 9-105(1)(b).

"Consumer goods". Section 9-109(1).

"Document". Section 9-105(1)(f).

"Entrusting". Section 2-403(3).

"General intangibles". Section 9-106.

"Good faith". Section 2-103(1)(b).

"Instrument". Section 9-105(1)(i).

"Merchant". Section 2-104(1).

"Mortgage". Section 9-105(1)(j).

"Pursuant to commitment". Section 9-105(1)(k).

"Receipt". Section 2-103(1)(c).

"Sale". Section 2-106(1).

“Sale on approval”. Section 2-326.

“Sale or return”. Section 2-326.

“Seller”. Section 2-103(1)(d).

(4) In addition, Article 1 contains general definitions and principles of construction and interpretation applicable throughout this Article.

#### OFFICIAL COMMENT

(a) “Buyer in ordinary course of business”. Section 1-201(9).

(b) “Cancellation”. Section 2-106(4). The effect of a cancellation is provided in Section 2A-505 (1).

(c) “Commercial unit”. Section 2-105(6).

(d) “Conforming”. Section 2-106(2).

(e) “Consumer lease”. New. This Article includes a subset of rules that applies only to consumer leases. Sections 2A-106, 2A-108(2), 2A-108(4), 2A-109(2), 2A-221, 2A-309, 2A-406, 2A-407, 2A-504(3)(b), and 2A-516(3)(b).

For a transaction to qualify as a consumer lease it must first qualify as a lease. Section 2A-103(1)(j). Note that this Article regulates the transactional elements of a lease, including a consumer lease; consumer protection statutes, present and future, and existing consumer protection decisions are unaffected by this Article. Section 2A-104(1)(c) and (2). Of course, Article 2A as state law also is subject to federal consumer protection law.

This definition is modeled after the definition of consumer lease in the Consumer Leasing Act, 15 U.S.C. §§ 1667 (1982), and in the Unif. Consumer Credit Code § 1.301(14), 7A U.L.A. 43 (1974). However, this definition of consumer lease differs from its models in several respects: the lessor can be a person regularly engaged either in the business of leasing or of selling goods, the lease need not be for a term exceeding four months, a lease primarily for an agricultural purpose is not covered, and whether there should be a limitation by dollar amount and its amount is left up to the individual states.

This definition focuses on the parties as well as the transaction. If a lease is within this definition, the lessor must be regularly engaged in the business of leasing or selling, and the lessee must be an individual not an organization; note that a lease to two or more individuals having a common interest through marriage or the like is not excluded as a lease to an organization under Section 1-201(28). The lessee must take the interest primarily for a personal, family or household purpose. If required by the enacting state, total payments under the lease contract, excluding payments for options to renew or buy, cannot exceed the figure designated.

(f) “Fault”. Section 1-201(16).

(g) “Finance Lease”. New. This Article includes a subset of rules that applies only to finance leases. Sections 2A-209, 2A-211(2), 2A-212(1), 2A-213, 2A- 219(1), 2A-220(1)(a), 2A-221, 2A-405(c), 2A-407, 2A- 516(2) and 2A-517(1)(a) and (2).

For a transaction to qualify as a finance lease it must first qualify as a lease. Section 2A-103(1)(j). Unless the lessor is comfortable that the transaction will qualify as a finance lease, the lease agreement should include provisions giving the lessor the benefits created by the subset of rules applicable to the transaction that qualifies as a finance lease under this Article.

A finance lease is the product of a three party transaction. The supplier manufactures or supplies the goods pursuant to the lessee’s specification, perhaps even pursuant to a purchase order, sales agreement or lease agreement between the supplier and the lessee. After the prospective finance lease is negotiated, a purchase order, sales agreement, or lease agreement is entered into by the lessor (as buyer or prime lessee) or an existing order, agreement or lease is assigned by the lessee to the lessor, and the lessor and the lessee then enter into a lease or sublease of the goods. Due to the limited function usually performed by the lessor, the lessee looks almost entirely to the supplier for representations, covenants and warranties. If a manufacturer’s warranty carries through, the lessee may also look to that. Yet, this definition does not restrict the lessor’s function solely to the supply of funds; if the lessor undertakes or performs other functions, express warranties, covenants and the common law will protect the

lessee.

This definition focuses on the transaction, not the status of the parties; to avoid confusion it is important to note that in other contexts, e.g., tax and accounting, the term finance lease has been used to connote different types of lease transactions, including leases that are disguised secured transactions. M. Rice, Equipment Financing, 62-71 (1981). A lessor who is a merchant with respect to goods of the kind subject to the lease may be a lessor under a finance lease. Many leases that are leases back to the seller of goods (Section 2A-308(3)) will be finance leases. This conclusion is easily demonstrated by a hypothetical. Assume that B has bought goods from C pursuant to a sales contract. After delivery to and acceptance of the goods by B, B negotiates to sell the goods to A and simultaneously to lease the goods back from A, on terms and conditions that, we assume, will qualify the transaction as a lease. Section 2A-103(1)(j). In documenting the sale and lease back, B assigns the original sales contract between B, as buyer, and C, as seller, to A. A review of these facts leads to the conclusion that the lease from A to B qualifies as a finance lease, as all three conditions of the definition are satisfied. Subparagraph (i) is satisfied as A, the lessor, had nothing to do with the selection, manufacture, or supply of the equipment. Subparagraph (ii) is satisfied as A, the lessor, bought the equipment at the same time that A leased the equipment to B, which certainly is in connection with the lease. Finally, subparagraph (iii) (A) is satisfied as A entered into the sales contract with B at the same time that A leased the equipment back to B. B, the lessee, will have received a copy of the sales contract in a timely fashion.

Subsection (i) requires the lessor to remain outside the selection, manufacture and supply of the goods; that is the rationale for releasing the lessor from most of its traditional liability. The lessor is not prohibited from possession, maintenance or operation of the goods, as policy does not require such prohibition. To insure the lessee's reliance on the supplier, and not on the lessor, subsection (ii) requires that the goods (where the lessor is the buyer of the goods) or that the right to possession and use of the goods (where the lessor is the prime lessee and the sublessor of the goods) be acquired in connection with the lease (or sublease) to qualify as a finance lease. The scope of the phrase "in connection with" is to be developed by the courts, case by case. Finally, as the lessee generally relies almost entirely upon the supplier for representations and covenants, and upon the supplier or a manufacturer, or both, for warranties with respect to the goods, subsection (iii) requires one of the following occur: (A) that the lessee receive a copy of the supply contract before signing the lease contract; (B) the lessee's approval of the supply contract is a condition to the effectiveness of the lease contract; (C) the lessee receive a statement describing the promises and warranties and any limitations relevant to the lessee before signing the lease contract; or (D) before signing the lease contract and except in a consumer lease, the lessee receive a writing identifying the supplier (unless the supplier was selected and required by the lessee) and the rights of the lessee under Section 2A-209, and advising the lessee a statement of promises and warranties is available from the supplier. Thus, even where oral supply orders or computer placed supply orders are compelled by custom and usage the transaction may still qualify as a finance lease if the lessee approves the supply contract before the lease contract is effective and such approval was a condition to the effectiveness of the lease contract. Moreover, where the lessor does not want the lessee to see the entire supply contract, including price information, the lessee may be provided with a separate statement of the terms of the supply contract relevant to the lessee; promises between the supplier and the lessor that do not affect the lessee need not be included. The statement can be a restatement of those terms or a copy of portions of the supply contract with the relevant terms clearly designated. Any implied warranties need not be designated, but a disclaimer or modification of remedy must be designated. A copy of any manufacturer's warranty is sufficient if that is the warranty provided. However, a copy of any Regulation M disclosure given pursuant to 12 C.F.R. [ 213.4(g) concerning warranties in itself is not sufficient since those disclosures need only briefly identify express warranties and need not include any disclaimer of warranty.

If a transaction does not qualify as a finance lease, the parties may achieve the same result by agreement; no negative implications are to be drawn if the transaction does not qualify. Further, absent the application of special rules (fraud, duress, and the like), a lease that qualifies as a finance lease and is assigned by the lessor or the lessee to a third party does not lose its status as a finance lease under this Article. Finally, this Article creates no special rule where the lessor is an affiliate of the supplier; whether the transaction qualifies as a finance lease will be determined by the facts of each case.

(h) "Goods". Section 9-105(1)(h). See Section 2A-103(3) for reference to the definition of "Account", "Chattel paper", "Document", "General intangibles" and "Instrument". See Section 2A-217 for determination of the time and manner of identification.

(i) "Installment lease contract". Section 2-612(1).

(j) "Lease". New. There are several reasons to codify the law with respect to leases of goods. An analysis of the case law as it applies to leases of goods suggests at least several significant issues to be resolved by codification. First and foremost is the definition of a lease. It is necessary to define lease to determine whether a transaction creates a lease or a security interest disguised as a lease. If the transaction creates a security interest disguised as a lease, the transaction will be governed by the Article on Secured Transactions (Article 9) and the lessor will be required to file a financing statement or take other action to perfect its interest in the goods against third parties. There is no such requirement with respect to leases under the common law and, except with respect to leases of fixtures (Section 2A-309), this Article imposes no such requirement. Yet the distinction between a lease and a security interest disguised as a lease is not clear from the case law at the time of the promulgation of this Article. DeKoven, Leases of Equipment: Puritan Leasing Company v. August, A Dangerous Decision, 12 U.S.F. L. Rev. 257 (1978).

At common law a lease of personal property is a bailment for hire. While there are several definitions of bailment for hire, all require a thing to be let and a price for the letting. Thus, in modern terms and as provided in this definition, a lease is created when the lessee agrees to furnish consideration for the right to the possession and use of goods over a specified period of time. Mooney, Personal Property Leasing: A Challenge, 36 Bus. Law. 1605, 1607 (1981). Further, a lease is neither a sale (Section 2-106(1)) nor a retention or creation of a security interest (Section 1-201(37)). Due to extensive litigation to distinguish true leases from security interests, an amendment to Section 1-201(37) has been promulgated with this Article to create a sharper distinction.

This section as well as Section 1-201(37) must be examined to determine whether the transaction in question creates a lease or a security interest. The following hypotheticals indicate the perimeters of the issue. Assume that A has purchased a number of copying machines, new, for \$1,000 each; the machines have an estimated useful economic life of three years. A advertises that the machines are available to rent for a minimum of one month and that the monthly rental is \$100.00. A intends to enter into leases where A provides all maintenance, without charge to the lessee. Further, the lessee will rent the machine, month to month, with no obligation to renew. At the end of the lease term the lessee will be obligated to return the machine to A's place of business. This transaction qualifies as a lease under the first half of the definition, for the transaction includes a transfer by A to a prospective lessee of possession and use of the machine for a stated term, month to month. The machines are goods (Section 2A-103(1)(h)). The lessee is obligated to pay consideration in return, \$100.00 for each month of the term.

However, the second half of the definition provides that a sale or a security interest is not a lease. Since there is no passing of title, there is no sale. Sections 2A-103(3) and 2-106(1). Under pre-Act security law this transaction would have created a bailment for hire or a true lease and not a conditional sale. Da Rocha v. Macomber, 330 Mass. 611, 614-15, 116 N.E.2d 139, 142 (1953). Under Section 1-201(37), as amended with the promulgation of this Article, the same result would follow. While the lessee is obligated to pay rent for the one month term of the lease, one of the other four conditions of the second paragraph of Section 1-201(37) must be met and none is. The term of the lease is one month and the economic life of the machine is 36 months; thus, subparagraph (a) of Section 1-201(37) is not now satisfied. Considering the amount of the monthly rent, absent economic duress or coercion, the lessee is not bound either to renew the lease for the remaining economic life of the goods or to become the owner. If the lessee did lease the machine for 36 months, the lessee would have paid the lessor \$3,600 for a machine that could have been purchased for \$1,000; thus, subparagraph (b) of Section 1-201(37) is not satisfied. Finally, there are no options; thus, subparagraphs (c) and (d) of Section 1-201(37) are not satisfied. This transaction creates a lease, not a security interest. However, with each renewal of the lease the facts and circumstances at the time of each renewal must be examined to determine if that conclusion remains accurate, as it is possible that a transaction that first creates a lease, later creates a security interest.

Assume that the facts are changed and that A requires each lessee to lease the goods for 36 months, with no right to terminate. Under pre-Act security law this transaction would have created a conditional sale, and not a bailment for hire or true lease. Hervey v. Rhode Island Locomotive Works, 93 U.S. 664, 672-73 (1876). Under this subsection, and Section 1-201(37), as amended with the inclusion of this Article in the Act, the same result would follow. The lessee's obligation for the term is not subject to termination by the lessee and the term is equal to the economic life of the machine.

Between these extremes there are many transactions that can be created. Some of the transactions have not been properly categorized by the courts in applying the 1978 and earlier Official Texts of Section 1-201(37). This subsection, together with Section 1-201(37), as amended

with the promulgation of this Article, draws a brighter line, which should create a clearer signal to the professional lessor and lessee.

(k) "Lease agreement". This definition is derived from the first sentence of Section 1-201(3). Because the definition of lease is broad enough to cover future transfers, lease agreement includes an agreement contemplating a current or subsequent transfer. Thus it was not necessary to make an express reference to an agreement for the future lease of goods (Section 2-106(1)). This concept is also incorporated in the definition of lease contract. Note that the definition of lease does not include transactions in ordinary building materials that are incorporated into an improvement on land. Section 2A-309(2).

The provisions of this Article, if applicable, determine whether a lease agreement has legal consequences; otherwise the law of bailments and other applicable law determine the same. Sections 2A-103(4) and 1-103.

(l) "Lease contract". This definition is derived from the definition of contract in Section 1-201(11). Note that a lease contract may be for the future lease of goods, since this notion is included in the definition of lease.

(m) "Leasehold interest". New.

(n) "Lessee". New.

(o) "Lessee in ordinary course of business". Section 1-201(9).

(p) "Lessor". New.

(q) "Lessor's residual interest". New.

(r) "Lien". New. This term is used in Section 2A-307 (Priority of Liens Arising by Attachment or Levy on, Security Interests in, and Other Claims to Goods).

(s) "Lot". Section 2-105(5).

(t) "Merchant lessee". New. This term is used in Section 2A-511 (Merchant Lessee's Duties as to Rightfully Rejected Goods). A person may satisfy the requirement of dealing in goods of the kind subject to the lease as lessor, lessee, seller, or buyer.

(u) "Present value". New. Authorities agree that present value should be used to determine fairly the damages payable by the lessor or the lessee on default. E.g., Taylor v. Commercial Credit Equip. Corp., 170 Ga. App. 322, 316 S.E.2d 788 (Ct. App. 1984). Present value is defined to mean an amount that represents the discounted value as of a date certain of one or more sums payable in the future. This is a function of the economic principle that a dollar today is more valuable to the holder than a dollar payable in two years. While there is no question as to the principle, reasonable people would differ as to the rate of discount to apply in determining the value of that future dollar today. To minimize litigation, this Article allows the parties to specify the discount or interest rate, if the rate was not manifestly unreasonable at the time the transaction was entered into. In all other cases, the interest rate will be a commercially reasonable rate that takes into account the facts and circumstances of each case, as of the time the transaction was entered into.

(v) "Purchase". Section 1-201(32). This definition omits the reference to lien contained in the definition of purchase in Article 1 (Section 1-201(32)). This should not be construed to exclude consensual liens from the definition of purchase in this Article; the exclusion was mandated by the scope of the definition of lien in Section 2A-103(1)(r). Further, the definition of purchaser in this Article adds a reference to lease; as purchase is defined in Section 1-201(32) to include any other voluntary transaction creating an interest in property, this addition is not substantive.

(w) "Sublease". New.

(x) "Supplier". New.

(y) "Supply contract". New.

(z) "Termination". Section 2-106(3). The effect of a termination is provided in Section 2A-505(2).

§ 2A-104. LEASES SUBJECT TO OTHER LAW.

(1) A lease, although subject to this Article, is also subject to any applicable:

(a) certificate of title statute of this Commonwealth: (list any certificate of title statutes covering automobiles, trailers, mobile homes, boats, farm tractors, and the like);

(b) certificate of title statute of another jurisdiction (Section 2A-105); or

(c) consumer protection statute of this Commonwealth, or final consumer protection decision of a court of this Commonwealth existing on the effective date of this Article.

(2) In case of conflict between this Article, other than Sections 2A-105, 2A-304(3) and 2A-305(3), and a statute or decision referred to in subsection (1), the statute or decision controls.

(3) Failure to comply with an applicable law has only the effect specified therein.

#### OFFICIAL COMMENT

Uniform Statutory Source: Sections 9-203(4) and 9-302(3)(b) and (c).

Changes: Substantially revised.

Purposes: 1. This Article creates a comprehensive scheme for the regulation of transactions that create leases. Section 2A-102. Thus, the Article supersedes all prior legislation dealing with leases, except to the extent set forth in this Section.

2. Subsection (1) states the general rule that a lease, although governed by the scheme of this Article, also may be governed by certain other applicable laws. This may occur in the case of a consumer lease. Section 2A-103(1)(e). Those laws may be state statutes existing prior to enactment of Article 2A or passed afterward. In this case, it is desirable for this Article to specify which statute controls. Or the law may be a pre-existing consumer protection decision. This Article preserves such decisions. Or the law may be a statute of the United States. Such a law controls without any statement in this Article under applicable principles of preemption.

An illustration of a statute of the United States that governs consumer leases is the Consumer Leasing Act, 15 U.S.C. § § 1667-1667(e) (1982) and its implementing regulation, Regulation M, 12 C.F.R. § 213 (1986); the statute mandates disclosures of certain lease terms, delimits the liability of a lessee in leasing personal property, and regulates the advertising of lease terms. An illustration of a state statute that governs consumer leases and which if adopted in the enacting state prevails over this Article is the Unif. Consumer Credit Code, which includes many provisions similar to those of the Consumer Leasing Act, e.g. Unif. Consumer Credit Code § § 3.202, 3.209, 3.401, 7A U.L.A. 108-09, 115, 125 (1974), as well as provisions in addition to those of the Consumer Leasing Act, e.g., Unif. Consumer Credit Code § 5.109 through § 5.111, 7A U.L.A. 171- 76 (1974) (the right to cure a default). Such statutes may define consumer lease so as to govern transactions within and without the definition of consumer lease under this Article.

3. Under subsection (2), subject to certain limited exclusions, in case of conflict a statute or a decision described in subsection (1) prevails over this Article. For example, a provision like Unif. Consumer Credit Code § 5.112, 7A U.L.A. 176 (1974), limiting self-help repossession, prevails over Section 2A-525(3).

4. Consumer protection in lease transactions is primarily left to other law. However, several provisions of this Article do contain special rules that may not be varied by agreement in the case of a consumer lease. E.g., Sections 2A-106, 2A-108, and 2A-109(2). Were that not so, the ability of the parties to govern their relationship by agreement together with the position of the lessor in a consumer lease too often could result in a one-sided lease agreement.

5. In construing this provision the reference to statute should be deemed to include applicable regulations. A consumer protection decision is "final" on the effective date of this Article if it is not subject to appeal on that date or, if subject to appeal, is not later reversed on appeal. Of course, such a decision can be overruled by a later decision or superseded by a later statute.

#### Cross References:

Sections 2A-103(1)(e), 2A-106, 2A-108, 2A-109(2) and 2A-525(3).

#### Definitional Cross Reference:

"Lease". Section 2A-103(1)(j).

§ 2A-105. TERRITORIAL APPLICATION OF ARTICLE TO GOODS  
COVERED BY CERTIFICATE OF TITLE.

Subject to the provisions of Sections 2A-304(3) and 2A-305(3), with respect to goods covered by a certificate of title issued under a statute of this State or of another jurisdiction, compliance and the effect of compliance or noncompliance with a certificate of title statute are governed by the law (including the conflict of laws rules) of the jurisdiction issuing the certificate until the earlier of (a) surrender of the certificate, or (b) four months after the goods are removed from that jurisdiction and thereafter until a new certificate of title is issued by another jurisdiction.

OFFICIAL COMMENT

Uniform Statutory Source: Section 9-103(2)(a) and (b).

Changes: Substantially revised. The provisions of the last sentence of Section 9-103(2)(b) have not been incorporated as it is superfluous in this context. The provisions of Section 9-103(2)(d) have not been incorporated because the problems dealt with are adequately addressed by this section and Sections 2A- 304(3) and 305(3).

Purposes: The new certificate referred to in (b) must be permanent, not temporary. Generally, the lessor or creditor whose interest is indicated on the most recently issued certificate of title will prevail over interests indicated on certificates issued previously by other jurisdictions. This provision reflects a policy that it is reasonable to require holders of interests in goods covered by a certificate of title to police the goods or risk losing their interests when a new certificate of title is issued by another jurisdiction.

Cross References:

Sections 2A-304(3), 2A-305(3), 9-103(2)(b) and 9- 103(2)(d).

Definitional Cross Reference:

"Goods". Section 2A-103(1)(h).

§§ 2A-106. LIMITATION ON POWER OF PARTIES TO CONSUMER LEASE TO CHOOSE  
APPLICABLE LAW AND JUDICIAL FORUM.

(1) If the law chosen by the parties to a consumer lease is that of a jurisdiction other than a jurisdiction in which the lessee resides at the time the lease agreement becomes enforceable or within 30 days thereafter or in which the goods are to be used, the choice is not enforceable.

(2) If the judicial forum chosen by the parties to a consumer lease is a forum that would not otherwise have jurisdiction over the lessee, the choice is not enforceable.

OFFICIAL COMMENT

Uniform Statutory Source: Unif. Consumer Credit Code

§§ 1.201(8), 7A U.L.A. 36 (1974).

Changes: Substantially revised.

Purposes: There is a real danger that a lessor may induce a consumer lessee to agree that the applicable law will be a jurisdiction that has little effective consumer protection, or to agree that the applicable forum will be a forum that is inconvenient for the lessee in the event of litigation. As a result, this section invalidates these choice of law or forum clauses, except where the law chosen is that of the state of the consumer's residence or where the goods will be kept, or the forum chosen is one that otherwise would have jurisdiction over the lessee.

Subsection (1) limits potentially abusive choice of law clauses in consumer leases. The 30-day rule in subsection (1) was suggested by Section 9-103(1)(c). This section has no effect on choice of law clauses in leases that are not consumer leases. Such clauses would be governed by other law.

Subsection (2) prevents enforcement of potentially abusive jurisdictional consent clauses in

consumer leases. By using the term judicial forum, this section does not limit selection of a nonjudicial forum, such as arbitration. This section has no effect on choice of forum clauses in leases that are not consumer leases; such clauses are, as a matter of current law, "prima facie valid". The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 10 (1972). Such clauses would be governed by other law, including the Model Choice of Forum Act (1968). Cross Reference:

Section 9-103(1)(c).

Definitional Cross Reference:

"Consumer lease". Section 2A-103(1)(e).

"Lease agreement". Section 2A-103(1)(k).

"Lessee". Section 2A-103(1)(n).

"Goods". Section 2A-103(1)(h).

"Party". Section 1-201(29).

#### § 2A-107. WAIVER OR RENUNCIATION OF CLAIM OR RIGHT

AFTER DEFAULT.

Any claim or right arising out of an alleged default or breach of warranty may be discharged in whole or in part without consideration by a written waiver or renunciation signed and delivered by the aggrieved party.

#### OFFICIAL COMMENT

Uniform Statutory Source: Section 1-107.

Changes: Revised to reflect leasing practices and terminology. This clause is used throughout the official comments to this Article to indicate the scope of change in the provisions of the Uniform Statutory Source included in the section; these changes range from one extreme, e.g., a significant difference in practice (a warranty as to merchantability is not implied in a finance lease (Section 2A-212)) to the other extreme, e.g., a modest difference in style or terminology (the transaction governed is a lease not a sale (Section 2A- 203)).

Cross References:

Sections 2A-203 and 2A-212. Definitional

Cross References:

"Aggrieved party". Section 1-201(2).

"Delivery". Section 1-201(14).

"Rights". Section 1-201(36).

"Signed". Section 1-201(39).

"Written". Section 1-201(46).

#### § 2A-108. UNCONSCIONABILITY.

(1) If the court as a matter of law finds a lease contract or any clause of a lease contract to have been unconscionable at the time it was made the court may refuse to enforce the lease contract, or it may enforce the remainder of the lease contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(2) With respect to a consumer lease, if the court as a matter of law finds that a lease contract or any clause of a lease contract has been induced by unconscionable conduct or that unconscionable conduct has occurred in the collection of a claim arising from a lease contract, the court may grant appropriate relief.

(3) Before making a finding of unconscionability under subsection (1) or (2), the court, on its own motion or that of a party, shall afford the parties a reasonable opportunity to present evidence as to the setting, purpose, and effect of the lease contract or clause thereof, or of the conduct.

(4) In an action in which the lessee claims unconscionability with respect to a consumer lease:

(a) If the court finds unconscionability under subsection (1) or (2), the court shall award reasonable attorney's fees to the lessee.

(b) If the court does not find unconscionability and the lessee claiming unconscionability has brought or maintained an action he or she knew to be groundless, the court shall award reasonable attorney's fees to the party against whom the claim is made.

(c) In determining attorney's fees, the amount of the recovery on behalf of the claimant under subsections (1) and (2) is not controlling.

#### OFFICIAL COMMENT

Uniform Statutory Source: Section 2-302 and Unif. Consumer Credit Code §§ 5.108, 7A U.L.A. 167-69 (1974).

Changes: Subsection (1) is taken almost verbatim from the provisions of Section 2-302(1). Subsection (2) is suggested by the provisions of Unif. Consumer Credit Code §§ 5.108(1), (2), 7A U.L.A. 167 (1974). Subsection (3), taken from the provisions of Section 2-302(2), has been expanded to cover unconscionable conduct. Unif. Consumer Credit Code §§ 5.108(3), 7A U.L.A. 167 (1974). The provision for the award of attorney's fees to consumers, subsection (4), covers unconscionability under subsection (1) as well as (2). Subsection (4) is modeled on the provisions of Unif. Consumer Credit Code §§ 5.108(6), 7A U.L.A. 169 (1974).

Purposes: Subsections (1) and (3) of this section apply the concept of unconscionability reflected in the provisions of Section 2-302 to leases. See *Dillman & Assocs. v. Capitol Leasing Co.*, 110 Ill. App. 3d 335, 342, 442 N.E.2d 311, 316 (App. Ct. 1982). Subsection (3) omits the adjective "commercial" found in subsection 2-302(2) because subsection (3) is concerned with all leases and the relevant standard of conduct is determined by the context.

The balance of the section is modeled on the provisions of Unif. Consumer Credit Code §§ 5.108, 7A U.L.A. 167-69 (1974). Thus subsection (2) recognizes that a consumer lease or a clause in a consumer lease may not itself be unconscionable but that the agreement would never have been entered into if unconscionable means had not been employed to induce the consumer to agree. To make a statement to induce the consumer to lease the goods, in the expectation of invoking an integration clause in the lease to exclude the statement's admissibility in a subsequent dispute, may be unconscionable. Subsection (2) also provides a consumer remedy for unconscionable conduct, such as using or threatening to use force or violence, in the collection of a claim arising from a lease contract. These provisions are not exclusive. The remedies of this section are in addition to remedies otherwise available for the same conduct under other law, for example, an action in tort for abusive debt collection or under another statute of this State for such conduct. The reference to appropriate relief in subsection (2) is intended to foster liberal administration of this remedy. Sections 2A-103(4) and 1-106(1).

Subsection (4) authorizes an award of reasonable attorney's fees if the court finds unconscionability with respect to a consumer lease under subsections (1) or (2). Provision is also made for recovery by the party against whom the claim was made if the court does not find unconscionability and does find that the consumer knew the action to be groundless. Further, subsection (4)(b) is independent of, and thus will not override, a term in the lease agreement that provides for the payment of attorney's fees.

#### Cross References:

Sections 1-106(1), 2-302 and 2A-103(4).

#### Definitional Cross Reference:

"Action". Section 1-201(1).

"Consumer lease". Section 2A-103(1)(e).

"Lease contract". Section 2A-103(1)(l).

"Lessee". Section 2A-103(1)(n).

"Party". Section 1-201(29).

#### § 2A-109. OPTION TO ACCELERATE AT WILL.

(1) A term providing that one party or his or her successor in interest may accelerate payment or performance or require collateral or additional collateral "at will" or "when he or she deems himself or herself insecure" or in words of similar import must be construed to mean that he or she has power to do so only if he or she in good faith believes that the prospect of payment or performance is impaired.

(2) With respect to a consumer lease, the burden of establishing good faith under subsection (1) is on the party who exercised the power; otherwise the burden of establishing lack of good faith is on the party against whom the power has been exercised.

#### OFFICIAL COMMENT

Uniform Statutory Source: Section 1-208 and Unif. Consumer Credit Code §§ 5.109(2), 7A U.L.A. 171 (1974).

Purposes: Subsection (1) reflects modest changes in style to the provisions of the first sentence of Section 1-208.

Subsection (2), however, reflects a significant change in the provisions of the second sentence of Section 1-208 by creating a new rule with respect to a consumer lease. A lease provision allowing acceleration at the will of the lessor or when the lessor deems itself insecure is of critical importance to the lessee. In a consumer lease it is a provision that is not usually agreed to by the parties but is usually mandated by the lessor. Therefore, where its invocation depends not on specific criteria but on the discretion of the lessor, its use should be regulated to prevent abuse. Subsection (1) imposes a duty of good faith upon its exercise. Subsection (2) shifts the burden of establishing good faith to the lessor in the case of a consumer lease, but not otherwise. Cross Reference:

Section 1-208.

Definitional Cross Reference:

"Burden of establishing". Section 1-201(8).

"Consumer lease". Section 2A-103(1)(e).

"Good faith". Sections 1-201(19) and 2-103(1)(b).

"Party". Section 1-201(29).

"Term". Section 1-201(42).

#### PART 2. FORMATION AND CONSTRUCTION OF LEASE CONTRACT

##### § 2A-201. STATUTE OF FRAUDS.

(1) A lease contract is not enforceable by way of action or defense unless:

(a) the total payments to be made under the lease contract, excluding payments for options to renew or buy, are less than \$1,000; or

(b) there is a writing, signed by the party against whom enforcement is sought or by that party's authorized agent, sufficient to indicate that a lease contract has been made between the parties and to describe the goods leased and the lease term.

(2) Any description of leased goods or of the lease term is sufficient and satisfies subsection (1)(b), whether or not it is specific, if it reasonably identifies what is described.

(3) A writing is not insufficient because it omits or incorrectly states a term agreed upon, but the lease contract is not enforceable under subsection (1)(b) beyond the lease term and the

quantity of goods shown in the writing.

(4) A lease contract that does not satisfy the requirements of subsection (1), but which is valid in other respects, is enforceable:

(a) if the goods are to be specially manufactured or obtained for the lessee and are not suitable for lease or sale to others in the ordinary course of the lessor's business, and the lessor, before notice of repudiation is received and under circumstances that reasonably indicate that the goods are for the lessee, has made either a substantial beginning of their manufacture or commitments for their procurement;

(b) if the party against whom enforcement is sought admits in that party's pleading, testimony or otherwise in court that a lease contract was made, but the lease contract is not enforceable under this provision beyond the quantity of goods admitted; or

(c) with respect to goods that have been received and accepted by the lessee.

(5) The lease term under a lease contract referred to in subsection (4) is:

(a) if there is a writing signed by the party against whom enforcement is sought or by that party's authorized agent specifying the lease term, the term so specified;

(b) if the party against whom enforcement is sought admits in that party's pleading, testimony, or otherwise in court a lease term, the term so admitted; or

(c) a reasonable lease term.

#### OFFICIAL COMMENT

Uniform Statutory Source: Sections 2-201, 9-203(1) and 9-110.

Changes: This section is modeled on Section 2-201, with changes to reflect the differences between a lease contract and a contract for the sale of goods. In particular, subsection (1)(b) adds a requirement that the writing "describe the goods leased and the lease term", borrowing that concept, with revisions, from the provisions of Section 9-203(1)(a). Subsection (2), relying on the statutory analogue in Section 9-110, sets forth the minimum criterion for satisfying that requirement.

Purposes: The changes in this section conform the provisions of Section 2-201 to custom and usage in lease transactions. Section 2-201(2), stating a special rule between merchants, was not included in this section as the number of such transactions involving leases, as opposed to sales, was thought to be modest. Subsection (4) creates no exception for transactions where payment has been made and accepted. This represents a departure from the analogue, Section 2-201(3)(c). The rationale for the departure is grounded in the distinction between sales and leases. Unlike a buyer in a sales transaction, the lessee does not tender payment in full for goods delivered, but only payment of rent for one or more months. It was decided that, as a matter of policy, this act of payment is not a sufficient substitute for the required memorandum. Subsection (5) was needed to establish the criteria for supplying the lease term if it is omitted, as the lease contract may still be enforceable under subsection (4).

#### Cross References:

Sections 2-201, 9-110 and 9-203(1)(a).

#### Definitional

#### Cross References:

"Action". Section 1-201(1).

"Agreed". Section 1-201(3).

"Buying". Section 2A-103(1)(a).

"Goods". Section 2A-103(1)(h).

"Lease". Section 2A-103(1)(j).

“Lease contract”. Section 2A-103(1)(l).

“Lessee”. Section 2A-103(1)(n).

“Lessor”. Section 2A-103(1)(p).

“Notice”. Section 1-201(25).

“Party”. Section 1-201(29).

“Sale”. Section 2-106(1).

“Signed”. Section 1-201(39).

“Term”. Section 1-201(42).

“Writing”. Section 1-201(46).

#### § 2A-202. FINAL WRITTEN EXPRESSION: PAROL OR EXTRINSIC EVIDENCE.

Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented:

(a) by course of dealing or usage of trade or by course of performance; and

(b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

#### OFFICIAL COMMENT

Uniform Statutory Source: Section 2-202.

Definitional

Cross References:

“Agreement”. Section 1-201(3).

“Course of dealing”. Section 1-205.

“Party”. Section 1-201(29).

“Term”. Section 1-201(42).

“Usage of trade”. Section 1-205.

“Writing”. Section 1-201(46).

#### § 2A-203. SEALS INOPERATIVE.

The affixing of a seal to a writing evidencing a lease contract or an offer to enter into a lease contract does not render the writing a sealed instrument and the law with respect to sealed instruments does not apply to the lease contract or offer.

#### OFFICIAL COMMENT

Uniform Statutory Source: Section 2-203.

Changes: Revised to reflect leasing practices and terminology. Definitional

Cross References:

“Lease contract”. Section 2A-103(1)(l).

“Writing”. Section 1-201(46).

§ 2A-204. FORMATION IN GENERAL.

(1) A lease contract may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of a lease contract.

(2) An agreement sufficient to constitute a lease contract may be found although the moment of its making is undetermined.

(3) Although one or more terms are left open, a lease contract does not fail for indefiniteness if the parties have intended to make a lease contract and there is a reasonably certain basis for giving an appropriate remedy.

OFFICIAL COMMENT

Uniform Statutory Source: Section 2-204.

Changes: Revised to reflect leasing practices and terminology. Definitional

Cross References:

“Agreement”. Section 1-201(3).

“Lease contract”. Section 2A-103(1)(l).

“Party”. Section 1-201(29).

“Remedy”. Section 1-201(34).

“Term”. Section 1-201(42).

§ 2A-205. FIRM OFFERS.

An offer by a merchant to lease goods to or from another person in a signed writing that by its terms gives assurance it will be held open is not revocable, for lack of consideration, during the time stated or, if no time is stated, for a reasonable time, but in no event may the period of irrevocability exceed 3 months. Any such term of assurance on a form supplied by the offeree must be separately signed by the offeror.

OFFICIAL COMMENT

Uniform Statutory Source: Section 2-205.

Changes: Revised to reflect leasing practices and terminology. Definitional

Cross References:

“Goods”. Section 2A-103(1)(h).

“Lease”. Section 2A-103(1)(j).

“Merchant”. Section 2-104(1).

“Person”. Section 1-201(30).

“Reasonable time”. Section 1-204(1) and (2).

“Signed”. Section 1-201(39).

“Term”. Section 1-201(42).

“Writing”. Section 1-201(46).

§ 2A-206. OFFER AND ACCEPTANCE IN FORMATION OF LEASE CONTRACT.

(1) Unless otherwise unambiguously indicated by the language or circumstances, an offer to make a lease contract must be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances.

(2) If the beginning of a requested performance is a reasonable mode of acceptance, an offeror who is not notified of acceptance within a reasonable time may treat the offer as having lapsed before acceptance.

**OFFICIAL COMMENT**

Uniform Statutory Source: Section 2-206(1)(a) and (2).

Changes: Revised to reflect leasing practices and terminology. Definitional

Cross References:

“Lease contract”. Section 2A-103(1)(l).

“Notifies”. Section 1-201(26).

“Reasonable time”. Section 1-204(1) and (2).

**§ 2A-207. COURSE OF PERFORMANCE OR PRACTICAL CONSTRUCTION.**

(1) If a lease contract involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection is relevant to determine the meaning of the lease agreement.

(2) The express terms of a lease agreement and any course of performance, as well as any course of dealing and usage of trade, must be construed whenever reasonable as consistent with each other; but if that construction is unreasonable, express terms control course of performance, course of performance controls both course of dealing and usage of trade, and course of dealing controls usage of trade.

(3) Subject to the provisions of Section 2A-208 on modification and waiver, course of performance is relevant to show a waiver or modification of any term inconsistent with the course of performance.

**OFFICIAL COMMENT**

Uniform Statutory Source: Sections 2-208 and 1-205(4).

Changes: Revised to reflect leasing practices and terminology, except that subsection (2) was further revised to make the subsection parallel the provisions of Section 1-205(4) by adding that course of dealing controls usage of trade.

Purposes: The section should be read in conjunction with Section 2A-208. In particular, although a specific term may control over course of performance as a matter of lease construction under subsection (2), subsection (3) allows the same course of dealing to show a waiver or modification, if Section 2A-208 is satisfied.

Cross References:

Sections 1-205(4), 2-208 and 2A-208. Definitional

Cross References:

“Course of dealing”. Section 1-205.

“Knowledge”. Section 1-201(25).

“Lease agreement”. Section 2A-103(1)(k).

“Lease contract”. Section 2A-103(1)(l).

“Party”. Section 1-201(29).

“Term”. Section 1-201(42).

“Usage of trade”. Section 1-205.

§ 2A-208. MODIFICATION, RESCISSION AND WAIVER.

(1) An agreement modifying a lease contract needs no consideration to be binding.

(2) A signed lease agreement that excludes modification or rescission except by a signed writing may not be otherwise modified or rescinded, but, except as between merchants, such a requirement on a form supplied by a merchant must be separately signed by the other party.

(3) Although an attempt at modification or rescission does not satisfy the requirements of subsection (2), it may operate as a waiver.

(4) A party who has made a waiver affecting an executory portion of a lease contract may retract the waiver by reasonable notification received by the other party that strict performance will be required of any term waived, unless the retraction would be unjust in view of a material change of position in reliance on the waiver.

OFFICIAL COMMENT

Uniform Statutory Source: Section 2-209.

Changes: Revised to reflect leasing practices and terminology, except that the provisions of subsection 2-209(3) were omitted.

Purposes: Section 2-209(3) provides that "the requirements of the statute of frauds section of this Article (Section 2-201) must be satisfied if the contract as modified is within its provisions." This provision was not incorporated as it is unfair to allow an oral modification to make the entire lease contract unenforceable, e.g. if the modification takes it a few dollars over the dollar limit. At the same time, the problem could not be solved by providing that the lease contract would still be enforceable in its pre-modification state (if it then satisfied the statute of frauds) since in some cases that might be worse than no enforcement at all. Resolution of the issue is left to the courts based on the facts of each case.

Cross References:

Sections 2-201 and 2-209. Definitional Cross References:

"Agreement". Section 1-201(3).

"Between merchants". Section 2-104(3).

"Lease agreement". Section 2A-103(1)(k).

"Lease contract". Section 2A-103(1)(l).

"Merchant". Section 2-104(1).

"Notification". Section 1-201(26).

"Party". Section 1-201(29).

"Signed". Section 1-201(39).

"Term". Section 1-201(42).

"Writing". Section 1-201(46).

§ 2A-209. LESSEE UNDER FINANCE LEASE AS BENEFICIARY OF SUPPLY CONTRACT.

(1) The benefit of a supplier's promises to the lessor including those of any third party provided in connection with or as part of the supply contract and of all warranties, whether express or implied, under the supply contract, extends to the lessee to the extent of the lessee's leasehold interest under a finance lease related to the supply contract, but is subject to the terms of the warranty and of the supply contract and all defenses or claims arising therefrom.

(2) The extension of the benefit of a supplier's promises and of warranties to the lessee (Section 2A-209(1)) does not: (i) modify the rights and obligations of the parties to the supply contract, whether arising therefrom or otherwise, or (ii) impose any duty or liability under the supply contract on the lessee.

(3) Any modification or rescission of the supply contract by the supplier and the lessor is effective between the supplier and the lessee unless, before the modification or rescission, the supplier has received notice that the lessee has entered into a finance lease related to the supply contract. If the modification or rescission is effective between the supplier and the lessee, the lessor is deemed to have assumed, in addition to the obligations of the lessor to the lessee under the lease contract, promises of the supplier to the lessor and warranties that were so modified or rescinded as they existed and were available to the lessee before modification or rescission.

(4) In addition to the extension of the benefit of the supplier's promises and of warranties to the lessee under subsection (1), the lessee retains all rights that the lessee may have against the supplier which arise from an agreement between the lessee and the supplier or under other law.

#### OFFICIAL COMMENT

Uniform Statutory Source: None.

Changes: This section is modeled on Section 9-318, the Restatement (Second) of Contracts § 302-315 (1981), and leasing practices. See Earman Oil Co. v. Burroughs Corp., 625 F.2d 1291, 1296-97 (5th Cir. 1980).

Purposes: 1. The function performed by the lessor in a finance lease is extremely limited. Section 2A-103(1)(g). The lessee looks to the supplier of the goods for warranties and the like or, in some cases as to warranties, to the manufacturer if a warranty made by that person is passed on. That expectation is reflected in subsection (1), which is self-executing. As a matter of policy, the operation of this provision may not be excluded, modified or limited; however, an exclusion, modification, or limitation of any term of the supply contract or warranty, including any with respect to rights and remedies, and any defense or claim such as a statute of limitations effective against the lessor as the acquiring party under the supply contract, is also effective against the lessee as the beneficiary designated under this provision. For example the supplier is not precluded from excluding or modifying an express or implied warranty under a supply contract. Sections 2-312(2) and 2-316 or section 2A-214. Further, the supplier is not precluded from limiting the rights and remedies of the lessor and from liquidating damages. Sections 2-718 and 2-719 or Sections 2A-503 and 2A-504. If the supply contract excludes or modifies warranties, limits remedies, or liquidates damages with respect to the lessor, such provisions are enforceable against the lessee as beneficiary. Thus, only selective discrimination against the beneficiaries designated under this section is precluded, i.e., exclusion of the supplier's liability to the lessee with respect to warranties made to the lessor. This section does not affect the development of other law with respect to products liability.

2. Enforcement of this benefit is by action. Sections 2A-103(4) and 1-106(2).

3. The benefit extended by these provisions is not without a price, as this Article also provides in the case of a finance lease that is not a consumer lease that the lessee's promises to the lessor under the lease contract become irrevocable and independent upon the lessee's acceptance of the goods. Section 2A-407.

4. Subsection (2) limits the effect of subsection (1) on the supplier and the lessor by preserving, notwithstanding the transfer of the benefits of the supply contract to the lessee, all of the supplier's and the lessor's rights and obligations with respect to each other and others; it further absolves the lessee of any duties with respect to the supply contract that might have been inferred from the extension of the benefits thereof.

5. Subsections (2) and (3) also deal with difficult issues related to modification or rescission of the supply contract. Subsection (2) states a rule that determines the impact of the statutory extension of benefit contained in subsection (1) upon the relationship of the parties to the supply contract and, in a limited respect, upon the lessee. This statutory extension of benefit, like that contained in Sections 2A-216 and 2-318, is not a modification of the supply contract by the parties. Thus, subsection (3) states the rules that apply to a modification or rescission of the supply contract by the parties. Subsection (3) provides that a modification or rescission is not effective between the supplier and the lessee if, before the modification or rescission occurs, the supplier received notice that the lessee has entered into the finance lease. On the other hand, if the modification or rescission is effective, then to the extent of the modification or rescission of the benefit or warranty, the lessor by statute assumes an obligation to provide to the lessee that which the lessee would otherwise lose. For example, assume a reduction in an express warranty from four years to one year. No prejudice to the lessee may occur if the goods perform as agreed. If, however, there is a breach of the express warranty after one year and before four years pass, the lessor is liable. A remedy for any prejudice to the lessee

because of the bifurcation of the lessee's recourse resulting from the action of the supplier and the lessor is left to resolution by the courts based on the facts of each case.

6. Subsection (4) makes it clear that the rights granted to the lessee by this section do not displace any rights the lessee otherwise may have against the supplier.

Cross References:

Sections 2A-103(1)(g), 2A-407 and 9-318.

Definitional:

Cross References:

"Action". Section 1-201(1).

"Finance lease". Section 2A-103(1)(g).

"Leasehold interest". Section 2A-103(1)(m).

"Lessee". Section 2A-103(1)(n).

"Lessor". Section 2A-103(1)(p).

"Notice". Section 1-201(25).

"Party". Section 1-201(29).

"Rights". Section 1-201(36).

"Supplier". Section 2A-103(1)(x).

"Supply contract". Section 2A-103(1)(y).

"Term". Section 1-201(42).

§ 2A-210. EXPRESS WARRANTIES.

(1) Express warranties by the lessor are created as follows:

(a) Any affirmation of fact or promise made by the lessor to the lessee which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods will conform to the affirmation or promise.

(b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods will conform to the description.

(c) Any sample or model that is made part of the basis of the bargain creates an express warranty that the whole of the goods will conform to the sample or model.

(2) It is not necessary to the creation of an express warranty that the lessor use formal words, such as "warrant" or "guarantee," or that the lessor have a specific intention to make a

warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the lessor's opinion or commendation of the goods does not create a warranty.

**OFFICIAL COMMENT**

Uniform Statutory Source: Section 2-313.

Changes: Revised to reflect leasing practices and terminology.

Purposes: All of the express and implied warranties of the Article on Sales (Article 2) are included in this Article, revised to reflect the differences between a sale of goods and a lease of goods. Sections 2A-210 through 2A-216. The lease of goods is sufficiently similar to the sale of goods to justify this decision. Hawkland, *The Impact of the Uniform Commercial Code on Equipment Leasing*, 1972 Ill. L.F. 446, 459-60. Many state and federal courts have reached the same conclusion.

Value of the goods, as used in subsection (2), includes rental value.

Cross References:

Article 2, esp. Section 2-313, and Sections 2A-210 through 2A-216.

Definitional

Cross References:

"Conforming". Section 2A-103(1)(d).

"Goods". Section 2A-103(1)(h).

"Lessee". Section 2A-103(1)(n).

"Lessor". Section 2A-103(1)(p).

"Value". Section 1-201(44).

**§ 2A-211. WARRANTIES AGAINST INTERFERENCE AND AGAINST INFRINGEMENT;  
LESSEE'S OBLIGATION AGAINST INFRINGEMENT.**

(1) There is in a lease contract a warranty that for the lease term no person holds a claim to or interest in the goods that arose from an act or omission of the lessor, other than a claim by way of infringement or the like, which will interfere with the lessee's enjoyment of its leasehold interest.

(2) Except in a finance lease there is in a lease contract by a lessor who is a merchant regularly dealing in goods of the kind a warranty that the goods are delivered free of the rightful claim of any person by way of infringement or the like.

(3) A lessee who furnishes specifications to a lessor or a supplier shall hold the lessor and the supplier harmless against any claim by way of infringement or the like that arises out of compliance with the specifications.

**OFFICIAL COMMENT**

Uniform Statutory Source: Section 2-312.

Changes: This section is modeled on the provisions of Section 2-312, with modifications to reflect the limited interest transferred by a lease contract and the total interest transferred by a sale. Section 2-312(2), which is omitted here, is incorporated in Section 2A-214. The warranty of quiet possession was abolished with respect to sales of goods. Section 2-312 official comment 1. Section 2A-211(1) reinstates the warranty of quiet possession with respect to leases. Inherent in the nature of the limited interest transferred by the lease - the right to possession and use of the goods - is the need of the lessee for protection greater than that afforded to the buyer. Since the scope of the protection is limited to claims or interests that arose from acts or omissions of the lessor, the lessor will be in position to evaluate the potential cost, certainly a far better position than that enjoyed by the lessee. Further, to the extent the market will allow, the lessor can attempt to pass on the anticipated additional cost to the lessee in the guise of higher rent.

Purposes: General language was chosen for subsection (1) that expresses the essence of the lessee's expectation: with an exception for infringement and the like, no person holding a claim or interest that arose from an act or omission of the lessor will be able to interfere with the lessee's use and enjoyment of the goods for the lease term. Subsection (2), like other similar provisions in later sections, excludes the finance lessor from extending this warranty; with few exceptions (Sections 2A-210 and 2A-211(1)), the lessee under a finance lease is to look to the supplier for warranties and the like. Subsections (2) and (3) are derived from Section 2-312(3). These subsections, as well as the analogue, should be construed so that applicable principles of law and equity supplement their provisions. Sections 2A-103(4) and 1-103.

Cross References:

Sections 2-312, 2-312(1), 2-312(2), 2-312 official comment 1, 2A-210, 2A-211(1) and 2A-214.

Definitional

Cross References:

"Delivery". Section 1-201(14).

"Finance lease". Section 2A-103(1)(g).

"Goods". Section 2A-103(1)(h).

"Lease". Section 2A-103(1)(j).

"Lease contract". Section 2A-103(1)(l).

"Leasehold interest". Section 2A-103(1)(m).

"Lessee". Section 2A-103(1)(n).

"Lessor". Section 2A-103(1)(p).

"Merchant". Section 2-104(1).

"Person". Section 1-201(30).

"Supplier". Section 2A-103(1)(x).

**§ 2A-212. IMPLIED WARRANTY OF MERCHANTABILITY.**

(1) Except in a finance lease, a warranty that the goods will be merchantable is implied in a lease contract if the lessor is a merchant with respect to goods of that kind.

(2) Goods to be merchantable must be at least such as

(a) pass without objection in the trade under the description in the lease agreement;

(b) in the case of fungible goods, are of fair average quality within the description;

(c) are fit for the ordinary purposes for which goods of that type are used;

(d) run, within the variation permitted by the lease agreement, of even kind, quality, and quantity within each unit and among all units involved;

(e) are adequately contained, packaged, and labeled as the lease agreement may require; and

(f) conform to any promises or affirmations of fact made on the container or label.

(3) Other implied warranties may arise from course of dealing or usage of trade.

**OFFICIAL COMMENT**

Uniform Statutory Source: Section 2-314.

Changes: Revised to reflect leasing practices and terminology. E.g., Glenn Dick Equip. Co. v.

Galey Constr., Inc., 97 Idaho 216, 225, 541 P.2d 1184, 1193 (1975) (implied warranty of merchantability (Article 2) extends to lease transactions).

Definitional

Cross References:

“Conforming”. Section 2A-103(1)(d).

“Course of dealing”. Section 1-205.

“Finance lease”. Section 2A-103(1)(g).

“Fungible”. Section 1-201(17).

“Goods”. Section 2A-103(1)(h).

“Lease agreement”. Section 2A-103(1)(k).

“Lease contract”. Section 2A-103(1)(l).

“Lessor”. Section 2A-103(1)(p).

“Merchant”. Section 2-104(1).

“Usage of trade”. Section 1-205.

§ 2A-213. IMPLIED WARRANTY OF FITNESS FOR PARTICULAR PURPOSE.

Except in a finance lease, if the lessor at the time the lease contract is made has reason to know of any particular purpose for which the goods are required and that the lessee is relying on the lessor’s skill or judgment to select or furnish suitable goods, there is in the lease contract an implied warranty that the goods will be fit for that purpose.

OFFICIAL COMMENT

Uniform Statutory Source: Section 2-315.

Changes: Revised to reflect leasing practices and terminology. E.g., All-States Leasing Co. v. Bass, 96 Idaho 873, 879, 538 P.2d 1177, 1183 (1975) (implied warranty of fitness for a particular purpose (Article 2) extends to lease transactions).

Definitional

Cross References:

“Finance lease”. Section 2A-103(1)(g).

“Goods”. Section 2A-103(1)(h).

“Knows”. Section 1-201(25).

“Lease contract”. Section 2A-103(1)(l).

“Lessee”. Section 2A-103(1)(n).

“Lessor”. Section 2A-103(1)(p).

§ 2A-214. EXCLUSION OR MODIFICATION OF WARRANTIES.

(1) Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit a warranty must be construed wherever reasonable as consistent with each other; but, subject to the provisions of Section 2A-202 on parol or extrinsic evidence, negation or limitation is inoperative to the extent that the construction is unreasonable.

(2) Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention “merchantability”, be by a writing, and be conspicuous. Subject to subsection (3), to exclude or modify any implied warranty of fitness the

exclusion must be by a writing and be conspicuous. Language to exclude all implied warranties of fitness is sufficient if it is in writing, is conspicuous and states, for example, "There is no warranty that the goods will be fit for a particular purpose".

(3) Notwithstanding subsection (2), but subject to subsection (4),

(a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is," or "with all faults," or by other language that in common understanding calls the lessee's attention to the exclusion of warranties and makes plain that there is no implied warranty, if in writing and conspicuous;

(b) if the lessee before entering into the lease contract has examined the goods or the sample or model as fully as desired or has refused to examine the goods, there is no implied warranty with regard to defects that an examination ought in the circumstances to have revealed; and

(c) an implied warranty may also be excluded or modified by course of dealing, course of performance, or usage of trade.

(4) To exclude or modify a warranty against interference or against infringement (Section 2A-211) or any part of it, the language must be specific, be by a writing, and be conspicuous, unless the circumstances, including course of performance, course of dealing, or usage of trade, give the lessee reason to know that the goods are being leased subject to a claim or interest of any person.

#### OFFICIAL COMMENT

Uniform Statutory Source: Sections 2-316 and 2-312(2).

Changes: Subsection (2) requires that a disclaimer of the warranty of merchantability be conspicuous and in writing as is the case for a disclaimer of the warranty of fitness; this is contrary to the rule stated in Section 2-316(2) with respect to the disclaimer of the warranty of merchantability. This section also provides that to exclude or modify the implied warranty of merchantability, fitness or against interference or infringement the language must be in writing and conspicuous. There are, however, exceptions to the rule. E.g., course of dealing, course of performance, or usage of trade may exclude or modify an implied warranty. Section 2A-214(3)(c). The analogue of Section 2-312(2) has been moved to subsection (4) of this section for a more unified treatment of disclaimers; there is no policy with respect to leases of goods that would justify continuing certain distinctions found in the Article on Sales (Article 2) regarding the treatment of the disclaimer of various warranties. Compare Sections 2-312(2) and 2-316(2). Finally, the example of a disclaimer of the implied warranty of fitness stated in subsection (2) differs from the analogue stated in Section 2-316(2); this example should promote a better understanding of the effect of the disclaimer.

Purposes: These changes were made to reflect leasing practices. E.g., FMC Finance Corp. v. Murphree, 632 F.2d 413, 418 (5th Cir. 1980) (disclaimer of implied warranty under lease transactions must be conspicuous and in writing). The omission of the provisions of Section 2-316(4) was not substantive. Sections 2A-503 and 2A-504.

#### Cross References:

Article 2, esp. Sections 2-312(2) and 2-316, and Sections 2A-503 and 2A-504.

#### Definitional

#### Cross References:

"Conspicuous". Section 1-201(10).

"Course of dealing". Section 1-205.

"Fault". Section 2A-103(1)(f).

"Goods". Section 2A-103(1)(h).

"Knows". Section 1-201(25).

"Lease". Section 2A-103(1)(j).

“Lease contract”. Section 2A-103(1)(l).

“Lessee”. Section 2A-103(1)(n).

“Person”. Section 1-201(30).

“Usage of trade”. Section 1-205.

“Writing”. Section 1-201(46).

#### § 2A-215. CUMULATION AND CONFLICT OF WARRANTIES EXPRESS OR IMPLIED.

Warranties, whether express or implied, must be construed as consistent with each other and as cumulative, but if that construction is unreasonable, the intention of the parties determines which warranty is dominant. In ascertaining that intention the following rules apply:

(a) Exact or technical specifications displace an inconsistent sample or model or general language of description.

(b) A sample from an existing bulk displaces inconsistent general language of description.

(c) Express warranties displace inconsistent implied warranties other than an implied warranty of fitness for a particular purpose.

#### OFFICIAL COMMENT

Uniform Statutory Source: Section 2-317.

#### Definitional Cross Reference:

“Party”. Section 1-201(29).

#### § 2A-216. THIRD-PARTY BENEFICIARIES OF EXPRESS AND IMPLIED WARRANTIES.

##### ALTERNATIVE A

A warranty to or for the benefit of a lessee under this Article, whether express or implied, extends to any natural person who is in the family or household of the lessee or who is a guest in the lessee’s home if it is reasonable to expect that such person may use, consume, or be affected by the goods and who is injured in person by breach of the warranty. This section does not displace principles of law and equity that extend a warranty to or for the benefit of a lessee to other persons. The operation of this section may not be excluded, modified, or limited, but an exclusion, modification, or limitation of the warranty, including any with respect to rights and remedies, effective against the lessee is also effective against any beneficiary designated under this section.

##### ALTERNATIVE B

A warranty to or for the benefit of a lessee under this Article, whether express or implied, extends to any natural person who may reasonably be expected to use, consume, or be affected by the goods and who is injured in person by breach of the warranty. This section does not displace principles of law and equity that extend a warranty to or for the benefit of a lessee to other persons. The operation of this section may not be excluded, modified, or limited, but an exclusion, modification, or limitation of the warranty, including any with respect to rights and remedies, effective against the lessee is also effective against the beneficiary designated under this section.

##### ALTERNATIVE C

A warranty to or for the benefit of a lessee under this Article, whether express or implied, extends to any person who may reasonably be expected to use, consume, or be affected by the goods and who is injured by breach of the warranty. The operation of this section may not be excluded, modified, or limited with respect to injury to the person of an individual to whom the warranty extends, but an exclusion, modification, or limitation of the warranty, including any with respect to rights and remedies, effective against the lessee is also effective against the beneficiary designated under this section.

#### OFFICIAL COMMENT

Uniform Statutory Source: Section 2-318.

Changes: The provisions of Section 2-318 have been included in this section, modified in two respects: first, to reflect leasing practice, including the special practices of the lessor under a finance lease; second, to reflect and thus codify elements of the official comment to Section 2-318 with respect to the effect of disclaimers and limitations of remedies against third parties.

Purposes: Alternative A is based on the 1962 version of Section 2-318 and is least favorable to the injured person as the doctrine of privity imposed by other law is abrogated to only a limited extent. Alternatives B and C are based on later additions to Section 2-318 and are more favorable to the injured person. In determining which alternative to select, the state legislature should consider making its choice parallel to the choice it made with respect to Section 2-318, as interpreted by the courts.

The last sentence of each of Alternatives A, B and C does not preclude the lessor from excluding or modifying an express or implied warranty under a lease. Section 2A-214. Further, that sentence does not preclude the lessor from limiting the rights and remedies of the lessee and from liquidating damages. Sections 2A-503 and 2A-504. If the lease excludes or modifies warranties, limits remedies for breach, or liquidates damages with respect to the lessee, such provisions are enforceable against the beneficiaries designated under this section. However, this last sentence forbids selective discrimination against the beneficiaries designated under this section, i.e., exclusion of the lessor's liability to the beneficiaries with respect to warranties made by the lessor to the lessee.

Other law, including the Article on Sales (Article 2), may apply in determining the extent to which a warranty to or for the benefit of the lessor extends to the lessee and third parties. This is in part a function of whether the lessor has bought or leased the goods.

This Article does not purport to change the development of the relationship of the common law, with respect to products liability, including strict liability in tort (as restated in Restatement (Second) of Torts, 402A (1965)), to the provisions of this Act.

Compare Cline v. Prowler Indus. of Maryland, 418 A.2d 968 (Del. 1980) and Hawkins Constr. Co. v. Matthews Co., 190 Neb. 546, 209 N.W.2d 643 (1973) with Dippel v. Sciano, 37 Wis. 2d 443, 155 N.W.2d 55 (1967).

Cross References:

Article 2, esp. Section 2-318, and Sections 2A-214, 2A-503 and 2A-504.

Definitional

Cross References:

"Goods". Section 2A-103(1)(h).

"Lessee". Section 2A-103(1)(n).

"Person". Section 1-201(30).

"Remedy". Section 1-201(34).

"Rights". Section 1-201(36).

§ 2A-217. IDENTIFICATION.

Identification of goods as goods to which a lease contract refers may be made at any time and in any manner explicitly agreed to by the parties. In the absence of explicit agreement, identification occurs:

(a) when the lease contract is made if the lease contract is for a lease of goods that are existing and identified;

(b) when the goods are shipped, marked, or otherwise designated by the lessor as goods to which the lease contract refers, if the lease contract is for a lease of goods that are not existing and identified; or

(c) when the young are conceived, if the lease contract is for a lease of unborn young of

animals.

**OFFICIAL COMMENT**

Uniform Statutory Source: Section 2-501.

**Changes:** This section, together with Section 2A-218, is derived from the provisions of Section 2-501, with changes to reflect lease terminology; however, this section omits as irrelevant to leasing practice the treatment of special property.

**Purposes:** With respect to subsection (b) there is a certain amount of ambiguity in the reference to when goods are designated, e.g., when the lessor is both selling and leasing goods to the same lessee/buyer and has marked goods for delivery but has not distinguished between those related to the lease contract and those related to the sales contract. As in Section 2-501(1)(b), this issue has been left to be resolved by the courts, case by case.

**Cross References:**

Sections 2-501 and 2A-218.

**Definitional**

**Cross References:**

“Agreement”. Section 1-201(3).

“Goods”. Section 2A-103(1)(h).

“Lease”. Section 2A-103(1)(j).

“Lease contract”. Section 2A-103(1)(l).

“Lessor”. Section 2A-103(1)(p).

“Party”. Section 1-201(29).

**§ 2A-218. INSURANCE AND PROCEEDS.**

(1) A lessee obtains an insurable interest when existing goods are identified to the lease contract even though the goods identified are nonconforming and the lessee has an option to reject them.

(2) If a lessee has an insurable interest only by reason of the lessor’s identification of the goods, the lessor, until default or insolvency or notification to the lessee that identification is final, may substitute other goods for those identified.

(3) Notwithstanding a lessee’s insurable interest under subsections (1) and (2), the lessor retains an insurable interest until an option to buy has been exercised by the lessee and risk of loss has passed to the lessee.

(4) Nothing in this section impairs any insurable interest recognized under any other statute or rule of law.

(5) The parties by agreement may determine that one or more parties have an obligation to obtain and pay for insurance covering the goods and by agreement may determine the beneficiary of the proceeds of the insurance.

**OFFICIAL COMMENT**

Uniform Statutory Source: Section 2-501.

**Changes:** This section, together with Section 2A-217, is derived from the provisions of Section 2-501, with changes and additions to reflect leasing practices and terminology.

**Purposes:** Subsection (2) states a rule allowing substitution of goods by the lessor under certain circumstances, until default or insolvency of the lessor, or until notification to the lessee that identification is final. Subsection (3) states a rule regarding the lessor’s insurable interest that, by virtue of the difference between a sale and a lease, necessarily is different from the

rule stated in Section 2-501(2) regarding the seller's insurable interest. For this purpose the option to buy shall be deemed to have been exercised by the lessee when the resulting sale is closed, not when the lessee gives notice to the lessor. Further, subsection (5) is new and reflects the common practice of shifting the responsibility and cost of insuring the goods between the parties to the lease transaction.

**Cross References:**

Sections 2-501, 2-501(2) and 2A-217.

**Definitional**

**Cross References:**

"Agreement". Section 1-201(3).

"Buying". Section 2A-103(1)(a).

"Conforming". Section 2A-103(1)(d).

"Goods". Section 2A-103(1)(h).

"Insolvent". Section 1-201(23).

"Lease contract". Section 2A-103(1)(l).

"Lessee". Section 2A-103(1)(n).

"Lessor". Section 2A-103(1)(p).

"Notification". Section 1-201(26).

"Party". Section 1-201(29).

**§ 2A-219. RISK OF LOSS.**

(1) Except in the case of a finance lease, risk of loss is retained by the lessor and does not pass to the lessee. In the case of a finance lease, risk of loss passes to the lessee.

(2) Subject to the provisions of this Article on the effect of default on risk of loss (Section 2A-220), if risk of loss is to pass to the lessee and the time of passage is not stated, the following rules apply:

(a) If the lease contract requires or authorizes the goods to be shipped by carrier

(i) and it does not require delivery at a particular destination, the risk of loss passes to the lessee when the goods are duly delivered to the carrier; but

(ii) if it does require delivery at a particular destination and the goods are there duly tendered while in the possession of the carrier, the risk of loss passes to the lessee when the goods are there duly so tendered as to enable the lessee to take delivery.

(b) If the goods are held by a bailee to be delivered without being moved, the risk of loss passes to the lessee on acknowledgment by the bailee of the lessee's right to possession of the goods.

(c) In any case not within subsection (a) or (b), the risk of loss passes to the lessee on the lessee's receipt of the goods if the lessor, or, in the case of a finance lease, the supplier, is a merchant; otherwise the risk passes to the lessee on tender of delivery.

**OFFICIAL COMMENT**

Uniform Statutory Source: Section 2-509(1) through (3).

Changes: Subsection (1) is new. The introduction to subsection (2) is new, but subparagraph (a) incorporates the provisions of Section 2-509(1); subparagraph (b) incorporates the provisions of Section 2-509(2) only in part, reflecting current practice in lease transactions.

Purposes: Subsection (1) states rules related to retention or passage of risk of loss consistent with current practice in lease transactions. The provisions of subsection (4) of Section 2-509 are not incorporated as they are not necessary. This section does not deal with responsibility for loss caused by the wrongful act of either the lessor or the lessee.

Cross References:

Sections 2-509(1), 2-509(2) and 2-509(4).

Definitional

Cross References:

“Delivery”. Section 1-201(14).

“Finance lease”. Section 2A-103(1)(g).

“Goods”. Section 2A-103(1)(h).

“Lease contract”. Section 2A-103(1)(l).

“Lessee”. Section 2A-103(1)(n).

“Lessor”. Section 2A-103(1)(p).

“Merchant”. Section 2-104(1).

“Receipt”. Section 2-103(1)(c).

“Rights”. Section 1-201(36).

“Supplier”. Section 2A-103(1)(x).

§ 2A-220. EFFECT OF DEFAULT ON RISK OF LOSS.

(1) Where risk of loss is to pass to the lessee and the time of passage is not stated:

(a) If a tender or delivery of goods so fails to conform to the lease contract as to give a right of rejection, the risk of their loss remains with the lessor, or, in the case of a finance lease, the supplier, until cure or acceptance.

(b) If the lessee rightfully revokes acceptance, he or she, to the extent of any deficiency in his or her effective insurance coverage, may treat the risk of loss as having remained with the lessor from the beginning.

(2) Whether or not risk of loss is to pass to the lessee, if the lessee as to conforming goods already identified to a lease contract repudiates or is otherwise in default under the lease contract, the lessor, or, in the case of a finance lease, the supplier, to the extent of any deficiency in his or her effective insurance coverage may treat the risk of loss as resting on the lessee for a commercially reasonable time.

OFFICIAL COMMENT

Uniform Statutory Source: Section 2-510.

Changes: Revised to reflect leasing practices and terminology. The rule in Section (1)(b) does not allow the lessee under a finance lease to treat the risk of loss as having remained with the supplier from the beginning. This is appropriate given the limited circumstances under which the lessee under a finance lease is allowed to revoke acceptance. Section 2A-517 and Section 2A-516 official comment.

Definitional

Cross References:

- “Conforming”. Section 2A-103(1)(d).
- “Delivery”. Section 1-201(14).
- “Finance lease”. Section 2A-103(1)(g).
- “Goods”. Section 2A-103(1)(h).
- “Lease contract”. Section 2A-103(1)(l).
- “Lessee”. Section 2A-103(1)(n).
- “Lessor”. Section 2A-103(1)(p).
- “Reasonable time”. Section 1-204(1) and (2).
- “Rights”. Section 1-201(36).
- “Supplier”. Section 2A-103(1)(x).

§ 2A-221. CASUALTY TO IDENTIFIED GOODS.

If a lease contract requires goods identified when the lease contract is made, and the goods suffer casualty without fault of the lessee, the lessor or the supplier before delivery, or the goods suffer casualty before risk of loss passes to the lessee pursuant to the lease agreement or Section 2A-219, then:

(a) if the loss is total, the lease contract is avoided; and (b) if the loss is partial or the goods have so deteriorated as to no longer conform to the lease contract, the lessee may nevertheless demand inspection and at his or her option either treat the lease contract as avoided or, except in a finance lease that is not a consumer lease, accept the goods with due allowance from the rent payable for the balance of the lease term for the deterioration or the deficiency in quantity but without further right against the lessor.

OFFICIAL COMMENT

Uniform Statutory Source: Section 2-613.

Changes: Revised to reflect leasing practices and terminology.

Purpose: Due to the vagaries of determining the amount of due allowance (Section 2-613(b)), no attempt was made in subsection (b) to treat a problem unique to lease contracts and installment sales contracts: determining how to recapture the allowance, e.g., application to the first or last rent payments or allocation, pro rata, to all rent payments.

Cross References:

Section 2-613.

Definitional

Cross References:

- “Conforming”. Section 2A-103(1)(d).
- “Consumer lease”. Section 2A-103(1)(e).
- “Delivery”. Section 1-201(14).
- “Fault”. Section 2A-103(1)(f).
- “Finance lease”. Section 2A-103(1)(g).
- “Goods”. Section 2A-103(1)(h).
- “Lease”. Section 2A-103(1)(j).

"Lease agreement". Section 2A-103(1)(k).

"Lease contract". Section 2A-103(1)(l).

"Lessee". Section 2A-103(1)(n).

"Lessor". Section 2A-103(1)(p).

"Rights". Section 1-201(36).

"Supplier". Section 2A-103(1)(x).

### PART 3. EFFECT OF LEASE CONTRACT

#### § 2A-301. ENFORCEABILITY OF LEASE CONTRACT.

Except as otherwise provided in this Article, a lease contract is effective and enforceable according to its terms between the parties, against purchasers of the goods and against creditors of the parties.

#### OFFICIAL COMMENT

Uniform Statutory Source: Section 9-201.

Changes: The first sentence of Section 9-201 was incorporated, modified to reflect leasing terminology. The second sentence of Section 9-201 was eliminated as not relevant to leasing practices.

Purposes: This section establishes a general rule regarding the validity and enforceability of a lease contract. The lease contract is effective and enforceable between the parties and against third parties. Exceptions to this general rule arise where there is a specific rule to the contrary in this Article. Enforceability is, thus, dependent upon the lease contract meeting the requirements of the Statute of Frauds provisions of Section 2A-201. Enforceability is also a function of the lease contract conforming to the principles of construction and interpretation contained in the Article on General Provisions (Article 1).

#### Section 2A-103(4).

The effectiveness or enforceability of the lease contract is not dependent upon the lease contract or any financing statement or the like being filed or recorded; however, the priority of the interest of a lessor of fixtures with respect to the interests of certain third parties in such fixtures is subject to the provisions of the Article on Secured Transactions (Article 9). Section 2A-309. Prior to the adoption of this Article filing or recording was not required with respect to leases, only leases intended as security. The definition of security interest, as amended concurrently with the adoption of this Article, more clearly delineates leases and leases intended as security and thus signals the need to file. Section 1-201(37). Those lessors who are concerned about whether the transaction creates a lease or a security interest will continue to file a protective financing statement. Section 9-408. Coogan, Leasing and the Uniform Commercial Code, in Equipment Leasing-Leveraged Leasing 681, 744-46 (2d ed. 1980).

Hypothetical: 1. In construing this section it is important to recognize its relationship to other sections in this Article. This is best demonstrated by reference to a hypothetical. Assume that on February 1 A, a manufacturer of combines and other farm equipment, leased a fleet of six combines to B, a corporation engaged in the business of farming, for a 12 month term. Under the lease agreement between A and B, A agreed to defer B's payment of the first two months' rent to April 1. On March 1 B recognized that it would need only four combines and thus subleased two combines to C for an 11 month term.

2. This hypothetical raises a number of issues that are answered by the sections contained in this part. Since lease is defined to include sublease (Section 2A-103(1)(j) and (w)), this section provides that the prime lease between A and B and the sublease between B and C are enforceable in accordance with their terms, except as otherwise provided in this Article; that exception, in this case, is one of considerable scope.

3. The separation of ownership, which is in A, and possession, which is in B with respect to four combines and which is in C with respect to two combines, is not relevant. Section 2A-302. A's interest in the six combines cannot be challenged simply because A parted with possession to B, who in turn parted with possession of some of the combines to C. Yet it is important to note

that by the terms of Section 2A-302 this conclusion is subject to change if otherwise provided in this Article.

4. B's entering the sublease with C raises an issue that is treated by this part. In a dispute over the leased combines A may challenge B's right to sublease. The general rule is permissive as to transfers of interests under a lease contract, including subleases. Section 2A-303(1). However, the rule creates two significant exceptions. If the prime lease contract between A and B prohibits B from subleasing the combines, Section 2A-303(1)(a) applies, as the transfer is voluntary and prohibited; thus, B's interest under the prime lease may not be transferred under the sublease to C. Absent a prohibition in the prime lease contract A might be able to argue that the sublease to C materially increases A's risk; thus B's interest under the prime lease may not be transferred under the sublease to C, if after demand by A, C fails to provide the assurances required by Section 2A-303(2). Section 2A-303(1)(b).

5. Resolution of this issue is also a function of the section dealing with the sublease of goods by a prime lessee (Section 2A-305). Subsection (1) of Section 2A-305, which is subject to the rule of Section 2A-303 stated above, provides that C takes subject to the interest of A under the prime lease between A and B. However, there are two exceptions. First, if B is a merchant (Sections 2A-103(3) and 2-104(1)) dealing in goods of that kind and C is a sublessee in the ordinary course of business (Sections 2A-103(1)(o) and 2A-103(1)(n)), C takes free of the prime lease between A and B. Second, if B has rejected the six combines under the prime lease with A, and B disposes of the goods by sublease to C, C takes free of the prime lease if C can establish good faith. Section 2A-511(4).

6. If the facts of this hypothetical are expanded and we assume that the prime lease obligated B to maintain the combines, an additional issue may be presented. Prior to entering the sublease, B, in satisfaction of its maintenance covenant, brought the two combines that it desired to sublease to a local independent dealer of A's. The dealer did the requested work for B. C inspected the combines on the dealer's lot after the work was completed. C signed the sublease with B two days later. C, however, was prevented from taking delivery of the two combines as B refused to pay the dealer's invoice for the repairs. The dealer furnished the repair service to B in the ordinary course of the dealer's business. If under applicable law the dealer has a lien on repaired goods in the dealer's possession, the dealer's lien will take priority over A's, B's and C's interests. Section 2A-306.

7. Now assume that C is in financial straits and one of C's creditors obtains a judgment against C. If the creditor levies on C's subleasehold interest in the two combines, who will prevail? Unless the levying creditor also holds a lien covered by Section 2A-306, discussed above, the judgment creditor will take its interest subject to B's rights under the sublease and A's rights under the prime lease. Section 2A-307(1). The hypothetical becomes more complicated if we assume that B is in financial straits and B's creditor holds the judgment. Here the judgment creditor takes subject to the sublease unless the lien attached to the two combines before the sublease contract became enforceable. Section 2A-307(2)(a). However, B's judgment creditor cannot prime A's interest in the goods because, with respect to A, the judgment creditor is a creditor of B in its capacity as lessee under the prime lease between A and B. Thus, here the judgment creditor's interest is subject to the lease between A and B. Section 2A-307(1).

8. Finally, assume that on April 1 B is unable to pay A the deferred rent then due under the prime lease, but that C is current in its payments under the sublease from B. What effect will B's default under the prime lease between A and B have on C's rights under the sublease between B and C? Section 2A-301 provides that a lease contract is effective against the creditors of either party. Since a lease contract includes a sublease contract (Section 2A-103(1)(l)), the sublease contract between B and C arguably could be enforceable against A, a prime lessor who has extended unsecured credit to B, the prime lessee/sublessor, if the sublease contract meets the requirements of Section 2A-201. However, the rule stated in Section 2A-301 is subject to other provisions in this Article. Under Section 2A-305, C, as sublessee, would take subject to the prime lease contract in most cases. Thus, B's default under the prime lease will in most cases lead to A's recovery of the goods from C. Section 2A-523. C's recourse will be to assert a claim for damages against B. Section 2A-508.

Relationship Between Sections: 1. As the analysis of the hypothetical demonstrates, Part 3 of the Article focuses on issues that relate to the enforceability of the lease contract (Sections 2A-301, 2A-302 and 2A-303) and to the priority of various claims to the goods subject to the lease contract (Sections 2A-304, 2A-305, 2A-306, 2A-307, 2A-308, 2A-309 and 2A-310).

2. This section states a general rule of enforceability, which is subject to specific rules to the contrary stated elsewhere in the Article. Section 2A-302 negates any notion that the separation of title and possession is fraudulent as a rule of law. Finally, Section 2A-303 states a permissive

rule with respect to the transfer of the lessor's interest (as well as the residual interest in the goods) or the lessee's interest under the lease contract. Conditions are imposed as a function of various issues including whether the transfer is voluntary or involuntary. In addition, a system of rules is created to deal with the rights and duties among assignor, assignee and the other party to the lease contract.

3. Sections 2A-304 and 2A-305 are twins that deal with good faith transferees of goods subject to the lease contract. Section 2A-304 creates a set of rules with respect to transfers by the lessor of goods subject to a lease contract; the transferee considered is a subsequent lessee of the goods. The priority dispute covered here is between the subsequent lessee and the original lessee of the goods (or persons claiming through the original lessee). Section 2A-305 creates a set of rules with respect to transfers by the lessee of goods subject to a lease contract; the transferees considered are buyers of the goods or sublessees of the goods. The priority dispute covered here is between the transferee and the lessor of the goods (or persons claiming through the lessor).

4. Section 2A-306 creates a rule with respect to priority disputes between holders of liens for services or materials furnished with respect to goods subject to a lease contract and the lessor or the lessee under that contract. Section 2A-307 creates a rule with respect to priority disputes between the lessee and creditors of the lessor and priority disputes between the lessor and creditors of the lessee.

5. Section 2A-308 creates a series of rules relating to allegedly fraudulent transfers and preferences. The most significant rule is that set forth in subsection (3) which validates sale-leaseback transactions if the buyer-lessor can establish that he or she bought for value and in good faith.

6. Finally, Sections 2A-309 and 2A-310 create a series of rules with respect to priority disputes between various third parties and a lessor of fixtures or accessions, respectively, with respect thereto.

#### Cross References:

Article 1, esp. Section 1-201(37), and Sections 2-104(1), 2A-103(1)(j), 2A-103(1)(l), 2A-103(1)(n), 2A-103(1)(o) and 2A-103(1)(w), 2A-103(3), 2A-103(4), 2A-201, 2A-301 through 2A-303, 2A-303(1), 2A-303(1)(a), 2A-303(1)(b), 2A-304 through 2A-307, 2A-307(1), 2A-307(2)(a), 2A-308 through 2A-310, 2A-508, 2A-511(4), 2A- 523, Article 9, esp. Sections 9-201 and 9-408.

#### Definitional

#### Cross References:

"Creditor". Section 1-201(12).

"Goods". Section 2A-103(1)(h).

"Lease contract". Section 2A-103(1)(l).

"Party". Section 1-201(29).

"Purchaser". Section 1-201(33).

"Term". Section 1-201(42).

#### § 2A-302. TITLE TO AND POSSESSION OF GOODS.

Except as otherwise provided in this Article, each provision of this Article applies whether the lessor or a third party has title to the goods, and whether the lessor, the lessee, or a third party has possession of the goods, notwithstanding any statute or rule of law that possession or the absence of possession is fraudulent.

#### OFFICIAL COMMENT

Uniform Statutory Source: Section 9-202.

Changes: Section 9-202 was modified to reflect leasing terminology and to clarify the law of leases with respect to fraudulent conveyances or transfers.

Purposes: The separation of ownership and possession of goods between the lessor and the

lessee (or a third party) has created problems under certain fraudulent conveyance statutes. See, e.g., *In re Ludlum Enters.*, 510 F.2d 996 (5th Cir. 1975); *Suburbia Fed. Sav. & Loan Ass'n v. Bel-Air Conditioning Co.*, 385 So. 2d 1151 (Fla. Dist. Ct. App. 1980). This section provides, among other things, that separation of ownership and possession per se does not affect the enforceability of the lease contract. Sections 2A-301 and 2A-308.

Cross References:

Sections 2A-301, 2A-308 and 9-202.

Definitional

Cross References:

"Goods". Section 2A-103(1)(h).

"Lessee". Section 2A-103(1)(n).

"Lessor". Section 2A-103(1)(p).

**§ 2A-303. ALIENABILITY OF PARTY'S INTEREST UNDER LEASE CONTRACT OR OF LESSOR'S RESIDUAL INTEREST IN GOODS; DELEGATION OF PERFORMANCE; TRANSFER OF RIGHTS.**

(1) As used in this section, "creation of a security interest" includes the sale of a lease contract that is subject to Article 9, Secured Transactions, by reason of Section 9-102(1)(b).

(2) Except as provided in subsections (3) and (4), a provision in a lease agreement which (i) prohibits the voluntary or involuntary transfer, including a transfer by sale, sublease, creation or enforcement of a security interest, or attachment, levy, or other judicial process, of an interest of a party under the lease contract or of the lessor's residual interest in the goods, or (ii) makes such a transfer an event of default, gives rise to the rights and remedies provided in subsection (5), but a transfer that is prohibited or is an event of default under the lease agreement is otherwise effective.

(3) A provision in a lease agreement which (i) prohibits the creation or enforcement of a security interest in an interest of a party under the lease contract or in the lessor's residual interest in the goods, or (ii) makes such a transfer an event of default, is not enforceable unless, and then only to the extent that, there is an actual transfer by the lessee of the lessee's right of possession or use of the goods in violation of the provision or an actual delegation of a material performance of either party to the lease contract in violation of the provision. Neither the granting nor the enforcement of a security interest in (i) the lessor's interest under the lease contract or (ii) the lessor's residual interest in the goods is a transfer that materially impairs the prospect of obtaining return performance by, materially changes the duty of, or materially increases the burden or risk imposed on, the lessee within the purview of subsection (5) unless, and then only to the extent that, there is an actual delegation of a material performance of the lessor.

(4) A provision in a lease agreement which (i) prohibits a transfer of a right to damages for default with respect to the whole lease contract or of a right to payment arising out of the transferor's due performance of the transferor's entire obligation, or (ii) makes such a transfer an event of default, is not enforceable, and such a transfer is not a transfer that materially impairs the prospect of obtaining return performance by, materially changes the duty of, or materially increases the burden or risk imposed on, the other party to the lease contract within the purview of subsection (5).

(5) Subject to subsections (3) and (4):

(a) if a transfer is made which is made an event of default under a lease agreement, the party to the lease contract not making the transfer, unless that party waives the default or otherwise agrees, has the rights and remedies described in Section 2A-501(2);

(b) if paragraph (a) is not applicable and if a transfer is made that (i) is prohibited under a lease agreement or (ii) materially impairs the prospect of obtaining return performance by, materially changes the duty of, or materially increases the burden or risk imposed on, the other party to the lease contract, unless the party not making the transfer agrees at any time to the transfer in the lease contract or otherwise, then, except as limited by contract, (i) the transferor is liable to the party not making the transfer for damages caused by the transfer to the extent

that the damages could not reasonably be prevented by the party not making the transfer and (ii) a court having jurisdiction may grant other appropriate relief, including cancellation of the lease contract or an injunction against the transfer.

(6) A transfer of "the lease" or of "all my rights under the lease", or a transfer in similar general terms, is a transfer of rights and, unless the language or the circumstances, as in a transfer for security, indicate the contrary, the transfer is a delegation of duties by the transferor to the transferee. Acceptance by the transferee constitutes a promise by the transferee to perform those duties. The promise is enforceable by either the transferor or the other party to the lease contract.

(7) Unless otherwise agreed by the lessor and the lessee, a delegation of performance does not relieve the transferor as against the other party of any duty to perform or of any liability for default.

(8) In a consumer lease, to prohibit the transfer of an interest of a party under the lease contract or to make a transfer an event of default, the language shall be specific, by a writing, and conspicuous.

#### OFFICIAL COMMENT

Uniform Statutory Source: Sections 2-210 and 9-311.

Changes: The provisions of Sections 2-210 and 9-311 were incorporated in this section, with substantial modifications to reflect leasing terminology and practice and to harmonize the principles of the respective provisions, i.e. limitations on delegation of performance on the one hand and alienability of rights on the other. In addition, unlike Section 2-210 which only deals with voluntary transfers, this section deals with involuntary as well as voluntary transfers. Moreover, the principle of Section 9-318(4) denying effectiveness to contractual terms prohibiting assignments of receivables due and to become due also is implemented.

Purposes: 1. Subsection (2) states a rule, consistent with Section 9-311, that voluntary and involuntary transfers of an interest of a party under the lease contract or of the lessor's residual interest, including by way of the creation or enforcement of a security interest, are effective, notwithstanding a provision in the lease agreement prohibiting the transfer or making the transfer an event of default. Although the transfers are effective, the provision in the lease agreement is nevertheless enforceable, but only as provided in subsection (5). Under subsection (5) the prejudiced party is limited to the remedies on "default under the lease contract" in this Article and, except as limited by this Article, as provided in the lease agreement, if the transfer has been made an event of default. Section 2A-501(2). Usually, there will be a specific provision to this effect or a general provision making a breach of a covenant an event of default. In those cases where the transfer is prohibited, but not made an event of default, the prejudiced party may recover damages; or, if the damage remedy would be ineffective adequately to protect that party, the court can order cancellation of the lease contract or enjoin the transfer. This rule that such provisions generally are enforceable is subject to subsections (3) and (4), which make such provisions unenforceable in certain instances.

2. The first such instance is described in subsection (3). A provision in a lease agreement which prohibits the creation or enforcement of a security interest, including sales of lease contracts subject to Article 9 (Sections 9-102(1)(b) and 9-104(f)), or makes it an event of default is generally not enforceable, reflecting the policy of Section 9-318(4). However, that policy gives way to the doctrine stated in Section 2-210(2), which gives one party to a contract the right to protect itself against an actual delegation (but not just a provision under which delegation might later occur) of a material performance by the other party. Accordingly, such a provision in a lease agreement is enforceable when the transferor delegates a material performance. Generally, a transfer for security is not a delegation of duties as stated in subsection (6). However, inasmuch as the creation of a security interest may include the sale of a lease contract, there could be a delegation of duties in that circumstance and, if such a delegation actually takes place and is of a material performance, a provision in a lease agreement prohibiting it or making it an event of default would be enforceable, giving rise to the rights and remedies stated in subsection (5). The statute does not define "material." The parties may set standards to determine its meaning. The term is intended to exclude delegations of matters such as accounting to a professional accountant and the performance of, as opposed to the responsibility for, maintenance duties to a person in the maintenance service industry.

3. For similar reasons, the lessor is entitled to protect its residual interest in the goods by prohibiting anyone but the lessee from possessing or using them. Accordingly, under subsection (3) if there is an actual transfer by the lessee of its right of possession or of the use of the

goods in violation of a provision in the lease agreement, such a provision likewise is enforceable giving rise to the rights and remedies stated in subsection (5). A transfer of the lessee's right of possession or use of the goods resulting from the enforcement of a security interest granted by the lessee in its leasehold interest is a "transfer by the lessee" under this subsection.

4. Finally, subsection (3) protects against a claim that the creation or enforcement of a security interest in the lessor's interest under the lease contract or in the residual interest is a transfer that materially impairs the prospect of obtaining return performance by, materially changes the duty of, or materially increases the burden or risk imposed on the lessee so as to give rise to the rights and remedies stated in subsection (5), unless the transfer involves an actual delegation of a material performance of the lessor.

5. While it is not likely that a transfer by the lessor of its right to payment under the lease contract would impair at a future time the ability of the lessee to obtain the performance due the lessee under the lease contract from the lessor, if under the circumstances reasonable grounds for insecurity as to receiving that performance arise, the lessee may employ the provision of this Article for demanding adequate assurance of due performance and has the remedy provided in that circumstance. Section 2A-401.

6. Sections 9-206 and 9-318(1) through (3) also are relevant. Section 9-206 sanctions an agreement by a lessee not to assert certain types of claims or defenses against the lessor's assignee. Section 9-318(1) through (3) deal with, among other things, the other party's rights against the assignee where Section 9-206(1) does not apply. Since the definition of contract under Section 1-201(11) includes a lease agreement, the definition of account debtor under Section 9-105(1)(a) includes a lessee of goods. As a result, Section 9-206 applies to lease agreements, and there is no need to restate those sections in this Article. The reference to "defenses or claims arising out of a sale" in Section 9-318(1) should be interpreted broadly to include defenses or claims arising out of a lease inasmuch as that section codifies the common law rule with respect to contracts, including lease contracts.

7. Subsection (4) is based upon Section 2-210(2) and Section 9-318(4). It makes unenforceable a prohibition against transfers of certain rights to payment or a provision making the transfer an event of default. It also provides that such transfers do not materially impair the prospect of obtaining return performance by, materially change the duty of, or materially increase the burden or risk imposed on, the other party to the lease contract so as to give rise to the rights and remedies stated in subsection (5). Accordingly, a transfer of a right to payment cannot be prohibited or made an event of default, or be one that materially impairs performance, changes duties or increases risk, if the right is already due or will become due without further performance being required by the party to receive payment. Thus, a lessor can transfer the right to future payments under the lease contract, including by way of a grant of a security interest, and the transfer will not give rise to the rights and remedies stated in subsection (5) if the lessor has no remaining performance under the lease contract. The mere fact that the lessor is obligated to allow the lessee to remain in possession and to use the goods as long as the lessee is not in default does not mean that there is "remaining performance" on the part of the lessor. Likewise, the fact that the lessor has potential liability under a "non-operating" lease contract for breaches of warranty does not mean that there is "remaining performance." In contrast, the lessor would have "remaining performance" under a lease contract requiring the lessor to regularly maintain and service the goods or to provide "upgrades" of the equipment on a periodic basis in order to avoid obsolescence. The basic distinction is between a mere potential duty to respond which is not "remaining performance," and an affirmative duty to render stipulated performance. Although the distinction may be difficult to draw in some cases, it is instructive to focus on the difference between "operating" and "non-operating" leases as generally understood in the marketplace. Even if there is "remaining performance" under a lease contract, a transfer for security of a right to payment that is made an event of default or that is in violation of a prohibition against transfer does not give rise to the rights and remedies under subsection (5) if it does not constitute an actual delegation of a material performance under subsection (3).

8. The application of either the rule of subsection (3) or the rule of subsection (4) to the grant by the lessor of a security interest in the lessor's right to future payment under the lease contract may produce the same result. Both subsections generally protect security transfers by the lessor in particular because the creation by the lessor of a security interest or the enforcement of that interest generally will not prejudice the lessee's rights if it does not result in a delegation of the lessor's duties. To the contrary, the receipt of loan proceeds or relief from the enforcement of an antecedent debt normally should enhance the lessor's ability to perform its duties under the lease contract. Nevertheless, there are circumstances where relief might be justified. For example, if ownership of the goods is transferred pursuant to enforcement of a security interest to a party whose ownership would prevent the lessee from

continuing to possess the goods, relief might be warranted. See 49 U.S.C. 1401(a) and (b) which places limitations on the operation of aircraft in the United States based on the citizenship or corporate qualification of the registrant.

9. Relief on the ground of material prejudice when the lease agreement does not prohibit the transfer or make it an event of default should only be afforded in extreme circumstances, considering the fact that the party asserting material prejudice did not insist upon a provision in the lease agreement that would protect against such a transfer.

10. Subsection (5) implements the rule of subsection (2). Subsection (2) provides that, even though a transfer is effective, a provision in the lease agreement prohibiting it or making it an event of default may be enforceable as provided in subsection (5). See *Brummond v. First National Bank of Clovis*, 656 P.2d 884, 35 U.C.C. Rep. Serv. (Callaghan) 1311 (N. Mex. 1983) stating the analogous rule for Section 9-311. If the prohibited transfer by the lease agreement is made an event of default, then, under subsection 5(a), unless the default is waived or there is an agreement otherwise, the aggrieved party has the rights and remedies referred to in Section 2A-501(2), viz. those in this Article and, except as limited in the Article, those provided in the lease agreement. In the unlikely circumstance that the lease agreement prohibits the transfer without making a violation of the prohibition an event of default or, even if there is no prohibition against the transfer, and the transfer is one that materially impairs performance, changes duties, or increases risk (for example, a sublease or assignment to a party using the goods improperly or for an illegal purpose), then subsection 5(b) is applicable. In that circumstance, unless the party aggrieved by the transfer has otherwise agreed in the lease contract, such as by assenting to a particular transfer or to transfers in general, or agrees in some other manner, the aggrieved party has the right to recover damages from the transferor and a court may, in appropriate circumstances, grant other relief, such as cancellation of the lease contract or an injunction against the transfer.

11. If a transfer gives rise to the rights and remedies provided in subsection (5), the transferee as an alternative may propose, and the other party may accept, adequate cure or compensation for past defaults and adequate assurance of future due performance under the lease contract. Subsection (5) does not preclude any other relief that may be available to a party to the lease contract aggrieved by a transfer subject to an enforceable prohibition, such as an action for interference with contractual relations.

12. Subsection (8) requires that a provision in a consumer lease prohibiting a transfer, or making it an event of default, must be specific, written and conspicuous. See Section 1-201(10). This assists in protecting a consumer lessee against surprise assertions of default.

13. Subsection (6) is taken almost verbatim from the provisions of Section 2-210(4). The subsection states a rule of construction that distinguishes a commercial assignment, which substitutes the assignee for the assignor as to rights and duties, and an assignment for security or financing assignment, which substitutes the assignee for the assignor only as to rights. Note that the assignment for security or financing assignment is a subset of all security interests. Security interest is defined to include "any interest of a buyer of ... chattel paper". Section 1-201(37). Chattel paper is defined to include a lease. Section 9-105(1)(b). Thus, a buyer of leases is the holder of a security interest in the leases. That conclusion should not influence this issue, as the policy is quite different. Whether a buyer of leases is the holder of a commercial assignment, or an assignment for security or financing assignment should be determined by the language of the assignment or the circumstances of the assignment.

#### Cross References:

Sections 1-201(11), 1-201(37), 2-210, 2A-401, 9-102(1)(b), 9-104(f), 9-105(1)(a), 9-206, and 9-318.

#### Definitional

#### Cross References:

"Agreed" and "Agreement". Section 1-201(3).

"Conspicuous". Section 1-201(10).

"Goods". Section 2A-103(1)(h).

"Lease". Section 2A-103(1)(j).

"Lease contract". Section 2A-103(1)(l).

"Lessee". Section 2A-103(1)(n).

"Lessor". Section 2A-103(1)(p).

"Lessor's residual interest". Section 2A-103(1)(q).

"Notice". Section 1-201(25).

"Party". Section 1-201(29).

"Person". Section 1-201(30).

"Reasonable time". Section 1-204(1) and (2).

"Rights". Section 1-201(36).

"Term". Section 1-201(42).

"Writing". Section 1-201(46).

#### § 2A-304. SUBSEQUENT LEASE OF GOODS BY LESSOR.

(1) Subject to Section 2A-303, a subsequent lessee from a lessor of goods under an existing lease contract obtains, to the extent of the leasehold interest transferred, the leasehold interest in the goods that the lessor had or had power to transfer, and except as provided in subsection (2) and Section 2A-527(4), takes subject to the existing lease contract. A lessor with voidable title has power to transfer a good leasehold interest to a good faith subsequent lessee for value, but only to the extent set forth in the preceding sentence. If goods have been delivered under a transaction of purchase the lessor has that power even though:

- (a) the lessor's transferor was deceived as to the identity of the lessor;
- (b) the delivery was in exchange for a check which is later dishonored;
- (c) it was agreed that the transaction was to be a "cash sale"; or
- (d) the delivery was procured through fraud punishable as larcenous under the criminal law.

(2) A subsequent lessee in the ordinary course of business from a lessor who is a merchant dealing in goods of that kind to whom the goods were entrusted by the existing lessee of that lessor before the interest of the subsequent lessee became enforceable against that lessor obtains, to the extent of the leasehold interest transferred, all of that lessor's and the existing lessee's rights to the goods, and takes free of the existing lease contract.

(3) A subsequent lessee from the lessor of goods that are subject to an existing lease contract and are covered by a certificate of title issued under a statute of this Commonwealth or of another jurisdiction takes no greater rights than those provided both by this section and by the certificate of title statute.

#### OFFICIAL COMMENT

Uniform Statutory Source: Section 2-403.

Changes: While Section 2-403 was used as a model for this section, the provisions of Section 2-403 were significantly revised to reflect leasing practices and to integrate this Article with certificate of title statutes.

Purposes: 1. This section must be read in conjunction with, as it is subject to, the provisions of Section 2A-303, which govern voluntary and involuntary transfers of rights and duties under a lease contract, including the lessor's residual interest in the goods.

2. This section must also be read in conjunction with Section 2-403. This section and Section 2A-305 are derived from Section 2-403, which states a unified policy on good faith purchases of goods. Given the scope of the definition of purchaser (Section 1-201(33)), a person who bought goods to lease as well as a person who bought goods subject to an existing lease from a lessor will take pursuant to Section 2-403. Further, a person who leases such goods from the person who bought them should also be protected under Section 2-403, first because the lessee's rights are derivative and second because the definition of purchaser should be interpreted to include

one who takes by lease; no negative implication should be drawn from the inclusion of lease in the definition of purchase in this Article. Section 2A-103(1)(v).

3. There are hypotheticals that relate to an trustee's unauthorized lease of entrusted goods to a third party that are outside the provisions of Sections 2-403, 2A-304 and 2A-305. Consider a sale of goods by M, a merchant, to B, a buyer. After paying for the goods B allows M to retain possession of the goods as B is short of storage. Before B calls for the goods M leases the goods to L, a lessee. This transaction is not governed by Section 2-403(2) as L is not a buyer in the ordinary course of business. Section 1-201(9). Further, this transaction is not governed by Section 2A-304(2) as B is not an existing lessee. Finally, this transaction is not governed by Section 2A-305(2) as B is not M's lessor. Section 2A-307(2) resolves the potential dispute between B, M and L. By virtue of B's entrustment of the goods to M and M's lease of the goods to L, B has a cause of action against M under the common law. Sections 2A-103(4) and 1-103. See, e.g., Restatement (Second) of Torts § 222A-243. Thus, B is a creditor of M. Sections 2A-103(4) and 1-201(12). Section 2A-307(2) provides that B, as M's creditor, takes subject to M's lease to L. Thus, if L does not default under the lease, L's enjoyment and possession of the goods should be undisturbed. However, B is not without recourse. B's action should result in a judgment against M providing, among other things, a turnover of all proceeds arising from M's lease to L, as well as a transfer of all of M's right, title and interest as lessor under M's lease to L, including M's residual interest in the goods. Section 2A-103(1)(q).

4. Subsection (1) states a rule with respect to the leasehold interest obtained by a subsequent lessee from a lessor of goods under an existing lease contract. The interest will include such leasehold interest as the lessor has in the goods as well as the leasehold interest that the lessor had the power to transfer. Thus, the subsequent lessee obtains unimpaired all rights acquired under the law of agency, apparent agency, ownership or other estoppel, whether based upon statutory provisions or upon case law principles. Sections 2A-103(4) and 1-103. In general, the subsequent lessee takes subject to the existing lease contract, including the existing lessee's rights thereunder. Furthermore, the subsequent lease contract is, of course, limited by its own terms, and the subsequent lessee takes only to the extent of the leasehold interest transferred thereunder.

5. Subsection (1) further provides that a lessor with voidable title has power to transfer a good leasehold interest to a good faith subsequent lessee for value. In addition, subsections (1)(a) through (d) provide specifically for the protection of the good faith subsequent lessee for value in a number of specific situations which have been troublesome under prior law.

6. The position of an existing lessee who entrusts leased goods to its lessor is not distinguishable from the position of other entrusters. Thus, subsection (2) provides that the subsequent lessee in the ordinary course of business takes free of the existing lease contract between the lessor trustee and the lessee entruster, if the lessor is a merchant dealing in goods of that kind. Further, the subsequent lessee obtains all of the lessor trustee's and the lessee entruster's rights to the goods, but only to the extent of the leasehold interest transferred by the lessor trustee. Thus, the lessor trustee retains the residual interest in the goods. Section 2A-103(1)(q). However, entrustment by the existing lessee must have occurred before the interest of the subsequent lessee became enforceable against the lessor. Entrusting is defined in Section 2-403(3) and that definition applies here. Section 2A-103(3).

7. Subsection (3) states a rule with respect to a transfer of goods from a lessor to a subsequent lessee where the goods are subject to an existing lease and covered by a certificate of title. The subsequent lessee's rights are no greater than those provided by this section and the applicable certificate of title statute, including any applicable case law construing such statute. Where the relationship between the certificate of title statute and Section 2-403, the statutory analogue to this section, has been construed by a court, that construction is incorporated here. Sections 2A-103(4) and 1-102(1) and (2). The better rule is that the certificate of title statutes are in harmony with Section 2-403 and thus would be in harmony with this section. E.g., Atwood Chevrolet-Olds v. Aberdeen Mun. School Dist., 431 So.2d 926, 928 (Miss. 1983); Godfrey v. Gilsdorf, 476 P.2d 3, 6, 86 Nev. 714, 718 (1970); Martin v. Nager, 192 N.J. Super. 189, 197-98, 469 A.2d 519, 523 (Super. Ct. Ch. Div. 1983). Where the certificate of title statute is silent on this issue of transfer, this section will control.

#### Cross References:

Sections 1-102, 1-103, 1-201(33), 2-403, 2A-103(1)(v), 2A-103(3), 2A-103(4), 2A-303 and 2A-305.

#### Definitional

#### Cross References:

"Agreed". Section 1-201(3).

"Delivery". Section 1-201(14).

"Entrusting". Section 2-403(3).

"Good faith". Sections 1-201(19) and 2-103(1)(b).

"Goods". Section 2A-103(1)(h).

"Lease". Section 2A-103(1)(j).

"Lease contract". Section 2A-103(1)(l).

"Leasehold interest". Section 2A-103(1)(m).

"Lessee". Section 2A-103(1)(n).

"Lessee in the ordinary course of business". Section 2A-103(1)(o).

"Lessor". Section 2A-103(1)(p).

"Merchant". Section 2-104(1).

"Purchase". Section 2A-103(1)(v).

"Rights". Section 1-201(36).

"Value". Section 1-201(44).

#### § 2A-305. SALE OR SUBLEASE OF GOODS BY LESSEE.

(1) Subject to the provisions of Section 2A-303, a buyer or sublessee from the lessee of goods under an existing lease contract obtains, to the extent of the interest transferred, the leasehold interest in the goods that the lessee had or had power to transfer, and except as provided in subsection (2) and Section 2A-511(4), takes subject to the existing lease contract. A lessee with a voidable leasehold interest has power to transfer a good leasehold interest to a good faith buyer for value or a good faith sublessee for value, but only to the extent set forth in the preceding sentence. When goods have been delivered under a transaction of lease the lessee has that power even though:

- (a) the lessor was deceived as to the identity of the lessee;
- (b) the delivery was in exchange for a check which is later dishonored; or
- (c) the delivery was procured through fraud punishable as larcenous under the criminal law.

(2) A buyer in the ordinary course of business or a sublessee in the ordinary course of business from a lessee who is a merchant dealing in goods of that kind to whom the goods were entrusted by the lessor obtains, to the extent of the interest transferred, all of the lessor's and lessee's rights to the goods, and takes free of the existing lease contract.

(3) A buyer or sublessee from the lessee of goods that are subject to an existing lease contract and are covered by a certificate of title issued under a statute of this Commonwealth or of another jurisdiction takes no greater rights than those provided both by this section and by the certificate of title statute.

#### OFFICIAL COMMENT

Uniform Statutory Source: Section 2-403.

Changes: While Section 2-403 was used as a model for this section, the provisions of Section 2-403 were significantly revised to reflect leasing practice and to integrate this Article with certificate of title statutes.

Purposes: 1. This section, a companion to Section 2A-304, states the rule with respect to the leasehold interest obtained by a buyer or sublessee from a lessee of goods under an existing lease contract. Cf. Section 2A-304 official comment. Note that this provision is consistent with

existing case law, which prohibits the bailee's transfer of title to a good faith purchaser for value under Section 2-403(1). Rohweder v. Aberdeen Product Credit Ass'n, 765 F.2d 109 (8th Cir. 1985).

2. Subsection (2) is also consistent with existing case law. American Standard Credit, Inc. v. National Cement Co., 643 F.2d 248, 269-70 (5th Cir. 1981); but cf. Exxon Co., U.S.A. v. TLW Computer Indus., 37 U.C.C. Rep. Serv. (Callaghan) 1052, 1057-58 (D. Mass. 1983). Unlike Section 2A-304(2), this subsection does not contain any requirement with respect to the time that the goods were entrusted to the merchant. In Section 2A-304(2) the competition is between two customers of the merchant lessor; the time of entrusting was added as a criterion to create additional protection to the customer who was first in time: the existing lessee. In subsection (2) the equities between the competing interests were viewed as balanced.

3. There appears to be some overlap between Section 2-403(2) and Section 2A-305(2) with respect to a buyer in the ordinary course of business. However, an examination of this Article's definition of buyer in the ordinary course of business (Section 2A-103(1)(a)) makes clear that this reference was necessary to treat entrusting in the context of a lease.

4. Subsection (3) states a rule of construction with respect to a transfer of goods from a lessee to a buyer or sublessee, where the goods are subject to an existing lease and covered by a certificate of title. Cf. Section 2A-304 official comment.

#### Cross References:

Sections 2-403, 2A-103(1)(a), 2A-304 and 2A-305(2).

#### Definitional

#### Cross References:

"Buyer". Section 2-103(1)(a).

"Buyer in the ordinary course of business". Section 2A-103(1)(a).

"Delivery". Section 1-201(14).

"Entrusting". Section 2-403(3).

"Good faith". Sections 1-201(19) and 2-103(1)(b).

"Goods". Section 2A-103(1)(h).

"Lease". Section 2A-103(1)(j).

"Lease contract". Section 2A-103(1)(l).

"Leasehold interest." Section 2A-103(1)(m).

"Lessee". Section 2A-103(1)(n).

"Lessee in the ordinary course of business". Section 2A-103(1)(o).

"Lessor". Section 2A-103(1)(p).

"Merchant". Section 2-104(1).

"Rights". Section 1-201(36).

"Sale". Section 2-106(1).

"Sublease". Section 2A-103(1)(w).

"Value". Section 1-201(44).

§ 2A-306. PRIORITY OF CERTAIN LIENS ARISING BY  
OPERATION OF LAW.

If a person in the ordinary course of his or her business furnishes services or materials with respect to goods subject to a lease contract, a lien upon those goods in the possession of that person given by statute or rule of law for those materials or services takes priority over any interest of the lessor or lessee under the lease contract or this Article unless the lien is created by statute and the statute provides otherwise or unless the lien is created by rule of law and the rule of law provides otherwise.

#### OFFICIAL COMMENT

Uniform Statutory Source: Section 9-310.

Changes: The approach reflected in the provisions of Section 9-310 was included, but revised to conform to leasing terminology and to expand the exception to the special priority granted to protected liens to cover liens created by rule of law as well as those created by statute.

Purposes: This section should be interpreted to allow a qualified lessor or a qualified lessee to be the competing lienholder if the statute or rule of law so provides. The reference to statute includes applicable regulations and cases; these sources must be reviewed in resolving a priority dispute under this section.

#### Cross Reference:

Section 9-310.

#### Definitional

#### Cross References:

"Goods". Section 2A-103(1)(h).

"Lease Contract". Section 2A-103(1)(l).

"Lessee". Section 2A-103(1)(n).

"Lessor". Section 2A-103(1)(p).

"Lien". Section 2A-103(1)(r).

"Person". Section 1-201(30).

#### § 2A-307. PRIORITY OF LIENS ARISING BY ATTACHMENT OR LEVY ON, SECURITY INTERESTS IN, AND OTHER CLAIMS TO GOODS.

(1) Except as otherwise provided in Section 2A-306, a creditor of a lessee takes subject to the lease contract.

(2) Except as otherwise provided in subsections (3) and (4) of this section and in Sections 2A-306 and 2A-308, a creditor of a lessor takes subject to the lease contract unless:

(a) The creditor holds a lien that attached to the goods before the lease contract became enforceable,

(b) The creditor holds a security interest in the goods and the lessee did not give value and receive delivery of the goods without knowledge of the security interest; or

(c) the creditor holds a security interest in the goods which was perfected (Section 9-303) before the lease contract became enforceable.

(3) A lessee in the ordinary course of business takes the leasehold interest free of a security interest in the goods created by the lessor even though the security interest is perfected (Section 9-303) and the lessee knows of its existence.

(4) A lessee other than a lessee in the ordinary course of business takes the leasehold interest free of a security interest to the extent that it secures future advances made after the secured party acquires knowledge of the lease or more than 45 days after the lease contract becomes enforceable, whichever first occurs, unless the future advances are made pursuant to a commitment entered into without knowledge of the lease and before the expiration of the 45-day period.

## OFFICIAL COMMENT

Uniform Statutory Source: None for subsection (1). Subsection (2) is derived from section 9-301, and subsections (3) and (4) are derived from Section 9-307(1) and (3), respectively.

Changes: The provisions of Sections 9-301 and 9-307(1) and (3) were incorporated, and modified to reflect leasing terminology and the basic concepts reflected in this Article.

Purposes: 1. Subsection (1) states a general rule of priority that a creditor of the lessee takes subject to the lease contract. The term lessee (Section 2A-103(1)(n)) includes sublessee. Therefore, this subsection not only covers disputes between the prime lessor and a creditor of the prime lessee but also disputes between the prime lessor, or the sublessor, and a creditor of the sublessee. Section 2A-301 official comment 3(g). Further, by using the term creditor (Section 1-201(12)), this subsection will cover disputes with a general creditor, a secured creditor, a lien creditor and any representative of creditors. Section 2A-103(4).

2. Subsection (2) states a general rule of priority that a creditor of a lessor takes subject to the lease contract. Note the discussion above with regard to the scope of these rules. Section 2A-301 official comment 3(g). Thus, the section will not only cover disputes between the prime lessee and a creditor of the prime lessor but also disputes between the prime lessee, or the sublessee, and a creditor of the sublessor.

3. To take priority over the lease contract, and the interests derived therefrom, the creditor must come within one of three exceptions stated within the rule. First, subsection (2)(a) provides that where the creditor holds a lien (Section 2A-103(1)(r)) that attached before the lease contract became enforceable (Section 2A-301), the creditor does not take subject to the lease. Second, subsection (2)(b) provides that when the creditor holds a security interest (Section 1-201(37)) whether or not perfected, the creditor has priority over a lesser who die not give value (Section 1-201(44)) and receive delivery of the goods without knowledge (Section 1-201(25)) of the security interest. As to other lessees, under subsection (2)(c) a secured creditor holding a perfected security interest before the time the lease contract became enforceable (Section 2A-301) does not take subject to the lease. With respect to this provision, the lessee is considered a buyer so that perfection of a purchase money security interest does not relate back (Section 9-301).

4. The rules of this section operate in favor of whichever party to the lease contract may enforce it, even if one party perhaps may not, e.g. under Section 2A-201(1)(b).

5. The rules stated in subsections (2)(b) and (c), and the rule in subsection (3), are best understood by reviewing a hypothetical. Assume that a merchant engaged in the business of selling and leasing musical instruments obtained possession of a truck load of musical instruments on deferred payment terms from a supplier of musical instruments on January 6. To secure payment of such credit the merchant granted the supplier a security interest in the instruments; the security interest was perfected by filing on January 15. The merchant, as lessor, entered into a lease to an individual of one of the musical instruments supplied by the supplier; the lease became enforceable on January 10. Under subsection (2)(b) the lessee will prevail unless subsection (c) provides otherwise.

Under the rule stated in subsection (2)(c) a priority dispute between the supplier, as the lessor's secured creditor, and the lessee would be determined by ascertaining on January 10 (the day the lease became enforceable) the validity and perfected status of the security interest in the musical instruments and the enforceability of the lease contract by the lessee. Nothing more appearing, under the rule stated in subsection (2)(c), the supplier's security interest in the musical instrument would have priority over the lease contract. Moreover, subsection (2) states that its rules are subject to the rules of subsections (3) and (4). Under this hypothetical the lessee should qualify as a "lessee in the ordinary course of business". Section 2A-103(1)(o). Subsection (3) also makes clear that the lessee in the ordinary course of business will win even if he or she knows of the existence of the supplier's security interest.

6. Subsections (3) and (4), which are modeled on the provisions of Section 9-307(1) and (3), respectively, state two exceptions to the priority rule stated in subsection (2) with respect to a creditor who holds a security interest. The lessee in the ordinary course of business will be treated in the same fashion as the buyer in the ordinary course of business, given a priority dispute with a secured creditor over goods subject to a lease contract.

### Cross References:

Sections 1-201(12), 1-201(25), 1-201(37), 1-201(44), 2A-103(1)(n), 2A-103(1)(o), 2A-103(1)(r),

2A-103(4), 2A-201(1)(b), 2A-301 official comment 3(g), Article 9, especially Sections 9-301, 9-307(1), and 9-307(3).

#### Definitional

#### Cross References:

"Creditor". Section 1-201(12).

"Goods". Section 2A-103(1)(h).

"Knowledge" and "Knows". Section 1-201(25).

"Lease". Section 2A-103(1)(j).

"Lease contract". Section 2A-103(1)(l).

"Leasehold interest". Section 2A-103(1)(m).

"Lessee". Section 2A-103(1)(n).

"Lessee in the ordinary course of business". Section 2A-103(1)(o).

"Lessor". Section 2A-103(1)(p).

"Lien". Section 2A-103(1)(r).

"Party". Section 1-201(29).

"Pursuant to commitment". Section 2A-103(3).

"Security interest". Section 1-201(37).

#### § 2A-308. SPECIAL RIGHTS OF CREDITORS.

(1) A creditor of a lessor in possession of goods subject to a lease contract may treat the lease contract as void if as against the creditor retention of possession by the lessor is fraudulent under any statute or rule of law, but retention of possession in good faith and current course of trade by the lessor for a commercially reasonable time after the lease contract becomes enforceable is not fraudulent.

(2) Nothing in this Article impairs the rights of creditors of a lessor if the lease contract (a) becomes enforceable, not in current course of trade but in satisfaction of or as security for a pre-existing claim for money, security, or the like, and (b) is made under circumstances which under any statute or rule of law apart from this Article would constitute the transaction a fraudulent transfer or voidable preference.

(3) A creditor of a seller may treat a sale or an identification of goods to a contract for sale as void if as against the creditor retention of possession by the seller is fraudulent under any statute or rule of law, but retention of possession of the goods pursuant to a lease contract entered into by the seller as lessee and the buyer as lessor in connection with the sale or identification of the goods is not fraudulent if the buyer bought for value and in good faith.

#### OFFICIAL COMMENT

Uniform Statutory Source: Section 2-402(2) and (3)(b).

Changes: Rephrased and new material added to conform to leasing terminology and practice.

Purposes: 1. Subsection (1) states a general rule of avoidance where the lessor has retained possession of goods if such retention is fraudulent under any statute or rule of law. However, the subsection creates an exception under certain circumstances for retention of possession of goods for a commercially reasonable time after the lease contract becomes enforceable.

2. Subsection (2) also preserves the possibility of an attack on the lease by creditors of the lessor if the lease was made in satisfaction of or as security for a pre-existing claim, and would constitute a fraudulent transfer or voidable preference under other law.

3. Finally, subsection (3) states a new rule with respect to sale-leaseback transactions, i.e., transactions where the seller sells goods to a buyer but possession of the goods is retained by the seller pursuant to a lease contract between the buyer as lessor and the seller as lessee. Notwithstanding any statute or rule of law that would treat such retention as fraud, whether per se, prima facie, or otherwise, the retention is not fraudulent if the buyer bought for value (Section 1-201(44)) and in good faith (Sections 1-201(19) and 2-103(1)(b)). Section 2A-103(3) and (4).

4. This provision overrides Section 2-402(2) to the extent it would otherwise apply to a sale-leaseback transaction.

Cross References:

Sections 1-201(19), 1-201(44), 2-402(2) and 2A-103(4).

Definitional

Cross References:

“Buyer”. Section 2-103(1)(a).

“Contract”. Section 1-201(11).

“Creditor”. Section 1-201(12).

“Good faith”. Sections 1-201(19) and 2-103(1)(b).

“Goods”. Section 2A-103(1)(h).

“Lease contract”. Section 2A-103(1)(l).

“Lessee”. Section 2A-103(1)(n).

“Lessor”. Section 2A-103(1)(p).

“Money”. Section 1-201(24).

“Reasonable time”. Section 1-204(1) and (2).

“Rights”. Section 1-201(36).

“Sale”. Section 2-106(1).

“Seller”. Section 2-103(1)(d).

“Value”. Section 1-201(44).

**§ 2A-309. LESSOR'S AND LESSEE'S RIGHTS WHEN GOODS BECOME FIXTURES.**

(1) In this section:

(a) goods are “fixtures” when they become so related to particular real estate that an interest in them arises under real estate law;

(b) a “fixture filing” is the filing, in the office where a mortgage on the real estate would be filed or recorded, of a financing statement covering goods that are or are to become fixtures and conforming to the requirements of Section 9-402(5);

(c) a lease is a “purchase money lease” unless the lessee has possession or use of the goods or the right to possession or use of the goods before the lease agreement is enforceable;

(d) a mortgage is a “construction mortgage” to the extent it secures an obligation incurred for the construction of an improvement on land including the acquisition cost of the land, if the recorded writing so indicates; and

(e) “encumbrance” includes real estate mortgages and other liens on real estate and all other rights in real estate that are not ownership interests.

(2) Under this Article a lease may be of goods that are fixtures or may continue in goods that become fixtures, but no lease exists under this Article of ordinary building materials incorporated into an improvement on land.

(3) This Article does not prevent creation of a lease of fixtures pursuant to real estate law.

(4) The perfected interest of a lessor of fixtures has priority over a conflicting interest of an encumbrancer or owner of the real estate if:

(a) the lease is a purchase money lease, the conflicting interest of the encumbrancer or owner arises before the goods become fixtures, the interest of the lessor is perfected by a fixture filing before the goods become fixtures or within ten days thereafter, and the lessee has an interest of record in the real estate or is in possession of the real estate; or

(b) the interest of the lessor is perfected by a fixture filing before the interest of the encumbrancer or owner is of record, the lessor's interest has priority over any conflicting interest of a predecessor in title of the encumbrancer or owner, and the lessee has an interest of record in the real estate or is in possession of the real estate.

(5) The interest of a lessor of fixtures, whether or not perfected, has priority over the conflicting interest of an encumbrancer or owner of the real estate if:

(a) the fixtures are readily removable factory or office machines, readily removable equipment that is not primarily used or leased for use in the operation of the real estate, or readily removable replacements of domestic appliances that are goods subject to a consumer lease, and before the goods become fixtures the lease contract is enforceable; or

(b) the conflicting interest is a lien on the real estate obtained by legal or equitable proceedings after the lease contract is enforceable; or

(c) the encumbrancer or owner has consented in writing to the lease or has disclaimed an interest in the goods as fixtures; or

(d) the lessee has a right to remove the goods as against the encumbrancer or owner. If the lessee's right to remove terminates, the priority of the interest of the lessor continues for a reasonable time.

(6) Notwithstanding subsection (4)(a) but otherwise subject to subsections (4) and (5), the interest of a lessor of fixtures, including the lessor's residual interest, is subordinate to the conflicting interest of an encumbrancer of the real estate under a construction mortgage recorded before the goods become fixtures if the goods become fixtures before the completion of the construction. To the extent given to refinance a construction mortgage, the conflicting interest of an encumbrancer of the real estate under a mortgage has this priority to the same extent as the encumbrancer of the real estate under the construction mortgage.

(7) In cases not within the preceding subsections, priority between the interest of a lessor of fixtures, including the lessor's residual interest, and the conflicting interest of an encumbrancer or owner of the real estate who is not the lessee is determined by the priority rules governing conflicting interests in real estate.

(8) If the interest of a lessor of fixtures, including the lessor's residual interest, has priority over all conflicting interests of all owners and encumbrancers of the real estate, the lessor or the lessee may (i) on default, expiration, termination, or cancellation of the lease agreement but subject to the lease agreement and this Article, or (ii) if necessary to enforce other rights and remedies of the lessor or lessee under this Article, remove the goods from the real estate, free and clear of all conflicting interests of all owners and encumbrancers of the real estate, but the lessor or lessee must reimburse any encumbrancer or owner of the real estate who is not the lessee and who has not otherwise agreed for the cost of repair of any physical injury, but not for any diminution in value of the real estate caused by the absence of the goods removed or by any necessity of replacing them. A person entitled to reimbursement may refuse permission to remove until the party seeking removal gives adequate security for the performance of this obligation.

(9) Even though the lease agreement does not create a security interest, the interest of a lessor of fixtures, including the lessor's residual interest, is perfected by filing a financing statement as a fixture filing for leased goods that are or are to become fixtures in accordance with the relevant provisions of the Article on Secured Transactions (Article 9).

## OFFICIAL COMMENT

Uniform Statutory Source: Section 9-313.

Changes: Revised to reflect leasing terminology and to add new material.

Purposes: 1. While Section 9-313 provided a model for this section, certain provisions were substantially revised.

2. Section 2A-309(1)(c), which is new, defines purchase money lease to exclude leases where the lessee had possession or use of the goods or the right thereof before the lease agreement became enforceable. This term is used in subsection (4)(a) as one of the conditions that must be satisfied to obtain priority over the conflicting interest of an encumbrancer or owner of the real estate.

3. Section 2A-309(4), which states one of several priority rules found in this section, deletes reference to office machines and the like (Section 9-313(4)(c)) as well as certain liens (Section 9-313(4)(d)). However, these items are included in subsection (5), another priority rule that is more permissive than the rule found in subsection (4) as it applies whether or not the interest of the lessor is perfected. In addition, subsection (5)(a) expands the scope of the provisions of Section 9-313(4)(c) to include readily removable equipment not primarily used or leased for use in the operation of real estate; the qualifier is intended to exclude from the expanded rule equipment integral to the operation of real estate, e.g., heating and air conditioning equipment.

4. The rule stated in subsection (7) is more liberal than the rule stated in Section 9-313(7) in that issues of priority not otherwise resolved in this subsection are left for resolution by the priority rules governing conflicting interests in real estate, as opposed to the Section 9-313(7) automatic subordination of the security interest in fixtures. Note that, for the purpose of this section, where the interest of an encumbrancer or owner of the real estate is paramount to the interest of the lessor, the latter term includes the residual interest of the lessor.

5. The rule stated in subsection (8) is more liberal than the rule stated in Section 9-313(8) in that the right of removal is extended to both the lessor and the lessee and the occasion for removal includes expiration, termination or cancellation of the lease agreement, and enforcement of rights and remedies under this Article, as well as default. The new language also provides that upon removal the goods are free and clear of conflicting interests of owners and encumbrancers of the real estate.

6. Finally, subsection (9) provides a mechanism for the lessor of fixtures to perfect its interest by filing a financing statement under the provisions of the Article on Secured Transactions (Article 9), even though the lease agreement does not create a security interest. Section 1-201(37). The relevant provisions of Article 9 must be interpreted permissively to give effect to this mechanism as it implicitly expands the scope of Article 9 so that its filing provisions apply to transactions that create a lease of fixtures, even though the lease agreement does not create a security interest. This mechanism is similar to that provided in Section 2-326(3)(c) for the seller of goods on consignment, even though the consignment is not "intended as security". Section 1-201(37). Given the lack of litigation with respect to the mechanism created for consignment sales, this new mechanism should prove effective.

### Cross References:

Sections 1-201(37), 2A-309(1)(c), 2A-309(4), Article 9, especially Sections 9-313, 9-313(4)(c), 9-313(4)(d), 9-313(7), 9-313(8) and 9-408.

### Definitional

### Cross References:

"Agreed". Section 1-201(3).

"Cancellation". Section 2A-103(1)(b).

"Conforming". Section 2A-103(1)(d).

"Consumer lease". Section 2A-103(1)(e).

"Goods". Section 2A-103(1)(h).

“Lease”. Section 2A-103(1)(j).  
“Lease agreement”. Section 2A-103(1)(k).  
“Lease contract”. Section 2A-103(1)(l).  
“Lessee”. Section 2A-103(1)(n).  
“Lessor”. Section 2A-103(1)(p).  
“Lien”. Section 2A-103(1)(r).  
“Mortgage”. Section 9-105(1)(j).  
“Party”. Section 1-201(29).  
“Person”. Section 1-201(30).  
“Reasonable time”. Section 1-204(1) and (2).  
“Remedy”. Section 1-201(34).  
“Rights”. Section 1-201(36).  
“Security interest”. Section 1-201(37).  
“Termination”. Section 2A-103(1)(z).  
“Value”. Section 1-201(44).  
“Writing”. Section 1-201(46).

**§ 2A-310. LESSOR’S AND LESSEE’S RIGHTS WHEN GOODS BECOME ACCESSIONS.**

(1) Goods are “accessions” when they are installed in or affixed to other goods.

(2) The interest of a lessor or a lessee under a lease contract entered into before the goods became accessions is superior to all interests in the whole except as stated in subsection (4).

(3) The interest of a lessor or a lessee under a lease contract entered into at the time or after the goods became accessions is superior to all subsequently acquired interests in the whole except as stated in subsection (4) but is subordinate to interests in the whole existing at the time the lease contract was made unless the holders of such interests in the whole have in writing consented to the lease or disclaimed an interest in the goods as part of the whole.

(4) The interest of a lessor or a lessee under a lease contract described in subsection (2) or (3) is subordinate to the interest of

(a) a buyer in the ordinary course of business or a lessee in the ordinary course of business of any interest in the whole acquired after the goods became accessions; or

(b) a creditor with a security interest in the whole perfected before the lease contract was made to the extent that the creditor makes subsequent advances without knowledge of the lease contract.

(5) When under subsections (2) or (3) and (4) a lessor or a lessee of accessions holds an interest that is superior to all interests in the whole, the lessor or the lessee may (a) on default, expiration, termination, or cancellation of the lease contract by the other party but subject to the provisions of the lease contract and this Article, or (b) if necessary to enforce his or her other rights and remedies under this Article, remove the goods from the whole, free and clear of all interests in the whole, but he or she must reimburse any holder of an interest in the whole who is not the lessee and who has not otherwise agreed for the cost of repair of any physical injury but not for any diminution in value of the whole caused by the absence of the goods removed or by any necessity for replacing them. A person entitled to reimbursement may refuse permission to remove until the party seeking removal gives adequate security for the performance of this obligation.

OFFICIAL COMMENT

Uniform Statutory Source: Section 9-314.

Changes: Revised to reflect leasing terminology and to add new material.

) Purposes: 1. Subsections (1) and (2) restate the provisions of subsection (1) of Section 9-314 to clarify the definition of accession and to add leasing terminology to the priority rule that applies when the lease is entered into before the goods become accessions. Subsection (3) restates the provisions of subsection (2) of Section 9-314 to add leasing terminology to the priority rule that applies when the lease is entered into on or after the goods become accessions. Unlike the rule with respect to security interests, the lease is merely subordinate, not invalid.

2. Subsection (4) creates two exceptions to the priority rules stated in subsections (2) and (3). Subsection (4) deletes the special priority rule found in the provisions of Section 9-314(3)(b) as the interests of the lessor and lessee are entitled to greater protection.

3. Finally, subsection (5) is modeled on the provisions of Section 9-314(4) with respect to removal of accessions, restated to reflect the parallel changes in Section 2A-309(8).

4. Neither this section nor Section 9-314 governs where the accession to the goods is not subject to the interest of a lessor or a lessee under a lease contract and is not subject to the interest of a secured party under a security agreement. This issue is to be resolved by the courts, case by case.

Cross References:

Sections 2A-309(8), 9-314(1), 9-314(2), 9-314(3)(b), 9-314(4).

Definitional

Cross References:

“Agreed”. Section 1-201(3).

“Buyer in the ordinary course of business”. Section 2A-103(1)(a).

“Cancellation”. Section 2A-103(1)(b).

“Creditor”. Section 1-201(12).

“Goods”. Section 2A-103(1)(h).

“Holder”. Section 1-201(20).

“Knowledge”. Section 1-201(25).

“Lease”. Section 2A-103(1)(j).

“Lease contract”. Section 2A-103(1)(l).

“Lessee”. Section 2A-103(1)(n).

“Lessee in the ordinary course of business”. Section 2A-103(1)(o).

“Lessor”. Section 2A-103(1)(p).

“Party”. Section 1-201(29).

“Person”. Section 1-201(30).

“Remedy”. Section 1-201(34).

“Rights”. Section 1-201(36).

“Security interest”. Section 1-201(37).

“Termination”. Section 2A-103(1)(z).

"Value". Section 1-201(44).

"Writing". Section 1-201(46).

§ 2A-311. PRIORITY SUBJECT TO SUBORDINATION.

Nothing in this Article prevents subordination by agreement by any person entitled to priority.

OFFICIAL COMMENT

Uniform Statutory Source: Section 9-316.

Purposes: The several preceding sections deal with questions of priority. This section is inserted to make it entirely clear that a person entitled to priority may effectively agree to subordinate the claim. Only the person entitled to priority may make such an agreement: the rights of such a person cannot be adversely affected by an agreement to which that person is not a party.

Cross References:

Sections 1-102 and 2A-304 through 2A-310.

Definitional Cross References:

"Agreement". Section 1-201(3).

"Person". Section 1-201(30).

PART 4. PERFORMANCE OF LEASE CONTRACT:

REPUDIATED, SUBSTITUTED AND EXCUSED

§ 2A-401. INSECURITY: ADEQUATE ASSURANCE OF PERFORMANCE.

(1) A lease contract imposes an obligation on each party that the other's expectation of receiving due performance will not be impaired.

(2) If reasonable grounds for insecurity arise with respect to the performance of either party, the insecure party may demand in writing adequate assurance of due performance. Until the insecure party receives that assurance, if commercially reasonable the insecure party may suspend any performance for which he or she has not already received the agreed return.

(3) A repudiation of the lease contract occurs if assurance of due performance adequate under the circumstances of the particular case is not provided to the insecure party within a reasonable time, not to exceed 30 days after receipt of a demand by the other party.

(4) Between merchants, the reasonableness of grounds for insecurity and the adequacy of any assurance offered must be determined according to commercial standards.

(5) Acceptance of any nonconforming delivery or payment does not prejudice the aggrieved party's right to demand adequate assurance of future performance.

OFFICIAL COMMENT

Uniform Statutory Source: Section 2-609.

Changes: Revised to reflect leasing practices and terminology. Note that in the analogue to subsection (3) (Section 2-609(4)), the adjective “justified” modifies demand. The adjective was deleted here as unnecessary, implying no substantive change.

) Definitional

Cross References:

“Aggrieved party”. Section 1-201(2).

“Agreed”. Section 1-201(3).

“Between merchants”. Section 2-104(3).

“Conforming”. Section 2A-103(1)(d).

“Delivery”. Section 1-201(14).

“Lease contract”. Section 2A-103(1)(l).

“Party”. Section 1-201(29).

“Reasonable time”. Section 1-204(1) and (2).

“Receipt”. Section 2-103(1)(c).

“Rights”. Section 1-201(36).

“Writing”. Section 1-201(46).

§ 2A-402. ANTICIPATORY REPUDIATION.

If either party repudiates a lease contract with respect to a performance not yet due under the lease contract, the loss of which performance will substantially impair the value of the lease contract to the other, the aggrieved party may:

(a) for a commercially reasonable time, await retraction of repudiation and performance by the repudiating party;

(b) make demand pursuant to Section 2A-401 and await assurance of future performance adequate under the circumstances of the particular case; or

(c) resort to any right or remedy upon default under the lease contract or this Article, even though the aggrieved party has notified the repudiating party that the aggrieved party would await the repudiating party’s performance and assurance and has urged retraction. In addition, whether or not the aggrieved party is pursuing one of the foregoing remedies, the aggrieved party may suspend performance or, if the aggrieved party is the lessor, proceed in accordance with the provisions of this Article on the lessor’s right to identify goods to the lease contract notwithstanding default or to salvage unfinished goods (Section 2A-524).

OFFICIAL COMMENT

Uniform Statutory Source: Section 2-610.

Changes: Revised to reflect leasing practices and terminology.

Definitional

Cross References:

“Aggrieved party”. Section 1-201(2).

“Goods”. Section 2A-103(1)(h).

“Lease contract”. Section 2A-103(1)(l).

“Lessor”. Section 2A-103(1)(p).

“Notifies”. Section 1-201(26).

“Party”. Section 1-201(29).

“Reasonable time”. Section 1-204(1) and (2).

“Remedy”. Section 1-201(34).

“Rights”. Section 1-201(36).

“Value”. Section 1-201(44).

#### § 2A-403. RETRACTION OF ANTICIPATORY REPUDIATION.

(1) Until the repudiating party's next performance is due, the repudiating party can retract the repudiation unless, since the repudiation, the aggrieved party has cancelled the lease contract or materially changed the aggrieved party's position or otherwise indicated that the aggrieved party considers the repudiation final.

(2) Retraction may be by any method that clearly indicates to the aggrieved party that the repudiating party intends to perform under the lease contract and includes any assurance demanded under Section 2A-401.

(3) Retraction reinstates a repudiating party's rights under a lease contract with due excuse and allowance to the aggrieved party for any delay occasioned by the repudiation.

#### OFFICIAL COMMENT

Uniform Statutory Source: Section 2-611.

Changes: Revised to reflect leasing practices and terminology. Note that in the analogue to subsection (2) (Section 2-611(2)) the adjective “justifiably” modifies demanded. The adjective was deleted here (as it was in Section 2A-401) as unnecessary, implying no substantive change.

#### Definitional

#### Cross References:

“Aggrieved party”. Section 1-201(2).

“Cancellation”. Section 2A-103(1)(b).

“Lease contract”. Section 2A-103(1)(l).

“Party”. Section 1-201(29).

“Rights”. Section 1-201(36).

#### § 2A-404. SUBSTITUTED PERFORMANCE.

(1) If without fault of the lessee, the lessor and the supplier, the agreed berthing, loading, or unloading facilities fail or the agreed type of carrier becomes unavailable or the agreed manner of delivery otherwise becomes commercially impracticable, but a commercially reasonable substitute is available, the substitute performance must be tendered and accepted.

(2) If the agreed means or manner of payment fails because of domestic or foreign governmental regulation:

(a) the lessor may withhold or stop delivery or cause the supplier to withhold or stop delivery unless the lessee provides a means or manner of payment that is commercially a substantial equivalent; and

(b) if delivery has already been taken, payment by the means or in the manner provided by the regulation discharges the lessee's obligation unless the regulation is discriminatory, oppressive, or predatory.

#### OFFICIAL COMMENT

Uniform Statutory Source: Section 2-614.

Changes: Revised to reflect leasing practices and terminology.

Definitional

Cross References:

“Agreed”. Section 1-201(3).

“Delivery”. Section 1-201(14).

“Fault”. Section 2A-103(1)(f).

“Lessee”. Section 2A-103(1)(n).

“Lessor”. Section 2A-103(1)(p).

“Supplier”. Section 2A-103(1)(x).

§ 2A-405. EXCUSED PERFORMANCE.

Subject to Section 2A-404 on substituted performance, the following rules apply:

(a) Delay in delivery or nondelivery in whole or in part by a lessor or a supplier who complies with paragraphs (b) and (c) is not a default under the lease contract if performance as agreed has been made impracticable by the occurrence of a contingency the nonoccurrence of which was a basic assumption on which the lease contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order, whether or not the regulation or order later proves to be invalid.

(b) If the causes mentioned in paragraph (a) affect only part of the lessor's or the supplier's capacity to perform, the lessor or supplier shall allocate production and deliveries among his customers but at his option may include regular customers not then under contract for sale or lease as well as his own requirements for further manufacture. The lessor or supplier may so allocate in any manner that is fair and reasonable.

(c) The lessor seasonably shall notify the lessee and in the case of a finance lease the supplier seasonably shall notify the lessor and the lessee, if known, that there will be delay or nondelivery and, if allocation is required under paragraph (b), of the estimated quota thus made available for the lessee.

OFFICIAL COMMENT

Uniform Statutory Source: Section 2-615.

Changes: Revised to reflect leasing practices and terminology.

Definitional

Cross References:

“Agreed”. Section 1-201(3).

“Contract”. Section 1-201(11).

“Delivery”. Section 1-201(14).

“Finance lease”. Section 2A-103(1)(g).

“Good faith”. Sections 1-201(19) and 2-103(1)(b).

“Knows”. Section 1-201(25).

“Lease”. Section 2A-103(1)(j).

“Lease contract”. Section 2A-103(1)(l).

“Lessee”. Section 2A-103(1)(n).

“Lessor”. Section 2A-103(1)(p).

“Notifies”. Section 1-201(26).

“Sale”. Section 2-106(1).

“Seasonably”. Section 1-204(3).

“Supplier”. Section 2A-103(1)(x).

#### § 2A-406. PROCEDURE ON EXCUSED PERFORMANCE.

(1) If the lessee receives notification of a material or indefinite delay or an allocation justified under Section 2A-405, the lessee may by written notification to the lessor as to any goods involved, and with respect to all of the goods if under an installment lease contract the value of the whole lease contract is substantially impaired (Section 2A-510):

(a) terminate the lease contract (Section 2A- 505(2)); or

(b) except in a finance lease that is not a consumer lease, modify the lease contract by accepting the available quota in substitution, with due allowance from the rent payable for the balance of the lease term for the deficiency but without further right against the lessor.

(2) If, after receipt of a notification from the lessor under Section 2A-405, the lessee fails so to modify the lease agreement within a reasonable time not exceeding 30 days, the lease contract lapses with respect to any deliveries affected.

#### OFFICIAL COMMENT

Uniform Statutory Source: Section 2-616(1) and (2).

Changes: Revised to reflect leasing practices and terminology. Note that subsection 1(a) allows the lessee under a lease, including a finance lease, the right to terminate the lease for excused performance (Sections 2A-404 and 2A-405). However, subsection 1(b), which allows the lessee the right to modify the lease for excused performance, excludes a finance lease that is not a consumer lease. This exclusion is compelled by the same policy that led to codification of provisions with respect to irrevocable promises. Section 2A-407.

#### Definitional

#### Cross References:

“Consumer lease”. Section 2A-103(1)(e).

“Delivery”. Section 1-201(14).

“Finance lease”. Section 2A-103(1)(g).

“Goods”. Section 2A-103(1)(h).

“Installment lease contract”. Section 2A-103(1)(i).

“Lease agreement”. Section 2A-103(1)(k).

“Lease contract”. Section 2A-103(1)(l).

“Lessee”. Section 2A-103(1)(n).

“Lessor”. Section 2A-103(1)(p).

“Notice”. Section 1-201(25).

“Reasonable time”. Section 1-204(1) and (2).

“Receipt”. Section 2-103(1)(c).

“Rights”. Section 1-201(36).

“Termination”. Section 2A-103(1)(z).

“Value”. Section 1-201(44).

“Written”. Section 1-201(46).

§ 2A-407. IRREVOCABLE PROMISES: FINANCE LEASES.

(1) In 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.

(2) A promise that has become irrevocable and independent under subsection (1):

(a) Is effective and enforceable between the parties, and by or against third parties including assignees of the parties; and

(b) Is not subject to cancellation, termination, modification, repudiation, excuse, or substitution without the consent of the party to whom the promise runs.

(3) This section does not affect the validity under any other law or a covenant in any lease contract making the lessee's promises acceptance of the goods.

OFFICIAL COMMENT

Uniform Statutory Source: None.

Purposes: 1. This section extends the benefits of the classic “hell or high water” clause to a finance lease that is not a consumer lease. This section is self-executing; no special provision need be added to the contract. This section makes covenants in a finance lease irrevocable and independent due to the function of the finance lessor in a three party relationship: the lessee is looking to the supplier to perform the essential covenants and warranties. Section 2A-209. Thus, upon the lessee's acceptance of the goods the lessee's promises to the lessor under the lease contract become irrevocable and independent. The provisions of this section remain subject to the obligation of good faith (Sections 2A-103(4) and 1-203), and the lessee's revocation of acceptance (Section 2A-517).

2. The section requires the lessee to perform even if the lessor's performance after the lessee's acceptance is not in accordance with the lease contract; the lessee may, however, have and pursue a cause of action against the lessor, e.g., breach of certain limited warranties (Sections 2A-210 and 2A-211(1)). This is appropriate because the benefit of the supplier's promises and warranties to the lessor under the supply contract and, in some cases, the warranty of a manufacturer who is not the supplier, is extended to the lessee under the finance lease. Section 2A-209. Despite this balance, this section excludes a finance lease that is a consumer lease. That a consumer be obligated to pay notwithstanding defective goods or the like is a principle that is not tenable under case law (Unico v. Owen, 50 N.J. 101, 232 A.2d 405 (1967)), state statute (Unif. Consumer Credit Code § § 3.403-405, 7A U.L.A. 126-31 (1974), or federal statute (15 U.S.C. § 1666i (1982))).

3. The relationship of the three parties to a transaction that qualifies as a finance lease is best demonstrated by a hypothetical. A, the potential lessor, has been contacted by B, the potential lessee, to discuss the lease of an expensive line of equipment that B has recently placed an order for with C, the manufacturer of such goods. The negotiation is completed and A, as lessor, and B, as lessee, sign a lease of the line of equipment for a 60-month term. B, as buyer, assigns the purchase order with C to A. If this transaction creates a lease (Section 2A-103(1)(j)), this transaction should qualify as a finance lease. Section 2A-103(1)(g).

4. The line of equipment is delivered by C to B's place of business. After installation by C and testing by B, B accepts the goods by signing a certificate of delivery and acceptance, a copy of which is sent by B to A and C. One year later the line of equipment malfunctions and B falls behind in its manufacturing schedule.

5. Under this Article, because the lease is a finance lease, no warranty of fitness or merchantability is extended by A to B. Sections 2A-212(1) and 2A-213. Absent an express provision in the lease agreement, application of Section 2A-210 or Section 2A-211(1), or application of the principles of law and equity, including the law with respect to fraud, duress,

or the like (Sections 2A-103(4) and 1-103), B has no claim against A. B's obligation to pay rent to A continues as the obligation became irrevocable and independent when B accepted the line of equipment (Section 2A-407(1)). B has no right of set-off with respect to any part of the rent still due under the lease. Section 2A-508(6). However, B may have another remedy. Despite the lack of privity between B and C (the purchase order with C having been assigned by B to A), B may have a claim against C. Section 2A-209(1).

6. This section does not address whether a "hell or high water" clause, *i.e.*, a clause that is to the effect of this section, is enforceable if included in a finance lease that is a consumer lease or a lease that is not a finance lease. That issue will continue to be determined by the facts of each case and other law which this section does not affect. Sections 2A-104, 2A-103(4), 9-206 and 9-318. However, with respect to finance leases that are not consumer leases courts have enforced "hell or high water" clauses. *In re O.P.M. Leasing Servs.*, 21 Bankr. 993, 1006 (Bankr. S.D.N.Y. 1982).

7. Subsection (2) further provides that a promise that has become irrevocable and independent under subsection (1) is enforceable not only between the parties but also against third parties. Thus, the finance lease can be transferred or assigned without disturbing enforceability. Further, subsection (2) also provides that the promise cannot, among other things, be cancelled or terminated without the consent of the lessor.

#### Cross References:

Sections 1-103, 1-203, 2A-103(1)(g), 2A-103(1)(j), 2A-103(4), 2A-104, 2A-209, 2A-209(1), 2A-210, 2A-211(1), 2A-212(1), 2A-213, 2A-517(1)(b), 9-206 and 9-318.

#### Definitional

#### Cross References:

"Cancellation". Section 2A-103(1)(b).

"Consumer lease". Section 2A-103(1)(e).

"Finance lease". Section 2A-103(1)(g).

"Goods". Section 2A-103(1)(h).

"Lease contract". Section 2A-103(1)(l).

"Lessee". Section 2A-103(1)(n).

"Party". Section 1-201(29).

"Termination". Section 2A-103(1)(z).

### PART 5. DEFAULT

#### A. IN GENERAL

##### § 2A-501. DEFAULT: PROCEDURE.

(1) Whether the lessor or the lessee is in default under a lease \*\*\* contract is determined by the lease agreement and this Article.

(2) If the lessor or the lessee is in default under the lease contract, the party seeking enforcement has rights and remedies as provided in this Article and, except as limited by this Article, as provided in the lease agreement.

(3) If the lessor or the lessee is in default under the lease contract, the party seeking enforcement may reduce the party's claim to judgment, or otherwise enforce the lease contract by self-help or any available judicial procedure or nonjudicial procedure, including administrative proceeding, arbitration, or the like, in accordance with this Article.

(4) Except as otherwise provided in Section 1-106(1) or this Article or the lease agreement, the rights and remedies referred to in subsections (2) and (3) are cumulative.

(5) If the lease agreement covers both real property and goods, the party seeking

enforcement may proceed under this Part as to the goods, or under other applicable law as to both the real property and the goods in accordance with that party's rights and remedies in respect of the real property, in which case this Part does not apply.

OFFICIAL COMMENT

Uniform Statutory Source: Section 9-501.

Changes: Substantially revised.

Purposes: 1. Subsection (1) is new and represents a departure from the Article on Secured Transactions (Article 9) as the subsection makes clear that whether a party to the lease agreement is in default is determined by this Article as well as the agreement. Sections 2A-508 and 2A-523. It further departs from Article 9 in recognizing the potential default of either party, a function of the bilateral nature of the obligations between the parties to the lease contract.

2. Subsection (2) is a version of the first sentence of Section 9-501(1), revised to reflect leasing terminology.

3. Subsection (3), an expansive version of the second sentence of Section 9-501(1), lists the procedures that may be followed by the party seeking enforcement; in effect, the scope of the procedures listed in subsection (3) is consistent with the scope of the procedures available to the foreclosing secured party.

4. Subsection (4) establishes that the parties' rights and remedies are cumulative. DeKoven, Leases of Equipment: Puritan Leasing Company v. August, A Dangerous Decision, 12 U.S.F. L. Rev. 257, 276-80 (1978). Cumulation, and largely unrestricted selection, of remedies is allowed in furtherance of the general policy of the Commercial Code, stated in Section 1-106, that remedies be liberally administered to put the aggrieved party in as good a position as if the other party had fully performed. Therefore, cumulation of, or selection among, remedies is available to the extent necessary to put the aggrieved party in as good a position as it would have been in had there been full performance. However, cumulation of, or selection among, remedies is not available to the extent that the cumulation or selection would put the aggrieved party in a better position than it would have been in had there been full performance by the other party.

5. Section 9-501(3), which, among other things, states that certain rules, to the extent they give rights to the debtor and impose duties on the secured party, may not be waived or varied, was not incorporated in this Article. Given the significance of freedom of contract in the development of the common law as it applies to bailments for hire and the lessee's lack of an equity of redemption, there was no reason to impose that restraint.

Cross References:

Sections 1-106, 2A-508, 2A-523, Article 9, especially Sections 9-501(1) and 9-501(3).

Definitional

Cross References:

"Goods". Section 2A-103(1)(h).

"Lease agreement". Section 2A-103(1)(k).

"Lease contract". Section 2A-103(1)(l).

"Lessee". Section 2A-103(1)(n).

"Lessor". Section 2A-103(1)(p).

"Party". Section 1-201(29).

"Remedy". Section 1-201(34).

"Rights". Section 1-201(36).

§ 2A-502. NOTICE AFTER DEFAULT.

Except as otherwise provided in this Article or the lease agreement, the lessor or lessee in

default under the lease contract is not entitled to notice of default or notice of enforcement from the other party to the lease agreement.

#### OFFICIAL COMMENT

Uniform Statutory Source: None.

Purposes: This section makes clear that absent agreement to the contrary or provision in this Article to the contrary, e.g., Section 2A-516(3)(a), the party in default is not entitled to notice of default or enforcement. While a review of Part 5 of Article 9 leads to the same conclusion with respect to giving notice of default to the debtor, it is never stated. Although Article 9 requires notice of disposition and strict foreclosure, the different scheme of lessors' and lessees' rights and remedies developed under the common law, and codified by this Article, generally does not require notice of enforcement; furthermore, such notice is not mandated by due process requirements. However, certain sections of this Article do require notice. E.g., Section 2A-517(2).

#### Cross References:

Sections 2A-516(3)(a), 2A-517(2), and Article 9, esp. Part 5.

#### Definitional

#### Cross References:

"Lease agreement". Section 2A-103(1)(k).

"Lease contract". Section 2A-103(1)(l).

"Lessee". Section 2A-103(1)(n).

"Lessor". Section 2A-103(1)(p).

"Notice". Section 1-201(25).

"Party". Section 1-201(29).

#### § 2A-503. MODIFICATION OR IMPAIRMENT OF RIGHTS AND REMEDIES.

(1) Except as otherwise provided in this Article, the lease agreement may include rights and remedies for default in addition to or in substitution for those provided in this Article and may limit or alter the measure of damages recoverable under this Article.

(2) Resort to a remedy provided under this Article or in the lease agreement is optional unless the remedy is expressly agreed to be exclusive. If circumstances cause an exclusive or limited remedy to fail of its essential purpose, or provision for an exclusive remedy is unconscionable, remedy may be had as provided in this Article.

(3) Consequential damages may be liquidated under Section 2A-504, or may otherwise be limited, altered, or excluded unless the limitation, alteration, or exclusion is unconscionable. Limitation, alteration, or exclusion of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation, alteration or exclusion of damages where the loss is commercial is not prima facie unconscionable.

(4) Rights and remedies on default by the lessor or the lessee with respect to any obligation or promise collateral or ancillary to the lease contract are not impaired by this Article.

#### OFFICIAL COMMENT

Uniform Statutory Source: Sections 2-719 and 2-701.

Changes: Rewritten to reflect lease terminology and to clarify the relationship between this section and Section 2A-504.

Purposes: 1. A significant purpose of this Part is to provide rights and remedies for those parties to a lease who fail to provide them by agreement or whose rights and remedies fail of their essential purpose or are unenforceable. However, it is important to note that this implies no restriction on freedom to contract. Sections 2A-103(4) and 1-102(3). Thus, subsection (1), a

revised version of the provisions of Section 2-719(1), allows the parties to the lease agreement freedom to provide for rights and remedies in addition to or in substitution for those provided in this Article and to alter or limit the measure of damages recoverable under this Article. Except to the extent otherwise provided in this Article ( e.g., Sections 2A-105, 106 and 108(1) and (2)), this Part shall be construed neither to restrict the parties' ability to provide for rights and remedies or to limit or alter the measure of damages by agreement, nor to imply disapproval of rights and remedy schemes other than those set forth in this Part.

2. Subsection (2) makes explicit with respect to this Article what is implicit in Section 2-719 with respect to the Article on Sales (Article 2): if an exclusive remedy is held to be unconscionable, remedies under this Article are available. Section 2-719 official comment 1.

3. Subsection (3), a revision of Section 2-719(3), makes clear that consequential damages may also be liquidated. Section 2A-504(1).

4. Subsection (4) is a revision of the provisions of Section 2-701. This subsection leaves the treatment of default with respect to obligations or promises collateral or ancillary to the lease contract to other law. Sections 2A-103(4) and 1-103. An example of such an obligation would be that of the lessor to the secured creditor which has provided the funds to leverage the lessor's lease transaction; an example of such a promise would be that of the lessee, as seller, to the lessor, as buyer, in a sale-leaseback transaction.

#### Cross References:

Sections 1-102(3), 1-103, Article 2, especially Sections 2- 701, 2-719, 2-719(1), 2-719(3), 2-719 official comment 1, and Sections 2A-103(4), 2A-105, 2A-106, 2A-108(1), 2A-108(2), 2A-504 and 2A-504(1).

#### Definitional

#### Cross References:

"Agreed". Section 1-201(3).

"Consumer goods". Section 9-109(1).

"Lease agreement". Section 2A-103(1)(k).

"Lease contract". Section 2A-103(1)(l).

"Lessee". Section 2A-103(1)(n).

"Lessor". Section 2A-103(1)(p).

"Person". Section 1-201(30).

"Remedy". Section 1-201(34).

"Rights". Section 1-201(36).

#### § 2A-504. LIQUIDATION OF DAMAGES.

(1) Damages payable by either party for default, or any other act or omission, including indemnity for loss or diminution of anticipated tax benefits or loss or damage to lessor's residual interest, may be liquidated in the lease agreement but only at an amount or by a formula that is reasonable in light of the then anticipated harm caused by the default or other act or omission.

(2) If the lease agreement provides for liquidation of damages, and such provision does not comply with subsection (1), or such provision is an exclusive or limited remedy that circumstances cause to fail of its essential purpose, remedy may be had as provided in this Article.

(3) If the lessor justifiably withholds or stops delivery of goods because of the lessee's default or insolvency (Section 2A-525 or 2A-526), the lessee is entitled to restitution of any amount by which the sum of his or her payments exceeds:

(a) the amount to which the lessor is entitled by virtue of terms liquidating the lessor's

damages in accordance with subsection (1); or

(b) in the absence of those terms, 20 percent of the then present value of the total rent the lessee was obligated to pay for the balance of the lease term, or, in the case of a consumer lease, the lesser of such amount or \$500.

(4) A lessee's right to restitution under subsection (3) is subject to offset to the extent the lessor establishes:

(a) a right to recover damages under the provisions of this Article other than subsection (1); and

(b) the amount or value of any benefits received by the lessee directly or indirectly by reason of the lease contract.

#### OFFICIAL COMMENT

Uniform Statutory Source: Sections 2-718(1), (2), (3) and 2-719(2).

Changes: Substantially rewritten.

Purposes: 1. Many leasing transactions are predicated on the parties' ability to agree to an appropriate amount of damages or formula for damages in the event of default or other act or omission. The rule with respect to sales of goods (Section 2-718) may not be sufficiently flexible to accommodate this practice. Thus, consistent with the common law emphasis upon freedom to contract with respect to bailments for hire, this section has created a revised rule that allows greater flexibility with respect to leases of goods.

2. Subsection (1), a significantly modified version of the provisions of Section 2-718(1), provides for liquidation of damages in the lease agreement at an amount or by a formula. Section 2-718(1) does not by its express terms include liquidation by a formula; this change was compelled by modern leasing practice. Subsection (1), in a further expansion of Section 2-718(1), provides for liquidation of damages for default as well as any other act or omission.

3. A liquidated damages formula that is common in leasing practice provides that the sum of lease payments past due, accelerated future lease payments, and the lessor's estimated residual interest, less the net proceeds of disposition (whether by sale or re-lease) of the leased goods is the lessor's damages. Tax indemnities, costs, interest and attorney's fees are also added to determine the lessor's damages. Another common liquidated damages formula utilizes a periodic depreciation allocation as a credit to the aforesaid amount in mitigation of a lessor's damages. A third formula provides for a fixed number of periodic payments as a means of liquidating damages. Stipulated loss or stipulated damage schedules are also common. Whether these formulae are enforceable will be determined in the context of each case by applying a standard of reasonableness in light of the harm anticipated when the formula was agreed to. Whether the inclusion of these formulae will affect the classification of the transaction as a lease or a security interest is to be determined by the facts of each case. Section 1-201(37). E.g. In re Noack, 44 Bankr. 172, 174-75 (Bankr. E.D. Wis. 1984).

4. This section does not incorporate two other tests that under sales law determine enforceability of liquidated damages, i.e., difficulties of proof of loss and inconvenience or nonfeasibility of otherwise obtaining an adequate remedy. The ability to liquidate damages is critical to modern leasing practice; given the parties' freedom to contract at common law, the policy behind retaining these two additional requirements here was thought to be outweighed. Further, given the expansion of subsection (1) to enable the parties to liquidate the amount payable with respect to an indemnity for loss or diminution of anticipated tax benefits resulted in another change: the last sentence of Section 2-718(1), providing that a term fixing unreasonably large liquidated damages is void as a penalty, was also not incorporated. The impact of local, state and federal tax laws on a leasing transaction can result in an amount payable with respect to the tax indemnity many times greater than the original purchase price of the goods. By deleting the reference to unreasonably large liquidated damages the parties are free to negotiate a formula, restrained by the rule of reasonableness in this section. These changes should invite the parties to liquidate damages. Peters, Remedies for Breach of Contracts Relating to the Sale of Goods Under the Uniform Commercial Code: A Roadmap for Article Two, 73 Yale L.J. 199, 278 (1963).

5. Subsection (2), a revised version of Section 2-719(2), provides that if the liquidated damages provision is not enforceable or fails of its essential purpose, remedy may be had as provided in this Article.

6. Subsection (3)(b) of this section differs from subsection (2)(b) of Section 2-718; in the absence of a valid liquidated damages amount or formula the lessor is permitted to retain 20 percent of the present value of the total rent payable under the lease. The alternative limitation of \$500 contained in Section 2-718 is deleted as unrealistically low with respect to a lease other than a consumer lease.

Cross References:

Sections 1-201(37), 2-718, 2-718(1), 2-718(2)(b) and 2-719(2).

Definitional

Cross References:

“Consumer lease”. Section 2A-103(1)(e).  
“Delivery”. Section 1-201(14).  
“Goods”. Section 2A-103(1)(h).  
“Insolvent”. Section 1-201(23).  
“Lease agreement”. Section 2A-103(1)(k).  
“Lease contract”. Section 2A-103(1)(l).  
“Lessee”. Section 2A-103(1)(n).  
“Lessor”. Section 2A-103(1)(p).  
“Lessor’s residual interest”. Section 2A-103(1)(q).  
“Party”. Section 1-201(29).  
“Present value”. Section 2A-103(1)(u).  
“Remedy”. Section 1-201(34).  
“Rights”. Section 1-201(36).  
“Term”. Section 1-201(42).  
“Value”. Section 1-201(44).

**§ 2A-505. CANCELLATION AND TERMINATION AND EFFECT OF CANCELLATION, TERMINATION, RESCISSION, OR FRAUD ON RIGHTS AND REMEDIES.**

(1) On cancellation of the lease contract, all obligations that are still executory on both sides are discharged, but any right based on prior default or performance survives, and the cancelling party also retains any remedy for default of the whole lease contract or any unperformed balance.

(2) On termination of the lease contract, all obligations that are still executory on both sides are discharged but any right based on prior default or performance survives.

(3) Unless the contrary intention clearly appears, expressions of “cancellation,” “rescission,” or the like of the lease contract may not be construed as a renunciation or discharge of any claim in damages for an antecedent default.

(4) Rights and remedies for material misrepresentation or fraud include all rights and remedies available under this Article for default.

(5) Neither rescission nor a claim for rescission of the lease contract nor rejection or return of the goods may bar or be deemed inconsistent with a claim for damages or other right or remedy.

## OFFICIAL COMMENT

Uniform Statutory Source: Sections 2-106(3) and (4), 2-720 and 2-721.

Changes: Revised to reflect leasing practices and terminology.

### Definitional

#### Cross References:

“Cancellation”. Section 2A-103(1)(b).

“Goods”. Section 2A-103(1)(h).

“Lease contract”. Section 2A-103(1)(l).

“Party”. Section 1-201(29).

“Remedy”. Section 1-201(34).

“Rights”. Section 1-201(36).

“Termination”. Section 2A-103(1)(z).

### § 2A-506. STATUTE OF LIMITATIONS.

(1) An action for default under a lease contract, including breach of warranty or indemnity, must be commenced within 4 years after the cause of action accrued. By the original lease contract the parties may reduce the period of limitation to not less than one year.

(2) A cause of action for default accrues when the act or omission on which the default or breach of warranty is based is or should have been discovered by the aggrieved party, or when the default occurs, whichever is later. A cause of action for indemnity accrues when the act or omission on which the claim for indemnity is based is or should have been discovered by the indemnified party, whichever is later.

(3) If an action commenced within the time limited by subsection (1) is so terminated as to leave available a remedy by another action for the same default or breach of warranty or indemnity, the other action may be commenced after the expiration of the time limited and within 6 months after the termination of the first action unless the termination resulted from dismissal for failure or neglect to prosecute.

(4) This section does not alter the law on tolling of the statute of limitations nor does it apply to causes of action that have accrued before this Article becomes effective.

## OFFICIAL COMMENT

Uniform Statutory Source: Section 2-725.

Changes: Substantially rewritten.

Purposes: 1. Subsection (1) does not incorporate the limitation found in Section 2-725(1) prohibiting the parties from extending the period of limitation. Breach of warranty and indemnity claims often arise in a lease transaction; with the passage of time such claims often diminish or are eliminated. To encourage the parties to commence litigation under these circumstances makes little sense.

2. Subsection (2) states two rules for determining when a cause of action accrues. With respect to default, the rule of Section 2-725(2) is not incorporated in favor of a more liberal rule of the later of the date when the default occurs or when the act or omission on which it is based is or should have been discovered. With respect to indemnity, a similarly liberal rule is adopted.

### Cross References:

Sections 2-725(1) and 2-725(2).

### Definitional

Cross References:

- “Action”. Section 1-201(1).
- “Aggrieved party”. Section 1-201(2).
- “Lease contract”. Section 2A-103(1)(l).
- “Party”. Section 1-201(29).
- “Remedy”. Section 1-201(34).
- “Termination”. Section 2A-103(1)(z).

§ 2A-507. PROOF OF MARKET RENT: TIME AND PLACE.

(1) Damages based on market rent (Section 2A-519 or 2A-528) are determined according to the rent for the use of the goods concerned for a lease term identical to the remaining lease term of the original lease agreement and prevailing at the times specified in Sections 2A-519 and 2A-528.

(2) If evidence of rent for the use of the goods concerned for a lease term identical to the remaining lease term of the original lease agreement and prevailing at the times or places described in this Article is not readily available, the rent prevailing within any reasonable time before or after the time described or at any other place or for a different lease term which in commercial judgment or under usage of trade would serve as a reasonable substitute for the one described may be used, making any proper allowance for the difference, including the cost of transporting the goods to or from the other place.

(3) Evidence of a relevant rent prevailing at a time or place or for a lease term other than the one described in this Article offered by one party is not admissible unless and until he or she has given the other party notice the court finds sufficient to prevent unfair surprise.

(4) If the prevailing rent or value of any goods regularly leased in any established market is in issue, reports in official publications or trade journals or in newspapers or periodicals of general circulation published as the reports of that market are admissible in evidence. The circumstances of the preparation of the report may be shown to affect its weight but not its admissibility.

OFFICIAL COMMENT

Uniform Statutory Source: Sections 2-723 and 2-724.

Changes: Revised to reflect leasing practices and terminology. Sections 2A-519 and 2A-528 specify the times as of which market rent is to be determined. Section 2A-507(2).

Definitional

Cross References:

- “Goods”. Section 2A-103(1)(h).
- “Lease”. Section 2A-103(1)(j).
- “Lease agreement”. Section 2A-103(1)(k).
- “Notice”. Section 1-201(25).
- “Party”. Section 1-201(29).
- “Reasonable time”. Section 1-204(1) and (2).
- “Usage of trade”. Section 1-205.
- “Value”. Section 1-201(44).

B. DEFAULT BY LESSOR

§ 2A-508. LESSEE'S REMEDIES.

(1) If a lessor fails to deliver the goods in conformity to the lease contract (Section 2A-509) or repudiates the lease contract (Section 2A-402), or a lessee rightfully rejects the goods (Section 2A-509) or justifiably revokes acceptance of the goods (Section 2A-517), then with respect to any goods involved, and with respect to all of the goods if under an installment lease contract the value of the whole lease contract is substantially impaired (Section 2A-510), the lessor is in default under the lease contract and the lessee may:

(a) cancel the lease contract (Section 2A-505(1));

(b) recover so much of the rent and security as has been paid, and is just under the circumstances;

(c) cover and recover damages as to all goods affected whether or not they have been identified to the lease contract (Sections 2A-518 and 2A-520), or recover damages for nondelivery (Sections 2A-519 and 2A-520);

(d) exercise any other rights or pursue any other remedies provided in the lease contract.

(2) If a lessor fails to deliver the goods in conformity to the lease contract or repudiates the lease contract, the lessee may also:

(a) if the goods have been identified, recover them (Section 2A-522); or

(b) in a proper case, obtain specific performance or recover the goods (Section 2A-521).

(3) If a lessor is otherwise in default under a lease contract, the lessee may exercise the rights and pursue the remedies provided in the lease contract, which may include a right to cancel the lease, and in Section 2A-519(3).

(4) If a lessor has breached a warranty, whether express or implied, the lessee may recover damages (Section 2A-519(4)).

(5) On rightful rejection or justifiable revocation of acceptance, a lessee has a security interest in goods in the lessee's possession or control for any rent and security that has been paid and any expenses reasonably incurred in their inspection, receipt, transportation, and care and custody and may hold those goods and dispose of them in good faith and in a commercially reasonable manner, subject to Section 2A-527(5).

(6) Subject to the provisions of Section 2A-407, a lessee, on notifying the lessor of the lessee's intention to do so, may deduct all or any part of the damages resulting from any default under the lease contract from any part of the rent still due under the same lease contract.

OFFICIAL COMMENT

Uniform Statutory Source: Sections 2-711 and 2-717.

Changes: Substantially rewritten.

Purposes: 1. This section is an index to Sections 2A-509 through 522 which set out the lessee's rights and remedies after the lessor's default. The lessor and the lessee can agree to modify the rights and remedies available under this Article; they can, among other things, provide that for defaults other than those specified in subsection (1) the lessee can exercise the rights and remedies referred to in subsection (1); and they can create a new scheme of rights and remedies triggered by the occurrence of the default. Sections 2A-103(4) and 1-102(3).

2. Subsection (1), a substantially rewritten version of the provisions of Section 2-711(1), lists three cumulative remedies of the lessee where the lessor has failed to deliver conforming goods or has repudiated the contract, or the lessee has rightfully rejected or justifiably revoked. Sections 2A-501(2) and (4). Subsection (1) also allows the lessee to exercise any contractual remedy. This Article rejects any doctrine of election of remedy. To determine if one remedy bars another in a particular case is a function of whether the lessee has been put in as good a position as if the lessor had fully performed the lease agreement. Use of multiply remedies is barred only if the effect is to put the lessee in a better position than it would have been in had the lessor fully performed under the lease. Sections 2A-103(4) and 1-106(1). Subsection (1)(b), in recognition that no bright line can be created that would operate fairly in all installment lease cases and in recognition of the fact that a lessee may be able to cancel the lease (revoke

acceptance of the goods) after the goods have been in use for some period of time, does not require that all lease payments made by the lessee under the lease be returned upon cancellation. Rather, only such portion as is just of the rent and security payments made may be recovered. If a defect in the goods is discovered immediately upon tender to the lessee and the goods are rejected immediately, then the lessee should recover all payments made. If, however, for example, a 36-month equipment lease is terminated in the 12th month because the lessor has materially breached the contract by failing to perform its maintenance obligations, it may be just to return only a small part or none of the rental payments already made.

3. Subsection (2), a version of the provisions of Section 2-711(2) revised to reflect leasing terminology, lists two alternative remedies for the recovery of the goods by the lessee; however, each of these remedies is cumulative with respect to those listed in subsection (1).

4. Subsection (3) is new. It covers defaults which do not deprive the lessee of the goods and which are not so serious as to justify rejection or revocation of acceptance under subsection (1). It also covers defaults for which the lessee could have rejected or revoked acceptance of the goods but elects not to do so and retains the goods. In either case, a lessee which retains the goods is entitled to recover damages as stated in Section 2A-519(3). That measure of damages is "the loss resulting in the ordinary course of events from the lessor's default as determined in any manner that is reasonable together with incidental and consequential damages, less expenses saved in consequence of the lessor's breach."

5. Subsection (1)(d) and subsection (3) recognize that the lease agreement may provide rights and remedies in addition to or different from those which Article 2A provides. In particular, subsection (3) provides that the lease agreement may give the remedy of cancellation of the lease for defaults by the lessor that would not otherwise be material defaults which would justify cancellation under subsection (1). If there is a right to cancel, there is, of course, a right to reject or revoke acceptance of the goods.

6. Subsection (4) is new and merely adds to the completeness of the index by including a reference to the lessee's recovery of damages upon the lessor's breach of warranty; such breach may not rise to the level of a default by the lessor justifying revocation of acceptance. If the lessee properly rejects or revokes acceptance of the goods because of a breach of warranty, the rights and remedies are those provided in subsection (1) rather than those in section 2A-519(4).

7. Subsection (5), a revised version of the provisions of Section 2-711(3), recognizes, on rightful rejection or justifiable revocation, the lessee's security interest in goods in its possession and control. Section 9-113, which recognized security interests arising under the Article on Sales (Article 2), was amended with the adoption of this Article to reflect the security interests arising under this Article. Pursuant to Section 2A-511(4), a purchaser who purchases goods from the lessee in good faith takes free of any rights of the lessor, or in the case of a finance lease the supplier. Such goods, however, must have been rightfully rejected and disposed of pursuant to Section 2A-511 or 2A-512. However, Section 2A-517(5) provides that the lessee will have the same rights and duties with respect to goods where acceptance has been revoked as with respect to goods rejected. Thus, Section 2A-511(4) will apply to the lessee's disposition of such goods.

8. Pursuant to Section 2A-527(5), the lessee must account to the lessor for the excess proceeds of such disposition, after satisfaction of the claim secured by the lessee's security interest.

9. Subsection (6), a slightly revised version of the provisions of Section 2-717, sanctions a right of set-off by the lessee, subject to the rule of Section 2A-407 with respect to irrevocable promises in a finance lease that is not a consumer lease, and further subject to an enforceable "hell or high water" clause in the lease agreement. Section 2A-407 official comment. No attempt is made to state how the set-off should occur; this is to be determined by the facts of each case.

10. There is no special treatment of the finance lease in this section. Absent supplemental principles of law and equity to the contrary, in the case of most finance leases, following the lessee's acceptance of the goods the lessee will have no rights or remedies against the lessor, because the lessor's obligations to the lessee are minimal. Sections 2A-210 and 2A-211(1). Since the lessee will look to the supplier for performance, this is appropriate. Section 2A-209.

#### Cross References:

Sections 1-102(3), 1-103, 1-106(1), Article 2, especially Sections 2-711, 2-717 and Sections 2A-103(4), 2A-209, 2A-210, 2A-211(1), 2A-407, 2A-501(2), 2A-501(4), 2A-509 through 2A-522, 2A-511(3), 2A-517(5), 2A-527(5) and Section 9-113.

**Definitional Cross References:**

- “Conforming”. Section 2A-103(1)(d).
- “Delivery”. Section 1-201(14).
- “Good faith”. Sections 1-201(19) and 2-103(1)(b).
- “Goods”. Section 2A-103(1)(h).
- “Installment lease contract”. Section 2A-103(1)(i).
- “Lease contract”. Section 2A-103(1)(l).
- “Lessee”. Section 2A-103(1)(n).
- “Lessor”. Section 2A-103(1)(p).
- “Notifies”. Section 1-201(26).
- “Receipt”. Section 2-103(1)(c).
- “Remedy”. Section 1-201(34).
- “Rights”. Section 1-201(36).
- “Security interest”. Section 1-201(37).
- “Value”. Section 1-201(44).

**§ 2A-509. LESSEE'S RIGHTS ON IMPROPER DELIVERY;  
RIGHTFUL REJECTION.**

(1) Subject to the provisions of Section 2A-510 on default in installment lease contracts, if the goods or the tender or delivery fail in any respect to conform to the lease contract, the lessee may reject or accept the goods or accept any commercial unit or units and reject the rest of the goods.

(2) Rejection of goods is ineffective unless it is within a reasonable time after tender or delivery of the goods and the lessee seasonably notifies the lessor.

**OFFICIAL COMMENT**

Uniform Statutory Source: Sections 2-601 and 2-602(1).

Changes: Revised to reflect leasing practices and terminology. Definitional

**Cross References:**

- “Commercial unit”. Section 2A-103(1)(c).
- “Conforming”. Section 2A-103(1)(d).
- “Delivery”. Section 1-201(14).
- “Goods”. Section 2A-103(1)(h).
- “Installment lease contract”. Section 2A-103(1)(i).
- “Lease contract”. Section 2A-103(1)(l).
- “Lessee”. Section 2A-103(1)(n).
- “Lessor”. Section 2A-103(1)(p).
- “Notifies”. Section 1-201(26).

“Reasonable time”. Section 1-204(1) and (2).

“Rights”. Section 1-201(36).

“Seasonably”. Section 1-204(3).

#### § 2A-510. INSTALLMENT LEASE CONTRACTS: REJECTION AND DEFAULT.

(1) Under an installment lease contract a lessee may reject any delivery that is nonconforming if the nonconformity substantially impairs the value of that delivery and cannot be cured or the nonconformity is a defect in the required documents; but if the nonconformity does not fall within subsection (2) and the lessor or the supplier gives adequate assurance of its cure, the lessee must accept that delivery.

(2) Whenever nonconformity or default with respect to one or more deliveries substantially impairs the value of the installment lease contract as a whole there is a default with respect to the whole. But, the aggrieved party reinstates the installment lease contract as a whole if the aggrieved party accepts a nonconforming delivery without seasonably notifying of cancellation or brings an action with respect only to past deliveries or demands performance as to future deliveries.

#### OFFICIAL COMMENT

Uniform Statutory Source: Section 2-612.

Changes: Revised to reflect leasing practices and terminology.

#### Definitional Cross References:

“Action”. Section 1-201(1)

“Aggrieved party”. Section 1-201(2).

“Cancellation”. Section 2A-103(1)(b).

“Conforming”. Section 2A-103(1)(d).

“Delivery”. Section 1-201(14).

“Installment lease contract”. Section 2A-103(1)(i).

“Lessee”. Section 2A-103(1)(n).

“Lessor”. Section 2A-103(1)(p).

“Notifies”. Section 1-201(26).

“Seasonably”. Section 1-204(3).

“Supplier”. Section 2A-103(1)(x).

“Value”. Section 1-201(44).

#### § 2A-511. MERCHANT LESSEE’S DUTIES AS TO RIGHTFULLY REJECTED GOODS.

(1) Subject to any security interest of a lessee (Section 2A-508(5)), if a lessor or a supplier has no agent or place of business at the market of rejection, a merchant lessee, after rejection of goods in his or her possession or control, shall follow any reasonable instructions received from the lessor or the supplier with respect to the goods. In the absence of those instructions, a merchant lessee shall make reasonable efforts to sell, lease, or otherwise dispose of the goods for the lessor’s account if they threaten to decline in value speedily. Instructions are not reasonable if on demand indemnity for expenses is not forthcoming.

(2) If a merchant lessee (subsection (1)) or any other lessee (Section 2A-512) disposes of goods, he or she is entitled to reimbursement either from the lessor or the supplier or out of the proceeds for reasonable expenses of caring for and disposing of the goods and, if the

expenses include no disposition commission, to such commission as is usual in the trade, or if there is none, to a reasonable sum not exceeding 10 percent of the gross proceeds.

(3) In complying with this section or Section 2A-512, the lessee is held only to good faith. Good faith conduct hereunder is neither acceptance or conversion nor the basis of an action for damages.

(4) A purchaser who purchases in good faith from a lessee pursuant to this section or Section 2A-512 takes the goods free of any rights of the lessor and the supplier even though the lessee fails to comply with one or more of the requirements of this Article.

#### OFFICIAL COMMENT

Uniform Statutory Source: Sections 2-603 and 2-706(5).

Changes: Revised to reflect leasing practices and terminology. This section, by its terms, applies to merchants as well as others. Thus, in construing the section it is important to note that under this Act the term good faith is defined differently for merchants (Section 2-103(1)(b)) than for others (Section 1-201(19)). Section 2A-103(3) and (4).

#### Definitional Cross References:

“Action”. Section 1-201(1).

“Good faith”. Sections 1-201(19) and 2-103(1)(b).

“Goods”. Section 2A-103(1)(h).

“Lease”. Section 2A-103(1)(j).

“Lessee”. Section 2A-103(1)(n).

“Lessor”. Section 2A-103(1)(p).

“Merchant lessee”. Section 2A-103(1)(t).

“Purchaser”. Section 1-201(33).

“Rights”. Section 1-201(36).

“Security interest”. Section 1-201(37).

“Supplier”. Section 2A-103(1)(x).

“Value”. Section 1-201(44).

#### § 2A-512. LESSEE'S DUTIES AS TO RIGHTFULLY REJECTED GOODS.

(1) Except as otherwise provided with respect to goods that threaten to decline in value speedily (Section 2A-511) and subject to any security interest of a lessee (Section 2A-508(5)):

(a) the lessee, after rejection of goods in the lessee's possession, shall hold them with reasonable care at the lessor's or the supplier's disposition for a reasonable time after the lessee's seasonable notification of rejection;

(b) if the lessor or the supplier gives no instructions within a reasonable time after notification of rejection, the lessee may store the rejected goods for the lessor's or the supplier's account or ship them to the lessor or the supplier or dispose of them for the lessor's or the supplier's account with reimbursement in the manner provided in Section 2A-511; but

(c) the lessee has no further obligations with regard to goods rightfully rejected.

(2) Action by the lessee pursuant to subsection (1) is not acceptance or conversion.

#### OFFICIAL COMMENT

Uniform Statutory Source: Sections 2-602(2)(b) and (c) and 2-604.

Changes: Substantially rewritten.

Purposes: The introduction to subsection (1) references goods that threaten to decline in value speedily and not perishables, the reference in Section 2-604, the statutory analogue. This is a change in style, not substance, as the first phrase includes the second. Subparagraphs (a) and (c) are revised versions of the provisions of Section 2-602(2)(b) and (c). Subparagraph (a) states the rule with respect to the lessee's treatment of goods in its possession following rejection; subparagraph (b) states the rule regarding such goods if the lessor or supplier then fails to give instructions to the lessee. If the lessee performs in a fashion consistent with subparagraphs (a) and (b), subparagraph (c) exonerates the lessee.

Cross References:

Sections 2-602(2)(b), 2-602(2)(c) and 2-604.

Definitional Cross References:

"Action". Section 1-201(1).

"Goods". Section 2A-103(1)(h).

"Lessee". Section 2A-103(1)(n).

"Lessor". Section 2A-103(1)(p).

"Notification". Section 1-201(26).

"Reasonable time". Section 1-204(1) and (2).

"Seasonably". Section 1-204(3).

"Security interest". Section 1-201(37).

"Supplier". Section 2A-103(1)(x).

"Value". Section 1-201(44).

**§ 2A-513. CURE BY LESSOR OF IMPROPER TENDER OR DELIVERY; REPLACEMENT.**

(1) If any tender or delivery by the lessor or the supplier is rejected because nonconforming and the time for performance has not yet expired, the lessor or the supplier may seasonably notify the lessee of the lessor's or the supplier's intention to cure and may then make a conforming delivery within the time provided in the lease contract.

(2) If the lessee rejects a nonconforming tender that the lessor or the supplier had reasonable grounds to believe would be acceptable with or without money allowance, the lessor or the supplier may have a further reasonable time to substitute a conforming tender if he seasonably notifies the lessee.

**OFFICIAL COMMENT**

Uniform Statutory Source: Section 2-508.

Changes: Revised to reflect leasing practices and terminology.

Definitional Cross References:

"Conforming". Section 2A-103(1)(d).

"Delivery". Section 1-201(14).

"Lease contract". Section 2A-103(1)(l).

"Lessee". Section 2A-103(1)(n).

"Lessor". Section 2A-103(1)(p).

"Money". Section 1-201(24).

“Notifies”. Section 1-201(26).

“Reasonable time”. Section 1-204(1) and (2).

“Seasonably”. Section 1-204(3).

“Supplier”. Section 2A-103(1)(x).

§ 2A-514. WAIVER OF LESSEE’S OBJECTIONS.

(1) In rejecting goods, a lessee’s failure to state a particular defect that is ascertainable by reasonable inspection precludes the lessee from relying on the defect to justify rejection or to establish default:

(a) if, stated seasonably, the lessor or the supplier could have cured it (Section 2A-513); or

(b) between merchants if the lessor or the supplier after rejection has made a request in writing for a full and final written statement of all defects on which the lessee proposes to rely.

(2) A lessee’s failure to reserve rights when paying rent or other consideration against documents precludes recovery of the payment for defects apparent on the face of the documents.

OFFICIAL COMMENT

Uniform Statutory Source: Section 2-605.

Changes: Revised to reflect leasing practices and terminology.

Purposes: The principles applicable to the commercial practice of payment against documents (subsection 2) are explained in official comment 4 to Section 2-605, the statutory analogue to this section. Cross Reference:

Section 2-605 official comment 4.

Definitional Cross References:

“Between merchants”. Section 2-104(3).

“Goods”. Section 2A-103(1)(h).

“Lessee”. Section 2A-103(1)(n).

“Lessor”. Section 2A-103(1)(p).

“Rights”. Section 1-201(36).

“Seasonably”. Section 1-204(3).

“Supplier”. Section 2A-103(1)(x).

“Writing”. Section 1-201(46).

§ 2A-515. ACCEPTANCE OF GOODS.

(1) Acceptance of goods occurs after the lessee has had a reasonable opportunity to inspect the goods and

(a) the lessee signifies or acts with respect to the goods in a manner that signifies to the lessor or the supplier that the goods are conforming or that the lessee will take or retain them in spite of their nonconformity; or

(b) the lessee fails to make an effective rejection of the goods (Section 2A-509(2)).

(2) Acceptance of a part of any commercial unit is acceptance of that entire unit.

OFFICIAL COMMENT

Uniform Statutory Source: Section 2-606.

Changes: The provisions of Section 2-606(1)(a) were substantially rewritten to provide that the lessee's conduct may signify acceptance. Further, the provisions of Section 2-606(1)(c) were not incorporated as irrelevant given the lessee's possession and use of the leased goods.

Cross References:

Sections 2-606(1)(a) and 2-606(1)(c).

Definitional Cross References:

"Commercial unit". Section 2A-103(1)(c).

"Conforming". Section 2A-103(1)(d).

"Goods". Section 2A-103(1)(h).

"Lessee". Section 2A-103(1)(n).

"Lessor". Section 2A-103(1)(p).

"Supplier". Section 2A-103(1)(x).

**§ 2A-516. EFFECT OF ACCEPTANCE OF GOODS; NOTICE OF DEFAULT; BURDEN OF ESTABLISHING DEFAULT AFTER ACCEPTANCE; NOTICE OF CLAIM OR LITIGATION TO PERSON ANSWERABLE OVER.**

(1) A lessee must pay rent for any goods accepted in accordance with the lease contract, with due allowance for goods rightfully rejected or not delivered.

(2) A lessee's acceptance of goods precludes rejection of the goods accepted. In the case of a finance lease, if made with knowledge of a nonconformity, acceptance cannot be revoked because of it. In any other case, if made with knowledge of a nonconformity, acceptance cannot be revoked because of it unless the acceptance was on the reasonable assumption that the nonconformity would be seasonably cured. Acceptance does not of itself impair any other remedy provided by this Article or the lease agreement for nonconformity.

(3) If a tender has been accepted:

(a) within a reasonable time after the lessee discovers or should have discovered any default, the lessee shall notify the lessor and the supplier, if any, or be barred from any remedy against the party not notified;

(b) except in the case of a consumer lease, within a reasonable time after the lessee receives notice of litigation for infringement or the like (Section 2A-211) the lessee shall notify the lessor or be barred from any remedy over for liability established by the litigation; and

(c) the burden is on the lessee to establish any default.

(4) If a lessee is sued for breach of a warranty or other obligation for which a lessor or a supplier is answerable over the following apply:

(a) The lessee may give the lessor or the supplier, or both, written notice of the litigation. If the notice states that the person notified may come in and defend and that if the lessor or the supplier does not do so that person will be bound in any action against that person by the lessee by any determination of fact common to the two litigations, then unless the person notified after reasonable receipt of the notice does come in and defend that person is so bound.

(b) The lessor or the supplier may demand in writing that the lessee turn over control of the litigation including settlement if the claim is one for infringement or the like (Section 2A-211) or else be barred from any remedy over. If the demand states that the lessor or the supplier agrees to bear all expense and to satisfy any adverse judgment, then unless the lessee after reasonable receipt of the demand does turn over control the lessee is so barred.

(5) Subsections (3) and (4) apply to any obligation of a lessee to hold the lessor or the supplier harmless against infringement or the like (Section 2A-211).

## OFFICIAL COMMENT

Uniform Statutory Source: Section 2-607.

Changes: Substantially revised.

Purposes: 1. Subsection (2) creates a special rule for finance leases, precluding revocation if acceptance is made with knowledge of nonconformity with respect to the lease agreement, as opposed to the supply agreement; this is not inequitable as the lessee has a direct claim against the supplier. Section 2A-209(1). Revocation of acceptance of a finance lease is permitted if the lessee's acceptance was without discovery of the nonconformity (with respect to the lease agreement, not the supply agreement) and was reasonably induced by the lessor's assurances. Section 2A-517(1)(b). Absent exclusion or modification, the lessor under a finance lease makes certain warranties to the lessee. Sections 2A-210 and 2A-211(1). Revocation of acceptance is not prohibited even after the lessee's promise has become irrevocable and independent. Section 2A-407 official comment. Where the finance lease creates a security interest, the rule may be to the contrary. General Elec. Credit Corp. of Tennessee v. Ger-Beck Mach. Co., 806 F.2d 1207 (3rd Cir. 1986).

2. Subsection (3)(a) requires the lessee to give notice of default, within a reasonable time after the lessee discovered or should have discovered the default. In a finance lease, notice may be given either to the supplier, the lessor, or both, but remedy is barred against the party not notified. In a finance lease, the lessor is usually not liable for defects in the goods and the essential notice is to the supplier. While notice to the finance lessor will often not give any additional rights to the lessee, it would be good practice to give the notice since the finance lessor has an interest in the goods. Subsection (3)(a) does not use the term finance lease, but the definition of supplier is a person from whom a lessor buys or leases goods to be leased under a finance lease. Section 2A-103(1)(x). Therefore, there can be a "supplier" only in a finance lease. Subsection (4) applies similar notice rules as to lessors and suppliers if a lessee is sued for a breach of warranty or other obligation for which a lessor or supplier is answerable over.

3. Subsection (3)(b) requires the lessee to give the lessor notice of litigation for infringement or the like. There is an exception created in the case of a consumer lease. While such an exception was considered for a finance lease, it was not created because it was not necessary - the lessor in a finance lease does not give a warranty against infringement. Section 2A-211(2). Even though not required under subsection (3)(b), the lessee who takes under a finance lease should consider giving notice of litigation for infringement or the like to the supplier, because the lessee obtains the benefit of the suppliers' promises subject to the suppliers' defenses or claims. Sections 2A-209(1) and 2-607(3)(b).

### Cross References:

Sections 2-607(3)(b), 2A-103(1)(x), 2A-209(1), 2A-210, 2A-211(1), 2A-211(2), 2A-407 official comment and 2A-517(1)(b).

### Definitional Cross References:

"Action". Section 1-201(1).

"Agreement". Section 1-201(3).

"Burden of establishing". Section 1-201(8).

"Conforming". Section 2A-103(1)(d).

"Consumer lease". Section 2A-103(1)(e).

"Delivery". Section 1-201(14).

"Discover". Section 1-201(25).

"Finance lease". Section 2A-103(1)(g).

"Goods". Section 2A-103(1)(h).

"Knowledge". Section 1-201(25).

"Lease agreement". Section 2A-103(1)(k).

"Lease contract". Section 2A-103(1)(l).

"Lessee". Section 2A-103(1)(n).

"Lessor". Section 2A-103(1)(p).

"Notice". Section 1-201(25).

"Notifies". Section 1-201(26).

"Person". Section 1-201(30).

"Reasonable time". Section 1-204(1) and (2).

"Receipt". Section 2-103(1)(c).

"Remedy". Section 1-201(34).

"Seasonably". Section 1-204(3).

"Supplier". Section 2A-103(1)(x).

"Written". Section 1-201(46).

#### § 2A-517. REVOCATION OF ACCEPTANCE OF GOODS.

(1) A lessee may revoke acceptance of a lot or commercial unit whose nonconformity substantially impairs its value to the lessee if the lessee has accepted it:

(a) except in the case of a finance lease, on the reasonable assumption that its nonconformity would be cured and it has not been seasonably cured; or

(b) without discovery of the nonconformity if the lessee's acceptance was reasonably induced either by the lessor's assurances or, except in the case of a finance lease, by the difficulty of discovery before acceptance.

(2) Except in the case of a finance lease that is not a consumer lease, a lessee may revoke acceptance of a lot or commercial unit if the lessor defaults under the lease contract and the default substantially impairs the value of that lot or commercial unit to the lessee.

(3) If the lease agreement so provides, the lessee may revoke acceptance of a lot or commercial unit because of other defaults by the lessor.

(4) Revocation of acceptance must occur within a reasonable time after the lessee discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by the nonconformity. Revocation is not effective until the lessee notifies the lessor.

(5) A lessee who so revokes has the same rights and duties with regard to the goods involved as if the lessee had rejected them.

#### OFFICIAL COMMENT

Uniform Statutory Source: Section 2-608.

Changes: Revised to reflect leasing practices and terminology. Note that in the case of a finance lease the lessee retains a limited right to revoke acceptance. Sections 2A-517(1)(b) and 2A-516 official comment. New subsections (2) and (3) added.

#### Purposes:

1. The section states the situations under which the lessee may return the goods to the lessor and cancel the lease. Subsection (2) recognizes that the lessor may have continuing obligations under the lease and that a default as to those obligations may be sufficiently material to justify revocation of acceptance of the leased items and cancellation of the lease by the lessee. For example, a failure by the lessor to fulfill its obligation to maintain leased equipment or to

supply other goods which are necessary for the operation of the leased equipment may justify revocation of acceptance and cancellation of the lease.

2. Subsection (3) specifically provides that the lease agreement may provide that the lessee can revoke acceptance for defaults by the lessor which in the absence of such an agreement might not be considered sufficiently serious to justify revocation. That is, the parties are free to contract on the question of what defaults are so material that the lessee can cancel the lease.

Cross References:

Sections 2A-516 official comment and 2A-517(1)(b).

Definitional Cross References:

“Commercial unit”. Section 2A-103(1)(c).

“Conforming”. Section 2A-103(1)(d).

“Discover”. Section 1-201(25).

“Finance lease”. Section 2A-103(1)(g).

“Goods”. Section 2A-103(1)(h).

“Lessee”. Section 2A-103(1)(n).

“Lessor”. Section 2A-103(1)(p).

“Lot”. Section 2A-103(1)(s).

“Notifies.” Section 1-201(26).

“Reasonable time”. Section 1-204(1) and (2).

“Rights”. Section 1-201(36).

“Seasonably”. Section 1-204(3).

“Value”. Section 1-201(44).

§ 2A-518. COVER; SUBSTITUTE GOODS.

(1) After default by a lessor under the lease contract of the type described in Section 2A-508(1), or, if agreed, after other default by the lessor, the lessee may cover by making any purchase or lease of or contract to purchase or lease goods in substitution for those due from the lessor.

(2) Except as otherwise provided with respect to damages liquidated in the lease agreement (Section 2A-504) or otherwise determined pursuant to agreement of the parties (Sections 1-102(3) and 2A-503), if a lessee's cover is by lease agreement substantially similar to the original lease agreement and the new lease agreement is made in good faith and in a commercially reasonable manner, the lessee may recover from the lessor as damages (i) the present value, as of the date of the commencement of the term of the new lease agreement, of the rent under the new lease agreement applicable to that period of the new lease term which is comparable to the then remaining term of the original lease agreement minus the present value as of the same date of the total rent for the then remaining lease term of the original lease agreement, and (ii) any incidental or consequential damages less expenses saved in consequence of the lessor's default.

(3) If a lessee's cover is by lease agreement that for any reason does not qualify for treatment under subsection (2), or is by purchase or otherwise, the lessee may recover from the lessor as if the lessee had elected not to cover and Section 2A-519 governs.

OFFICIAL COMMENT

Uniform Statutory Source: Section 2-712.

Changes: Substantially revised.

Purposes: 1. Subsection (1) allows the lessee to take action to fix its damages after default by the lessor. Such action may consist of the lease of goods. The decision to cover is a function of commercial judgment, not a statutory mandate replete with sanctions for failure to comply. Cf. Section 9-507.

2. Subsection (2) states a rule for determining the amount of lessee's damages provided that there is no agreement to the contrary. The lessee's damages will be established using the new lease agreement as a measure if the following three criteria are met: (i) the lessee's cover is by lease agreement, (ii) the lease agreement is substantially similar to the original lease agreement, and (iii) such cover was effected in good faith, and in a commercially reasonable manner. Thus, the lessee will be entitled to recover from the lessor the present value, as of the date of commencement of the term of the new lease agreement, of the the rent under the new lease agreement applicable to that period which is comparable to the ten remaining term of the original lease agreement less the present value of the rent reserved for the remaining term under the original lease, together with incidental or consequential damages less expenses saved in consequence of the lessor's default. Consequently damages may include loss suffered by the lessee because of deprivation of the use of the goods during the period between default and the acquisition of the goods under the new lease agreement. If the lessee's cover does not satisfy the criteria of subsection (2), Section 2A-519 governs.

3. Two of the three criteria to be met by the lessee are familiar, but the concept of the new lease agreement being substantially similar to the original lease agreement is not. Given the many variables facing a party who intends to lease goods and the rapidity of change in the market place, the policy decision was made not to draft with specificity. It was thought unwise to seek to establish certainty at the cost of fairness. Thus, the decision of whether the new lease agreement is substantially similar to the original will be determined case by case.

4. While the section does not draw a bright line, it is possible to describe some of the factors that should be considered in finding that a new lease agreement is substantially similar to the original. First, the goods subject to the new lease agreement should be examined. For example, in a lease of computer equipment the new lease might be for more modern equipment. However, it may be that at the time of the lessor's breach it was not possible to obtain the same type of goods in the market place. Because the lessee's remedy under Section 2A-519 is intended to place the lessee in essentially the same position as if he had covered, if goods similar to those to have been delivered under the original lease are not available, then the computer equipment in this hypothetical should qualify as a commercially reasonable substitute. See Section 2-712(1).

5. Second, the various elements of the new lease agreement should also be examined. Those elements include the presence or absence of options to purchase or release; the lessor's representations, warranties and covenants to the lessee, as well as those to be provided by the lessee to the lessor; and the services, if any, to be provided by the lessor or by the lessee. All of these factors allocate cost and risk between the lessor and the lessee and thus affect the amount of rent to be paid. If the differences between the original lease and the new lease can be easily valued, it would be appropriate for a court to adjust the difference in rental to take account of the difference between the two leases, find that the new lease is substantially similar to the old lease, and award cover damages under this section. If, for example, the new lease requires the lessor to insure the goods in the hands of the lessee, while the original lease required the lessee to insure, the usual cost of such insurance could be deducted from the rent due under the new lease before determining the difference in rental between the two leases.

6. Having examined the goods and the agreement, the test to be applied is whether, in light of these comparisons, the new lease agreement is substantially similar to the original lease agreement. These findings should not be made with scientific precision, as they are a function of economics, nor should they be made independently with respect to the goods and each element of the agreement, as it is important that a sense of commercial judgment pervade the finding. To establish the new lease as a proper measure of damage under subsection (2), these factors, taken as a whole, must result in a finding that the new lease agreement is substantially similar to the original.

7. A new lease can be substantially similar to the original lease even though its term extends beyond the remaining term of the original lease, so long as the court can fairly apportion a part of the rental payments under the new lease to that part of the term of the new lease which is comparable to the remaining lease term under the original lease. Also, the lease term of the new lease may be comparable to the term of the original lease even though the beginning and ending dates of the two leases are not the same. For example, a two-month lease of agricultural equipment for the months of August and September may be comparable to a two-month lease running from the 15th of August to the 15th of October if in the particular location two-month

leases beginning on August 15th are basically interchangeable with two-month leases beginning August 1st. Similarly, the term of a one-year truck lease beginning on the 15th of January may be comparable to the term of a one-year truck lease beginning January 2d. If the lease terms are found to be comparable, the court may base cover damages on the entire difference between the costs under the two leases.

Cross References:

Sections 2-712(1), 2A-519 and 9-507.

Definitional

Cross References:

“Agreement”. Section 1-201(3).

“Contract”. Section 1-201(11).

“Good faith”. Sections 1-201(19) and 2-103(1)(b).

“Goods”. Section 2A-103(1)(h).

“Lease”. Section 2A-103(1)(j).

“Lease agreement”. Section 2A-103(1)(k).

“Lease contract”. Section 2A-103(1)(l).

“Lessee”. Section 2A-103(1)(n).

“Lessor”. Section 2A-103(1)(p).

“Party”. Section 1-201(29).

“Present value”. Section 2A-103(1)(u).

“Purchase”. Section 2A-103(1)(v).

**§ 2A-519. LESSEE'S DAMAGES FOR NON-DELIVERY, REPUDIATION, DEFAULT, AND BREACH OF WARRANTY IN REGARD TO ACCEPTED GOODS.**

(1) Except as otherwise provided with respect to damages liquidated in the lease agreement (Section 2A-504) or otherwise determined pursuant to agreement of the parties (Sections 1-102(3) and 2A-503), if a lessee elects not to cover or a lessee elects to cover and the cover is by lease agreement that for any reason does not qualify for treatment under Section 2A-518(2), or is by purchase or otherwise, the measure of damages for non-delivery or repudiation by the lessor or for rejection or revocation of acceptance by the lessee is the present value as of the date of the default, of the then market rent minus the present value as of the same date of the original rent, computed for the remaining lease term of the original lease agreement, together with incidental and consequential damages, less expenses saved in consequence of the lessor's default.

(2) Market rent is to be determined as of the place for tender or, in cases of rejection after arrival or revocation of acceptance, as of the place of arrival.

(3) Except as otherwise agreed, the lessee has accepted goods and given notification (Section 2A-516(3)), the measure of damages for non-conforming tender or delivery or other default by a lessor is the loss resulting in the ordinary course of events from the lessor's default as determined in any manner that is reasonable together with incidental and consequential damages, less expenses saved in consequence of the lessor's default.

(4) Except as otherwise agreed, the measure of damages for breach of warranty is the present value at the time and place of acceptance of the difference between the value of the use of the goods accepted and the value if they had been as warranted for the lease term, unless special circumstances show proximate damages of a different amount, together with incidental and consequential damages, less expenses saved in consequence of the lessor's default or breach of warranty.

OFFICIAL COMMENT

Changes: Substantially revised.

Purposes: 1. Subsection (1), a revised version of the provisions of Section 2-713(1), states the basic rule governing the measure of lessee's damages for non-delivery or repudiation by the lessor or for rightful rejection or revocation of acceptance by the lessee. This measure will apply, absent agreement to the contrary, if the lessee does not cover or if the cover does not qualify under Section 2A-518. There is no sanction for cover that does not qualify.

2. The measure of damage is the present value, as of the date of default, of the market rent for the remaining term of the lease less the present value of the original rent for the remaining term of the lease, plus incidental and consequential damages less expenses saved in consequence of the default. Note that the reference in Section 2A-519(1) is to the date of default not to the date of an event of default. An event of default under a lease agreement becomes a default under a lease agreement only after the expiration of any relevant period of grace and compliance with any notice requirements under this Article and the lease agreement. American Bar Foundation, Commentaries on Indentures, § 5-1, at 216-217 (1971). Section 2A-501(1). This conclusion is also a function of whether, as a matter of fact or law, the event of default has been waived, suspended or cured. Sections 2A-103(4) and 1-103.

3. Subsection (2), a revised version of the provisions of Section 2-713(2), states the rule with respect to determining market rent.

4. Subsection (3), a revised version of the provisions of Section 2-714(1) and (3), states the measure of damages where goods have been accepted and acceptance is not revoked. The subsection applies both to defaults which occur at the inception of the lease and to defaults which occur subsequently, such as failure to comply with an obligation to maintain the leased goods. The measure in essence is the loss, in the ordinary course of events, flowing from the default.

5. Subsection (4), a revised version of the provisions of Section 2-714(2), states the measure of damages for breach of warranty. The measure in essence is the present value of the difference between the value of the goods accepted and of the goods if they had been as warranted.

6. Subsections (1),(3) and (4) specifically state that the parties may by contract vary the damages rules stated in those subsections.

Cross References:

Sections 2-713(1), 2-713(2), 2-714 and Section 2A-518.

Definitional

Cross References:

"Conforming". Section 2A-103(1)(d).

"Delivery". Section 1-201(14).

"Goods". Section 2A-103(1)(h).

"Lease". Section 2A-103(1)(j).

"Lease agreement". Section 2A-103(1)(k).

"Lessee". Section 2A-103(1)(n).

"Lessor". Section 2A-103(1)(p).

"Notification". Section 1-201(26).

"Present value". Section 2A-103(1)(u).

"Value". Section 1-201(44).

§ 2A-520. LESSEE'S INCIDENTAL AND CONSEQUENTIAL

DAMAGES.

(1) Incidental damages resulting from a lessor's default include expenses reasonably incurred in inspection, receipt, transportation, and care and custody of goods rightfully rejected or goods the acceptance of which is justifiably revoked, any commercially reasonable charges, expenses or commissions in connection with effecting cover, and any other reasonable expense incident to the default.

(2) Consequential damages resulting from a lessor's default include:

(a) any loss resulting from general or particular requirements and needs of which the lessor at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and

(b) injury to person or property proximately resulting from any breach of warranty.

OFFICIAL COMMENT

Uniform Statutory Source: Section 2-715.

Changes: Revised to reflect leasing terminology and practices.

Purposes: 1. Subsection (1), a revised version of the provisions of Section 2-715(1), lists some examples of incidental damages resulting from a lessor's default; the list is not exhaustive. Subsection (1) makes clear that it applies not only to rightful rejection, but also to justifiable revocation.

2. Subsection (2), a revised version of the provisions of Section 2-715(2), lists some examples of consequential damages resulting from a lessor's default; the list is not exhaustive.

Cross References:

Section 2-715.

Definitional

Cross References:

"Goods". Section 2A-103(1)(h).

"Knows". Section 1-201(25).

"Lessee". Section 2A-103(1)(n).

"Lessor". Section 2A-103(1)(p).

"Person". Section 1-201(30).

"Receipt". Section 2-103(1)(c).

§ 2A-521. LESSEE'S RIGHT TO SPECIFIC PERFORMANCE OR OTHER SIMILAR RIGHTS.

(1) Specific performance may be decreed if the goods are unique or in other proper circumstances.

(2) A decree for specific performance may include any terms and conditions as to payment of the rent, damages, or other relief that the court deems just.

(3) A lessee has a right of detinue, sequestration, claim and delivery, or the like for goods identified to the lease contract if after reasonable effort the lessee is unable to effect cover for those goods or the circumstances reasonably indicate that the effort will be unavailing.

OFFICIAL COMMENT

Uniform Statutory Source: Section 2-716.

Changes: Revised to reflect leasing practices and terminology, and to expand the reference to the right of replevin in subsection (3) to include other similar rights of the lessee.

Definitional

Cross References:

“Delivery”. Section 1-201(14).

“Goods”. Section 2A-103(1)(h).

“Lease contract”. Section 2A-103(1)(l).

“Lessee”. Section 2A-103(1)(n).

“Rights”. Section 1-201(36).

“Term”. Section 1-201(42).

§ 2A-522. LESSEE'S RIGHT TO GOODS ON LESSOR'S  
INSOLVENCY.

(1) Subject to subsection (2) and even though the goods have not been shipped, a lessee who has paid a part or all of the rent and security for goods identified to a lease contract (Section 2A-217) on making and keeping good a tender of any unpaid portion of the rent and security due under the lease contract may recover the goods identified from the lessor if the lessor becomes insolvent within 10 days after receipt of the first installment of rent and security.

(2) A lessee acquires the right to recover goods identified to a lease contract only if they conform to the lease contract.

OFFICIAL COMMENT

Uniform Statutory Source: Section 2-502.

Changes: Revised to reflect leasing practices and terminology.

Definitional

Cross References:

“Conforming”. Section 2A-103(1)(d).

“Goods”. Section 2A-103(1)(h).

“Insolvent”. Section 1-201(23).

“Lease contract”. Section 2A-103(1)(l).

“Lessee”. Section 2A-103(1)(n).

“Lessor”. Section 2A-103(1)(p).

“Receipt”. Section 2-103(1)(c).

“Rights”. Section 1-201(36).

C. DEFAULT BY LESSEE

§ 2A-523. LESSOR'S REMEDIES.

(1) If a lessee wrongfully rejects or revokes acceptance of goods or fails to make a payment when due or repudiates with respect to a part or the whole, then, with respect to any goods involved, and with respect to all of the goods if under an installment lease contract the value of the whole lease contract is substantially impaired (Section 2A-510), the lessee is in default under the lease contract and the lessor may:

- (a) cancel the lease contract (Section 2A-505(1));
- (b) proceed respecting goods not identified to the lease contract (Section 2A-524);
- (c) withhold delivery of the goods and take possession of goods previously delivered (Section 2A-525);
- (d) stop delivery of the goods by any bailee (Section 2A-526);
- (e) dispose of the goods and recover damages (Section 2A-527), or retain the goods and recover damages (Section 2A-528), or in a proper case recover rent (Section 2A-529);
- (f) exercise any other rights or pursue any other remedies provided in the lease contract.

(2) If a lessor does not fully exercise a right or obtain a remedy to which the lessor is entitled under subsection (1), the lessor may recover the loss resulting in the ordinary course of events from the lessee's default as determined in any reasonable manner, together with incidental damages, less expenses saved in consequence of the lessee's default.

(3) If a lessee is otherwise in default under a lease contract, the lessor may exercise the rights and pursue the remedies provided in the lease contract which may include a right to cancel the lease. In addition, unless otherwise provided in the lease contract:

(a) if the default substantially impairs the value of the lease contract to the lessor, the lessor may exercise the rights and pursue the remedies provided in subsections (1) or (2); or

(b) if the default does not substantially impair the value of the lease contract to the lessor, the lessor may recover as provided in subsection (2).

#### OFFICIAL COMMENT

Uniform Statutory Source: Section 2-703.

Changes: Substantially revised.

Purposes: 1. Subsection is an index to Sections 2A-524 through 2A-531 and states that the remedies provided in those sections are available for the defaults referred to in subsection (1): wrongful rejection or revocation of acceptance, failure to make a payment when due, or repudiation. In addition, remedies provided in the lease contract are available. Subsection (2) sets out a remedy if the lessor does not elect to invoke a remedy available under subsection (1), and subsection (3) sets out statutory remedies for defaults not specifically referred to in subsection (1). Subsection (3) provides that, if any default by the lessee other than those specifically referred to in subsection (1) is material, the lessor can exercise the remedies provided in subsection (1) or (2); otherwise the available remedy is as provided in subsection (3). A lessor who has brought an action seeking one of the remedies available under subsection (1) may amend so as to claim a remedy under subsection (2) unless the right or remedy first chosen has been pursued to an extent inconsistent with the new course of action. Further, the lessor may pursue remedies under both subsections (1) and (2) unless doing so would put the lessor in a better position than it would have been in had the lessee fully performed.

The lessor and the lessee can agree to modify the rights and remedies available under the Article; they can, among other things, provide that for defaults other than those specified in subsection (1) the lessor can exercise the rights and remedies referred to in subsection (1), whether or not the default would otherwise be held to substantially impair the value of the lease contract to the lessor; they can also create a new scheme of rights and remedies triggered by the occurrence of the default. Sections 2A-103(4) and 1-102(3).

3. Subsection (1), a substantially rewritten version of Section 2-703, lists various cumulative remedies of the lessor where the lessee wrongfully rejects or revokes acceptance, fails to make a payment when due, or repudiates. Section 2A-501(2) and (4). The subsection also allows the lessor to exercise any contractual remedy.

4. This Article rejects any general doctrine of election of remedy. Whether, in a particular case, one remedy bars another, is a function of whether lessor has been put in as good a position as if the lessee had fully performed the lease contract. Multiple remedies are barred only if the effect is to put the lessor in a better position than it would have been in had the lessee fully performed under the lease. Sections 2A-103(4), 2A-501(4) and 1-106(1).

5. Hypothetical: To better understand the application of subparagraphs (a) through (e), it is useful to review a hypothetical. Assume that A is a merchant in the business of selling and leasing new bicycles of various types. B is about to engage in the business of subleasing bicycles to summer residents of and visitors to an island resort. A, as lessor, has agreed to lease 60 bicycles to B. While there is one master lease, deliveries and terms are staggered. 20 bicycles are to be delivered by A to B's island location on June 1; the term of the lease of these bicycles is four months. 20 bicycles are to be delivered by A to B's island location on July 1; the term of the lease of these bicycles is three months. Finally, 20 bicycles are to be delivered by A to B's island location on August 1; the term of the lease of these bicycles is two months. B is obligated to pay rent to A on the 15th day of each month during the term for the lease. Rent is \$50 per month, per bicycle. B has no option to purchase or release and must return the bicycles to A at the end of the term, in good condition, reasonable wear and tear excepted. Since the retail price of each bicycle is \$400 and bicycles used in the retail rental business have a useful economic life of 36 months, this transaction creates a lease. Sections 2A-103(1)(j) and 1-201(37).

6. A's current inventory of bicycles is not large. Thus, upon signing the lease with B in February, A agreed to purchase 60 new bicycles from A's principal manufacturer, with special instructions to drop ship the bicycles to B's island location in accordance with the delivery schedule set forth in the lease.

7. The first shipment of 20 bicycles was received by B on May 21. B inspected the bicycles, accepted the same as conforming to the lease and signed a receipt of delivery and acceptance. However, due to poor weather that summer, business was terrible and B was unable to pay the rent due on June 15. Pursuant to the lease A sent B notice of default and proceeded to enforce his rights and remedies against B.

8. A's counsel first advised A that under Section 2A-510(2) and the terms of the lease B's failure to pay was a default with respect to the whole. Thus, to minimize A's continued exposure, A was advised to take possession of the bicycles. If A had possession of the goods A could refuse to deliver. Section 2A-525(1). However, the facts here are different. With respect to the bicycles in B's possession, A has the right to take possession of the bicycles, without breach of the peace. Section 2A-525(2). If B refuses to allow A access to the bicycles, A can proceed by action, including replevin or injunctive relief.

9. With respect to the 40 bicycles that have not been delivered, this Article provides various alternatives. First, assume that 20 of the remaining 40 bicycles have been manufactured and delivered by the manufacturer to a carrier for shipment to B. Given the size of the shipment, the carrier was using a small truck for the delivery and the truck had not yet reached the island ferry when the manufacturer (at the request of A) instructed the carrier to divert the shipment to A's place of business. A's right to stop delivery is recognized under these circumstances. Section 2A-526(1). Second, assume that the 20 remaining bicycles were in the process of manufacture when B defaulted. A retains the right (as between A as lessor and B as lessee) to exercise reasonable commercial judgment whether to complete manufacture or to dispose of the unfinished goods for scrap. Since A is not the manufacturer and A has a binding contract to buy the bicycles, A elected to allow the manufacturer to complete the manufacture of the bicycles, but instructed the manufacturer to deliver the completed bicycles to A's place of business. Section 2A-524(2).

10. Thus, so far A has elected to exercise the remedies referred to in subparagraphs (b) through (d) in subsection (1). None of these remedies bars any of the others because A's election and enforcement merely resulted in A's possession of the bicycles. Had B performed A would have recovered possession of the bicycles. Thus A is in the process of obtaining the benefit of his bargain. Note that A could exercise any other rights or pursue any other remedies provided in the lease contract (Section 2A-523(1)(f)), or elect to recover his loss due to the lessee's default under Section 2A-523(2).

11. A's counsel next would determine what action, if any, should be taken with respect to the goods. As stated in subparagraph (e) and as discussed fully in Section 2A-527(1) the lessor may, but has no obligation to, dispose of the goods by a substantially similar lease and recover damages based on that action, but lessor will not be able to recover damages which put it in a better position than performance would have done, nor will it be able to recover damages for losses which it could have reasonably avoided. In this case, since A is in the business of leasing and selling bicycles, A will probably inventory the 60 bicycles for its retail trade.

12. A's counsel then will determine which of the various means of ascertaining A's damages against B are available. Subparagraph (e) catalogues each relevant section. First, under Section 2A-527(2) the amount of A's claim is computed by comparing the original lease between A and

B with any subsequent lease of the bicycles but only if the subsequent lease is substantially similar to the original lease contract. While the section does not define this term, the official comment does establish some parameters. If, however, A elects to lease the bicycles to his retail trade, it is unlikely that the resulting lease will be substantially similar to the original, as leases to retail customers are considerably different from leases to wholesale customers like B. If, however, the leases were substantially similar, the damage claim is for accrued and unpaid rent to the beginning of the new lease, plus the present value as of the same date, of the rent reserved under the original lease for the balance of its term less the present value as of the same date of the rent reserved under the replacement lease for a term comparable to the balance of the term of the original lease, together with incidental damages less expenses saved in consequence of the lessee's default.

13. If the new lease is not substantially similar or if A elects to sell the bicycles or to hold the bicycles, damages are computed under Section 2A-528 or 2A-529.

14. If A elects to pursue his claim under Section 2A-528(1) the damage rule is the same as that stated in Section 2A-527(2) except that damages are measured from default if the lessee never took possession of the goods or from the time when the lessor did or could have regained possession and that the standard of comparison is not the rent reserved under a substantially similar lease entered into by the lessor but a market rent, as defined in Section 2A-507. Further, if the facts of this hypothetical were more elaborate A may be able to establish that the measure of damage under subsection (1) is inadequate to put him in the same position that B's performance would have, in which case A can claim the present value of his lost profits.

15. Yet another alternative for computing A's damage claim against B which will be available in some situations is recovery of the present value as of entry of judgment, of the rent for the ten remaining lease term under Section 2A-529. However this formulation is not available if the goods have been repossessed or tendered back to A. For the 20 bicycles repossessed and the remaining 40 bicycles, A will be able to recover the present value of the rent only if A is unable to dispose of them, or circumstances indicate the effort will be unavailing. If as has prevailed in an action for the rent, at any time up to collection of a judgment by A against B, A may dispose of the bicycles. In such case A's claim for damages against B is governed by Section 2A-527 or 2A-528. Section 2A-529(3). The resulting recalculation of claim should reduce the amount recoverable by A against B and the lessor is required to cause an appropriate credit to be entered against the earlier judgment. However, the nature of the post-judgment proceedings to resolve this issue, and the sanctions for a failure to comply, if any, will be determined by other law.

16. Finally, if the lease agreement had so provided pursuant to subdivision (f), A's claim against B would not be determined under any of these statutory formulae, but pursuant to a liquidated damages clause. Section 2A-504(1).

17. These various methods of computing A's damage claim against B are alternatives subject to Section 2A-501(4). However, the pursuit of any one of these alternatives is not a bar to, nor has it been barred by, A's earlier action to obtain possession of the 60 bicycles. These formulae, which vary as a function of an overt or implied mitigation of damage theory, focus on allowing A a recovery of the benefit of his bargain with B. Had B performed, A would have received the rent as well as the return of the 60 bicycles at the end of the term.

18. Finally, A's counsel should also advise A of his right to cancel the lease contract under subparagraph (a). Section 2A-505(1). Cancellation will discharge all existing obligations but preserve A's rights and remedies.

19. Subsection (2) recognizes that a lessor who is entitled to exercise the rights or to obtain a remedy granted by subsection (1) may choose not to do so. In such cases, the lessor can recover damages as provided in subsection (2). For example, for non-payment of rent, the lessor may decide not to take possession of the goods and cancel the lease, but rather to merely sue for the unpaid rent as it comes due plus lost interest or other damages "determined in any reasonable manner."

20. Subsection (3) allows the lessor access to a remedy scheme provided in this Article as well as that contained in the lease contract if the lessee is in default for reasons other than those stated in subsection (1). Note that the reference to this Article includes supplementary principles of law and equity, e.g., fraud, misrepresentation and duress. Sections 2A-103(4) and 1-103.

21. There is no special treatment of the finance lease in this section. Absent supplementary principles of law to the contrary, in most cases the supplier will have no rights or remedies

against the defaulting lessee. Section 2A-209(2)(ii). Given that the supplier will look to the lessor for payment, this is appropriate. However, there is a specific exception to this rule with respect to the right to identify goods to the lease contract. Section 2A-524(2). The parties are free to create a different result in a particular case. Sections 2A-103(4) and 1-102(3).

Cross References:

Sections 1-102(3), 1-103, 1-106(1), 1-201(37), 2-703, 2A-103(1)(j), 2A-103(4), 2A-209(2)(ii), 2A-501(4), 2A-504(1), 2A-505(1), 2A-507, 2A-510(2), 2A-524 through 2A-531, 2A-524(2), 2A-525(1), 2A-525(2), 2A-526(1), 2A-527(1), 2A-527(2), 2A-528(1) and 2A-529(3).

Definitional

Cross References:

“Delivery”. Section 1-201(14).

“Goods”. Section 2A-103(1)(h).

“Installment lease contract”. Section 2A-103(1)(i).

“Lease contract”. Section 2A-103(1)(l).

“Lessee”. Section 2A-103(1)(n).

“Lessor”. Section 2A-103(1)(p).

“Remedy”. Section 1-201(34).

“Rights”. Section 1-201(36).

“Value”. Section 1-201(44).

§ 2A-524. LESSOR'S RIGHT TO IDENTIFY GOODS TO LEASE CONTRACT.

(1) A lessor aggrieved under Section 2A-523(1) may:

(a) identify to the lease contract conforming goods not already identified if at the time the lessor learned of the default they were in the lessor's or the supplier's possession or control; and

(b) dispose of goods (Section 2A-527(1)) that demonstrably have been intended for the particular lease contract even though those goods are unfinished.

(2) If the goods are unfinished, in the exercise of reasonable commercial judgment for the purposes of avoiding loss and of effective realization, an aggrieved lessor or the supplier may either complete manufacture and wholly identify the goods to the lease contract or cease manufacture and lease, sell, or otherwise dispose of the goods for scrap or salvage value or proceed in any other reasonable manner.

**OFFICIAL COMMENT**

Uniform Statutory Source: Section 2-704.

Changes: Revised to reflect leasing practices and terminology.

Definitional

Cross References:

“Aggrieved party”. Section 1-201(2).

“Conforming”. Section 2A-103(1)(d).

“Goods”. Section 2A-103(1)(h).

“Learn”. Section 1-201(25).

“Lease”. Section 2A-103(1)(j).

“Lease contract”. Section 2A-103(1)(l).

“Lessor”. Section 2A-103(1)(p).

“Rights”. Section 1-201(36).

“Supplier”. Section 2A-103(1)(x).

“Value”. Section 1-201(44).

#### § 2A-525. LESSOR’S RIGHT TO POSSESSION OF GOODS.

(1) If a lessor discovers the lessee to be insolvent, the lessor may refuse to deliver the goods.

(2) After a default by the lessee under the lease contract of the type described in Section 2A-523(1) or 2A-523(3)(a) or, if agreed, after other default by the lessee, the lessor has the right to take possession of the goods. If the lease contract so provides, the lessor may require the lessee to assemble the goods and make them available to the lessor at a place to be designated by the lessor which is reasonably convenient to both parties. Without removal, the lessor may render unusable any goods employed in trade or business, and may dispose of goods on the lessee’s premises (Section 2A-527).

(3) The lessor may proceed under subsection (2) without judicial process if it can be done without breach of the peace or the lessor may proceed by action.

#### OFFICIAL COMMENT

Uniform Statutory Source: Section 2-702(1) and 9-503.

Changes: Substantially revised.

Purposes: 1. Subsection (1), a revised version of the provisions of Section 2-702(1), allows the lessor to refuse to deliver goods if the lessee is insolvent. Note that the provisions of Section 2-702(2), granting the unpaid seller certain rights of reclamation, were not incorporated in this section. Subsection (2) made this unnecessary.

2. Subsection (2), a revised version of the provisions of Section 9-503, allows the lessor, on a section 2A-523(a) or 2A-523(3) a default by the lessee, the right to take possession of or reclaim the goods. Also, the lessor can contract for the right to take possession of the goods for other defaults by the lessee. Therefore, since the lessee’s insolvency is an event of default in a standard lease agreement, subsection (2) is the functional equivalent of Section 2-702(2). Further, subsection (2) sanctions the classic crate and delivery clause obligating the lessee to assemble the goods and to make them available to the lessor. Finally, the lessor may leave the goods in place, render them unusable (if they are goods employed in trade or business), and dispose of them on the lessee’s premises.

3. Subsection (3), a revised version of the provisions of Section 9-503, allows the lessor to proceed under subsection (2) without judicial process, absent breach of the peace, or by action. Sections 2A-501(3), 2A-103(4) and 1-201(1). In the appropriate case action includes injunctive relief. Clark Equip. Co. v. Armstrong Equip. Co., 431 F.2d 54 (5th Cir. 1970), cert. denied, 402 U.S. 909 (1971). This Section, as well as a number of other Sections in this Part, are included in the Article to codify the lessor’s common law right to protect the lessor’s reversionary interest in the goods. Section 2A-103(1)(q). These Sections are intended to supplement and not displace principles of law and equity with respect to the protection of such interest. Sections 2A-103(4) and 1-103. Such principles apply in many instances, e.g., loss or damage to goods if risk of loss passes to the lessee, failure of the lessee to return goods to the lessor in the condition stipulated in the lease, and refusal of the lessee to return goods to the lessor after termination or cancellation of the lease. See also section 2A-532.

#### Cross References:

Sections 1-106(2), 2-702(1), 2-702(2), 2A-103(4), 2A- 501(3), 2A-532 and 9-503.

#### Definitional

Cross References:

- "Action". Section 1-201(1).
- "Delivery". Section 1-201(14).
- "Discover". Section 1-201(25).
- "Goods". Section 2A-103(1)(h).
- "Insolvent". Section 1-201(23).
- "Lease contract". Section 2A-103(1)(l).
- "Lessee". Section 2A-103(1)(n).
- "Lessor". Section 2A-103(1)(p).
- "Party". Section 1-201(29).
- "Rights". Section 1-201(36).

§ 2A-526. LESSOR'S STOPPAGE OF DELIVERY IN TRANSIT OR OTHERWISE.

(1) A lessor may stop delivery of goods in the possession of a carrier or other bailee if the lessor discovers the lessee to be insolvent and may stop delivery of carload, truckload, planeload, or larger shipments of express or freight if the lessee repudiates or fails to make a payment due before delivery, whether for rent, security or otherwise under the lease contract, or for any other reason the lessor has a right to withhold or take possession of the goods.

(2) In pursuing its remedies under subsection (1), the lessor may stop delivery until

(a) receipt of the goods by the lessee;

(b) acknowledgment to the lessee by any bailee of the goods, except a carrier, that the bailee holds the goods for the lessee; or

(c) such an acknowledgment to the lessee by a carrier via reshipment or as warehouseman.

(3) (a) To stop delivery, a lessor shall so notify as to enable the bailee by reasonable diligence to prevent delivery of the goods.

(b) After notification, the bailee shall hold and deliver the goods according to the directions of the lessor, but the lessor is liable to the bailee for any ensuing charges or damages.

(c) A carrier who has issued a nonnegotiable bill of lading is not obliged to obey a notification to stop received from a person other than the consignor.

OFFICIAL COMMENT

Uniform Statutory Source: Section 2-705.

Changes: Revised to reflect leasing practices and terminology.

Definitional

Cross References:

- "Bill of lading". Section 1-201(6).
- "Delivery". Section 1-201(14).
- "Discover". Section 1-201(25).
- "Goods". Section 2A-103(1)(h).
- "Insolvent". Section 1-201(23).

"Lease contract". Section 2A-103(1)(l).

"Lessee". Section 2A-103(1)(n).

"Lessor". Section 2A-103(1)(p).

"Notifies" and "Notification". Section 1-201(26).

"Person". Section 1-201(30).

"Receipt". Section 2-103(1)(c).

"Remedy". Section 1-201(34).

"Rights". Section 1-201(36).

#### § 2A-527. LESSOR'S RIGHTS TO DISPOSE OF GOODS.

(1) After a default by a lessee under the lease contract of the type described in Section 2A-523(1) or 2A-523(3)(a) or after the lessor refuses to deliver or takes possession of goods (Section 2A-525 or 2A-526), or, it agreed, after other default by a lessee, the lessor may dispose of the goods concerned or the undelivered balance thereof by lease, sale or otherwise.

(2) Except as otherwise provided with respect to damages liquidated in the lease agreement (Section 2A-504) or otherwise determined pursuant to agreement of the parties (Sections 1-102(3) and 2A-503), if the disposition is by lease agreement substantially similar to the original lease agreement and the new lease agreement is made in good faith and in a commercially reasonable manner, the lessor may recover from the lessee as damages (i) accrued and unpaid rent as of the date of the commencement of the term of the new lease agreement, (ii) the present value, as of the same date of the total rent for the then remaining lease term of the original lease agreement minus the present value, as of the same date, of the rent under the new lease agreement applicable to that period of the new lease term which is comparable to the then remaining term of the original lease agreement, and (iii) any incidental damages allowed under Section 2A-530, less expenses saved in consequence of the lessee's default.

(3) If the lessor's disposition is by lease agreement that for any reason does not qualify for treatment under subsection (2), or is by sale or otherwise, the lessor may recover from the lessee as if the lessor had elected not to dispose of the goods and Section 2A-528 governs.

(4) A subsequent buyer or lessee who buys or leases from the lessor in good faith for value as a result of a disposition under this section takes the goods free of the original lease contract and any rights of the original lessee even though the lessor fails to comply with one or more of the requirements of this Article.

(5) The lessor is not accountable to the lessee for any profit made on any disposition. A lessee who has rightfully rejected or justifiably revoked acceptance shall account to the lessor for any excess over the amount of the lessee's security interest (Section 2A-508(5)).

#### OFFICIAL COMMENT

Uniform Statutory Source: Section 2-706(1), (5) and (6).

Changes: Substantially revised.

Purposes: 1. Subsection (1), a revised version of the first sentence of subsection 2-706(1), allows the lessor the right to dispose of goods after a statutory or other material default by the lessee (even if the goods remain in the lessee's possession - Section 2A-525(2)) after the lessor refuses to deliver or takes possession of the goods, or, if agreed, after other contractual default. The lessor's decision to exercise this right is a function of a commercial judgment, not a statutory mandate replete with sanctions for failure to comply. Cf. Section 9-507. As the owner of the goods, in the case of a lessor, or as the prime lessee of the goods, in the case of a sublessor, compulsory disposition of the goods is inconsistent with the nature of the interest held by the lessor or the sublessor and is not necessary because the interest held by the lessee or the sublessee is not protected by a right of redemption under the common law or this Article. Subsection 2A-527(5).

2. The rule for determining the measure of damages recoverable by the lessor against the lessee is a function of several variables. If the lessor has elected to effect disposition under

subsection (1) and such disposition is by lease that qualifies under subsection (2), the measure of damages set forth in subsection (2) will apply, absent agreement to the contrary. Sections 2A-504, 2A-103(4) and 1-102(3).

3. The lessor's damages will be established using the new lease agreement as a measure if the following three criteria are satisfied: (i) the lessor disposed of the goods by lease, (ii) the lease agreement is substantially similar to the original lease agreement, and (iii) such disposition was in good faith, and in a commercially reasonable manner. Thus, the lessor will be entitled to recover from the lessee the accrued and unpaid rent as of the date of Commencement of the term of the new lease, and the present value, as of the same date, of the rent under original lease for the then remaining term less the present value as of the same date of the rent under the new lease agreement applicable to the period of the new lease comparable to the remaining term under the original lease, together with incidental damages less expenses saved in consequence of the lessee's default. If the lessor's disposition does not satisfy the criteria of subsection (2), the lessor may calculate its claim against the lessee pursuant to Section 2A-528. Section 2A-523(1)(e).

4. Two of the three criteria to be met by the lessor are familiar, but the concept of the new lease agreement that is substantially similar to the original lease agreement is not. Given the many variables facing a party who intends to lease goods and the rapidity of change in the market place, the policy decision was made not to draft with specificity. It was thought unwise to seek to establish certainty at the cost of fairness. The decision of whether the new lease agreement is substantially similar to the original will be determined case by case.

5. While the section does not draw a bright line, it is possible to describe some of the factors that should be considered in a finding that a new lease agreement is substantially similar to the original. The various elements of the new lease agreement should be examined. Those elements include the options to purchase or release; the lessor's representations, warranties and covenants to the lessee as well as those to be provided by the lessee to the lessor; and the services, if any, to be provided by the lessor or by the lessee. All of these factors allocate cost and risk between the lessor and the lessee and thus affect the amount of rent to be paid. These findings should not be made with scientific precision, as they are a function of economics, nor should they be made independently, as it is important that a sense of commercial judgment pervade the finding. See Section 2A-507(2). To establish the new lease as a proper measure of damage under subsection (2), these various factors, taken as a whole, must result in a finding that the new lease agreement is substantially similar to the original. If the differences between the original lease and the new lease can be easily valued, it would be appropriate for a court to find that the new lease is substantially similar to the old lease, adjust the difference in the rent between the two leases to take account of the differences, and award damages under this section. If, for example, the new lease requires the lessor to insure the goods in the hands of the lessee, while the original lease required the lessee to insure, the usual cost of such insurance could be deducted from rent due under the new lease before the difference in rental between the two leases is determined.

6. The following hypothetical illustrates the difficulty of providing a bright line. Assume that A buys a jumbo tractor for \$1 million and then leases the tractor to B for a term of 36 months. The tractor is delivered to and is accepted by B on May 1. On June 1 B fails to pay the monthly rent to A. B returns the tractor to A, who immediately releases the tractor to C for a term identical to the term remaining under the lease between A and B. All terms and conditions under the lease between A and C are identical to those under the original lease between A and B, except that C does not provide any property damage or other insurance coverage, and B agreed to provide complete coverage. Coverage is expensive and difficult to obtain. It is a question of fact whether it is so difficult to adjust the recovery to take account of the difference between the two leases as to insurance that the second lease is not substantially similar to the original.

7. A new lease can be substantially similar to the original lease even though its term extends beyond the remaining term of the original lease, so long as the court can fairly apportion a part of the rental payments under the new lease to that part of the term of the new lease which is comparable to the remaining lease term under the original lease. Also, the lease term of the new lease may be comparable to the remaining term of the original lease even though the beginning and ending dates of the two leases are not the same. For example, a two-month lease of agricultural equipment for the months of August and September may be comparable to a two-month lease running from the 15th of August to the 15th of October if in the particular location two-month leases beginning on August 15th are basically interchangeable with two-month leases beginning August 1st. Similarly, the term of a one-year truck lease beginning on the 15th of January may be comparable to the term of a one-year truck lease beginning January 2d. If the lease terms are found to be comparable, the court may base cover damages on the entire

difference between the costs under the two leases.

8. Subsection (3), which is new, provides that if the lessor's disposition is by lease that does not qualify under subsection (2), or is by sale or otherwise, Section 2A-528 governs.

9. Subsection (4), a revised version of subsection 2-706(5), applies to protect a subsequent buyer or lessee who buys or leases from the lessor in good faith and for value, pursuant to a disposition under this section. Note that by its terms, the rule in subsection 2A-304(1), which provides that the subsequent lessee takes subject to the original lease contract, is controlled by the rule stated in this subsection.

10. Subsection (5), a revised version of subsection 2-706(6), provides that the lessor is not accountable to the lessee for any profit made by the lessor on a disposition. This rule follows from the fundamental premise of the bailment for hire that the lessee under a lease of goods has no equity of redemption to protect.

Cross References:

Sections 1-102(3), 2-706(1), 2-706(5), 2-706(6), 2A-103(4), 2A-304(1), 2A-504, 2A-507(2), 2A-523(1)(e), 2A-525(2), 2A-527(5), 2A-528 and 9-507.

Definitional

Cross References:

"Buyer" and "Buying". Section 2-103(1)(a).

"Delivery". Section 1-201(14).

"Good faith". Sections 1-201(19) and 2-103(1)(b).

"Goods". Section 2A-103(1)(h).

"Lease". Section 2A-103(1)(j).

"Lease contract". Section 2A-103(1)(l).

"Lessee". Section 2A-103(1)(n).

"Lessor". Section 2A-103(1)(p).

"Present value". Section 2A-103(1)(u).

"Rights". Section 1-201(36).

"Sale". Section 2-106(1).

"Security interest". Section 1-201(37).

"Value". Section 1-201(44).

**§ 2A-528. LESSOR'S DAMAGES FOR NON-ACCEPTANCE OR REPUDIATION.**

(1) Except as otherwise provided with respect to damages liquidated in the lease agreement (Section 2A-504) or otherwise determined pursuant to agreement of the parties (Sections 1-102(3) and 2A-503), if a lessor elects to retain the goods or a lessor elects to dispose of the goods and disposition is by lease agreement that for any reason does not qualify for treatment under Section 2A-527(2), or is by sale or otherwise, the lessor may recover from the lessee as damages for a default of the type described in Section 2A-523(1) or 2A-523(3)(a), or, if agreed, for other default of the lessee (i) accrued and unpaid rent as of the date of default if the lessee has never taken possession of the goods or, if the lessee has taken possession of the goods, as of the date the lessor repossessed the goods or an earlier date on which the lessee makes a tender of the goods to the lessor, (ii) the present value as of the date determined under clause (i) of the total rent for the then remaining lease term of the original lease agreement minus the present value as of the same date of the market rent at the place where the goods are located computed for the same lease term, and (iii) any incidental damages allowed under Section 2A-530, less expenses saved in consequence of the lessee's default.

(2) If the measure of damages provided in subsection (1) is inadequate to put a lessor in as good a position as performance would have, the measure of damages is the present value of the profit, including reasonable overhead, the lessor would have made from full performance by the lessee, together with any incidental damages allowed under Section 2A-530, due allowance for costs reasonably incurred and due credit for payments or proceeds of disposition.

#### OFFICIAL COMMENT

Uniform Statutory Source: Section 2-708.

Changes: Substantially revised.

Purposes: 1. Subsection (1), a substantially revised version of Section 2-708(1), states the basic rule governing the measure of lessor's damages for a default described in Section 2A-523(1) or (3)(a), and, if agreed, for a contractual default. This measure will apply if the lessor elects to retain the goods (whether undelivered, returned by the lessee, or repossessed by the lessor after acceptance and default by the lessee) or if the lessor's disposition does not qualify under subsection 2A-527(2). Section 2A-527(3). Note that under some of these conditions, the lessor may recover damages from the lessee pursuant to the rule set forth in Section 2A-529. There is no sanction for disposition that does not qualify under subsection 2A-527(2). Application of the rule set forth in this section is subject to agreement to the contrary. Sections 2A-504, 2A-103(4) and 1-102(3).

2. If the lessee has never taken possession of the goods, the measure of damage is the accrued and unpaid rent as of the date of default together with the present value, as of the date of default, of the original rent for the remaining term of the lease less the present value as of the same date of market rent, and incidental damages, less expenses saved in consequence of the default. Note that the reference in Section 2A-528(1)(i) and (ii) is to the date of default not to the date of an event of default. An event of default under a lease agreement becomes a default under a lease agreement only after the expiration of any relevant period of grace and compliance with any notice requirements under this Article and the lease agreement. American Bar Foundation, Commentaries on Indentures, § 5-1, at 216-217 (1971). Section 2A-501(1). This conclusion is also a function of whether, as a matter of fact or law, the event of default has been waived, suspended or cured. Sections 2A-103(4) and 1-103. If the lessee has taken possession of the goods, the measure of damages is the accrued and unpaid rent as of the earlier of the time the lessor repossesses the goods or the time the lessee tenders the goods to the lessor plus the difference between the present value, as of the same time, of the rent under the lease for the remaining lease term and the present value, as of the same time, of the market rent.

3. Market rent will be computed pursuant to Section 2A-507.

4. Subsection (2), a somewhat revised version of the provisions of subsection 2-708(2), states a measure of damages which applies if the measure of damages in subsection (1) is inadequate to put the lessor in as good a position as performance would have. The measure of damage is the lessor's profit, including overhead, together with incidental damages, with allowance for costs reasonably incurred and credit for payments or proceeds of disposition. In determining the amount of due credit with respect to proceeds of disposition a proper value should be attributed to the lessor's residual interest in the goods. Sections 2A-103(1)(q) and 2A-507(4).

5. In calculating profit, a court should include any expected appreciation of the goods, e.g. the foal of a leased brood mare. Because this subsection is intended to give the lessor the benefit of the bargain, a court should consider any reasonable benefit or profit expected by the lessor from the performance of the lease agreement. See Honeywell, Inc. v. Lithonia Lighting, Inc., 317 F. Supp. 406, 413 (N.D. Ga. 1970); Locks v. Wade, 36 N.J. Super. 128, 131, 114 A.2d 875, 877 (Super. Ct. App. Div. 1955). Further, in calculating profit the concept of present value must be given effect. Taylor v. Commercial Credit Equip. Corp., 170 Ga. App. 322, 316 S.E.2d 788 (Ct. App. 1984). See generally Section 2A-103(1)(u).

#### Cross References:

Sections 1-102(3), 2-708, 2A-103(1)(u), 2A-402, 2A-504, 2A-507, 2A-527(2) and 2A-529.

#### Definitional

#### Cross References:

"Agreement". Section 1-201(3).

“Goods”. Section 2A-103(1)(h).

“Lease”. Section 2A-103(1)(j).

“Lease agreement”. Section 2A-103(1)(k).

“Lessee”. Section 2A-103(1)(n).

“Lessor”. Section 2A-103(1)(p).

“Party”. Section 1-201(29).

“Present value”. Section 2A-103(1)(u).

“Sale”. Section 2-106(1).

#### § 2A-529. LESSOR'S ACTION FOR THE RENT.

(1) After default by the lessee under the lease contract of the type described in Section 2A-523(1) or 2A-523(3)(a) or, if agreed, after other default by the lessee, if the lessor complies with subsection (2), the lessor may recover from the lessee as damages:

(a) For goods accepted by the lessee and not repossessed by or tendered to the lessor, and for conforming goods lost or damaged within a commercially reasonable time after risk of loss passes to the lessee (Section 2A-219), (i) accrued and unpaid rent as of the date of entry of judgment in favor of the lessor, (ii) the present value as of the same date of the rent for the then remaining lease term of the lease agreement, and (iii) any incidental damages allowed under Section 2A-530, less expenses saved in consequence of the lessee's default; and

(b) For goods identified to the lease contract if the lessor is unable after reasonable effort to dispose of them at a reasonable price or the circumstances reasonably indicate that effort will be unavailing, (i) accrued and unpaid rent as of the date of entry of judgment in favor of the lessor, (ii) the present value as of the same date of the rent for the then remaining lease term of the lease agreement, and (iii) any incidental damages allowed under Section 2A-530, less expenses saved in consequence of the lessee's default.

(2) Except as provided in subsection (3), the lessor shall hold for the lessee for the remaining lease term of the lease agreement any goods that have been identified to the lease contract and are in the lessor's control.

(3) The lessor may dispose of the goods at any time before collection of the judgment for damages obtained pursuant to subsection (1). If the disposition is before the end of the remaining lease term of the lease agreement, the lessor's recovery against the lessee for damages will be governed by Section 2A-527 or Section 2A-528, and the lessor will cause an appropriate credit to be provided against a judgment for damages to the extent that the amount of the judgment exceeds the recovery available pursuant to section 2A-527 or 2A-528.

(4) Payment of the judgment for damages obtained pursuant to subsection (1) entitles the lessee to use and possession of the goods not then disposed of for the remaining lease term of the lease agreement.

(5) After a lessee has wrongfully rejected or revoked acceptance of goods, has failed to pay rent then due, or has repudiated (Section 2A-402), a lessor who is held not entitled to rent under this section must nevertheless be awarded damages for non-acceptance under Sections 2A-527 and 2A-528.

#### OFFICIAL COMMENT

Uniform Statutory Source: Section 2-709.

Changes: Substantially revised.

Purposes: 1. Absent a lease contract provision to the contrary, an action for the full unpaid rent (discounted to present value as of the time of entry of judgment as to rent due after that time) is available as to goods not lost or damaged only if the lessee retains possession of the goods or the lessor is or apparently will be unable to dispose of them at a reasonable price after reasonable effort. There is no general right in a lessor to recover the full rent from the lessee upon holding the goods for the lessee. If the lessee tenders goods back to the lessor, and

the lessor refuses to accept the tender, the lessor will be limited to the damages it would have suffered had it taken back the goods. The rule in Article 2 that the seller can recover the price of accepted goods is rejected here. In a lease, the lessor always has a residual interest in the goods which the lessor usually realizes upon at the end of a lease term by either sale or a new lease. Therefore, it is not a substantial imposition on the lessor to require it to take back and dispose of the goods if the lessee chooses to tender them back before the end of the lease term: the lessor will merely do earlier what it would have done anyway, sell or relet the goods. Further, the lessee will frequently encounter substantial difficulties if the lessee attempts to sublet the goods for the remainder of the lease term. In contrast to the buyer who owns the entire interest in goods and can easily dispose of them, the lessee is selling only the right to use the goods under the terms of the lease and the sublessee must assume a relationship with the lessor. In that situation, it is usually more efficient to eliminate the original lessee as a middleman by allowing the lessee to return the goods to the lessor who can then redispense of them.

2. In some situations even where possession of the goods is reacquired, a lessor will be able to recover as damages the present value of the full rent due, not under this section, but under 2A-528(2) which allows a lost profit recovery if necessary to put the lessor in the position it would have been in had the lessee performed. Following is an example of such a case. A is a lessor of construction equipment and maintains a substantial inventory. B leases from A a backhoe for a period of two weeks at a rental of \$1,000. After three days, B returns the backhoe and refuses to pay the rent. A has five backhoes in inventory, including the one returned by B. During the next 11 days after the return by B of the backhoe, A rents no more than three backhoes at any one time and, therefore, always has two on hand. If B had kept the backhoe for the full rental period, A would have earned the full rental on that backhoe, plus the rental on the other backhoes it actually did rent during that period. Getting this backhoe back before the end of the lease term did not enable A to make any leases it would not otherwise have made. The only way to put A in the position it would have been in had the lessee fully performed is to give the lessor the full rentals. A realized no savings at all because the backhoe was returned early and might even have incurred additional expense if it was paying for parking space for equipment in inventory. A has no obligation to relet the backhoe for the benefit of B rather than leasing that backhoe or any other in inventory for its own benefit. Further, it is probably not reasonable to expect A to dispose of the backhoe by sale when it is returned in an effort to reduce damages suffered by B. Ordinarily, the loss of a two-week rental would not require A to reduce the size of its backhoe inventory. Whether A would similarly be entitled to full rentals as lost profit in a one-year lease of a backhoe is a question of fact: in any event the lessor, subject to mitigation of damages rules, is entitled to be put in as good a position as it would have been had the lessee fully performed the lease contract.

3. Under Subsection (2) a lessor who is able and elects to sue for the rent due under a lease must goods not lost or damaged for the lessee. Subsection (3) creates an exception to the subsection (2) requirement. If the lessor disposes of those goods prior to collection of the judgment (whether as a matter of law or agreement), the lessor's recovery is governed by the measure of damages in Section 2A-527 if the disposition is by lease that is substantially similar to the original lease, or otherwise by the measure of damages in Section 2A-528. Section 2A-523 official comment.

4. Subsection (4), which is new, further reinforces the requisites of Subsection (2). In the event the judgment for damages obtained by the lessor against the lessee pursuant to subsection (1) is satisfied, the lessee regains the right to use and possession of the remaining goods for the balance of the original lease term; a partial satisfaction of the judgment creates no right in the lessee to use and possession of the goods.

5. The relationship between subsections (2) and (4) is important to understand. Subsection (2) requires the lessor to hold for the lessee identified goods in the lessor's possession. Absent agreement to the contrary, whether in the lease or otherwise, under most circumstances the requirement that the lessor hold the goods for the lessee for the term will mean that the lessor is not allowed to use them. Sections 2A-103(4) and 1-203. Further, the lessor's use of the goods could be viewed as a disposition of the goods that would bar the lessor from recovery under this section, remitting the lessor to the two preceding sections for a determination of the lessor's claim for damages against the lessee.

6. Subsection (5), the analogue of subsection 2-709(3), further reinforces the thrust of subsection (3) by stating that a lessor who is held not entitled to rent under this section has not elected a remedy; the lessor must be awarded damages under Sections 2A-527 and 2A-528. This is a function of two significant policies of this Article - that resort to a remedy is optional, unless expressly agreed to be exclusive (Section 2A-503(2)) and that rights and remedies provided in this Article are generally cumulative. (Section 2A-501(2) and (4)).

**Cross References:**

Sections 1-203, 2-709, 2-709(3), 2A-103(4), 2A-501(2), 2A-501(4), 2A-503(2), 2A-504, 2A-523(1)(e), 2A-525(2), 2A-527, 2A-528 and 2A-529(2).

**Definitional**

**Cross References:**

“Action”. Section 1-201(1).

“Conforming”. Section 2A-103(1)(d).

“Goods”. Section 2A-103(1)(h).

“Lease”. Section 2A-103(1)(j).

“Lease agreement”. Section 2A-103(1)(k).

“Lease contract”. Section 2A-103(1)(l).

“Lessee”. Section 2A-103(1)(n).

“Lessor”. Section 2A-103(1)(p).

“Present value”. Section 2A-103(1)(u).

“Reasonable time”. Section 1-204(1) and (2).

**§ 2A-530. LESSOR'S INCIDENTAL DAMAGES.**

Incidental damages to an aggrieved lessor include any commercially reasonable charges, expenses, or commissions incurred in stopping delivery, in the transportation, care and custody of goods after the lessee's default, in connection with return or disposition of the goods, or otherwise resulting from the default.

**OFFICIAL COMMENT**

Uniform Statutory Source: Section 2-710.

Changes: Revised to reflect leasing practices and terminology.

**Definitional**

**Cross References:**

“Aggrieved party”. Section 1-201(2).

“Delivery”. Section 1-201(14).

“Goods”. Section 2A-103(1)(h).

“Lessee”. Section 2A-103(1)(n).

“Lessor”. Section 2A-103(1)(p).

**§ 2A-531. STANDING TO SUE THIRD PARTIES FOR INJURY TO GOODS.**

(1) If a third party so deals with goods that have been identified to a lease contract as to cause actionable injury to a party to the lease contract (a) the lessor has a right of action against the third party, and (b) the lessee also has a right of action against the third party if the lessee:

(i) has a security interest in the goods;

(ii) has an insurable interest in the goods; or

(iii) bears the risk of loss under the lease contract or has since the injury assumed that risk

as against the lessor and the goods have been converted or destroyed.

(2) If at the time of the injury the party plaintiff did not bear the risk of loss as against the other party to the lease contract and there is no arrangement between them for disposition of the recovery, his suit or settlement, subject to his own interest, is as a fiduciary for the other party to the lease contract.

(3) Either party with the consent of the other may sue for the benefit of whom it may concern.

#### OFFICIAL COMMENT

Uniform Statutory Source: Section 2-722.

Changes: Revised to reflect leasing practices and terminology.

#### Definitional

#### Cross References:

"Action". Section 1-201(1).

"Goods". Section 2A-103(1)(h).

"Lease contract". Section 2A-103(1)(l).

"Lessee". Section 2A-103(1)(n).

"Lessor". Section 2A-103(1)(p).

"Party". Section 1-201(29).

"Rights". Section 1-201(36).

"Security interest". Section 1-201(37).

§ 2A-532. LESSOR'S RIGHTS TO RESIDUAL INTEREST. In addition to any other recovery permitted by this Article or other law, the lessor may recover from the lessee an amount that will fully compensate the lessor for any loss of or damage to the lessor's residual interest in the goods caused by the default of the lessee.

#### OFFICIAL COMMENT

Uniform Statutory Source: None.

This section recognizes the right of the lessor to recover under this Article (as well as under other law) from the lessee for failure to comply with the lease obligations as to the condition of leased goods when returned to the lessor, for failure to return the goods at the end of the lease, or for any other default which causes loss or injury to the lessor's residual interest in the goods.

#### ARTICLE 1 AND ARTICLE 9: CONFORMING AMENDMENTS

§ 8.1-105. (Effective until January 1, 1991) Territorial application of the act; parties' power to choose applicable law.—(1) Except as provided hereafter in this section, when a transaction bears a reasonable relation to this Commonwealth and also to another state or nation the parties may agree that the law either of this Commonwealth or of such other state or nation shall govern their rights and duties. Failing such agreement this act applies to transactions bearing an appropriate relation to this Commonwealth.

(2) Where one of the following provisions of this act specifies the applicable law, that provision governs and a contrary agreement is effective only to the extent permitted by the law (including the conflict of laws rules) so specified:

Rights of creditors against sold goods. § 8.2-402.

Applicability of the title on bank deposits and collections. § 8.4-102.

Bulk transfers subject to the title on bulk transfers. § 8.6-102.

Applicability of the title on investment securities. § 8.8-106.

Perfection provisions of the title on secured transactions. § 8.9-103.

§ 8.1-105. (Effective January 1, 1991) Territorial application of the act; parties' power to choose applicable law.—(1) Except as provided hereafter in this section, when a transaction bears a reasonable relation to this Commonwealth and also to another state or nation the parties may agree that the law either of this Commonwealth or of such other state or nation shall govern their rights and duties. Failing such agreement this act applies to transactions bearing an appropriate relation to this Commonwealth.

(2) Where one of the following provisions of this act specifies the applicable law, that provision governs and a contrary agreement is effective only to the extent permitted by the law (including the conflict of laws rules) so specified:

Rights of creditors against sold goods. § 8.2-402.

*Applicability of the title on leases. §§ 8.2A-105 and 8.2A-106.*

Applicability of the title on bank deposits and collections. § 8.4-102.

Applicability of the title on funds transfers. § 8.4A-507.

Bulk transfers subject to the title on bulk transfers. § 8.6-102.

Applicability of the title on investment securities. § 8.8-106.

Perfection provisions of the title on secured transactions. § 8.9-103.

#### OFFICIAL COMMENT

Uniform Statutory Source: Section 1-105, 1978 Official Text of the Act.

Changes: Subsection (2) is amended to reference two sections of the Article on Leases (Article 2A), which is being promulgated at the same time as this amendment.

#### § 1-201(37). GENERAL DEFINITIONS: "SECURITY INTEREST"

§ 8.1-201. General definitions.—Subject to additional definitions contained in the subsequent titles of this act which are applicable to specific titles or parts thereof, and unless the context otherwise requires, in this act:

(1) "Action" in the sense of a judicial proceeding includes recoupment, counterclaim, set-off, suit in equity and any other proceedings in which rights are determined.

(2) "Aggrieved party" means a party entitled to resort to a remedy.

(3) "Agreement" means the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance as provided in §§ 8.1-205 and 8.2-208. Whether an agreement has legal consequences is determined by the provisions of this act, if applicable; otherwise by the law of contracts as provided in § 8.1-103. (Compare "Contract.")

(4) "Bank" means any person engaged in the business of banking.

(5) "Bearer" means the person in possession of an instrument, document of title, or certificated security payable to bearer or indorsed in blank.

(6) "Bill of lading" means a document evidencing the receipt of goods for shipment issued by a person engaged in the business of transporting or forwarding goods, and includes an airbill. "Airbill" means a document serving for air transportation as a bill of lading does for marine or rail transportation, and includes an air consignment note or air waybill.

(7) "Branch" includes a separately incorporated foreign branch of a bank.

(8) "Burden of establishing" a fact means the burden of persuading the triers of fact that the existence of the fact is more probable than its nonexistence.

(9) "Buyer in ordinary course of business" means a person who in good faith and without knowledge that the sale to him is in violation of the ownership rights or security interest of a third party in the goods buys in ordinary course from a person in the business of selling goods of that kind but does not include a pawnbroker. All persons who sell minerals or the like (including oil and gas) at wellhead or minehead shall be deemed to be persons in the business of selling goods of that kind. "Buying" may be for cash or by exchange of other property or on secured or unsecured credit and includes receiving goods or documents of title under a preexisting contract for sale but does not include a transfer in bulk or as security for or in total or partial satisfaction of a money debt.

(10) "Conspicuous" : A term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. A printed heading in capitals (as: NONNEGOTIABLE BILL OF LADING) is conspicuous. Language in the body of a form is "conspicuous" if it is in larger or other contrasting type or color. But in a telegram any stated term is "conspicuous." Whether a term or clause is "conspicuous" or not is for decision by the court.

(11) "Contract" means the total legal obligation which results from the parties' agreement as affected by this act and any other applicable rules of law. (Compare "Agreement.")

(12) "Creditor" includes a general creditor, a secured creditor, a lien creditor and any representative of creditors, including an assignee for the benefit of creditors, a trustee in bankruptcy, a receiver in equity and an executor or administrator of an insolvent debtor's or assignor's estate.

(13) "Defendant" includes a person in the position of defendant in a cross-action or counterclaim.

(14) "Delivery" with respect to instruments, documents of title, chattel paper or certificated securities means voluntary transfer of possession.

(15) "Document of title" includes bill of lading, dock warrant, dock receipt, warehouse receipt or order for the delivery of goods, and also any other document which in the regular course of business or financing is treated as adequately evidencing that the person in possession of it is entitled to receive, hold and dispose of the document and the goods it covers. To be a document of title a document must purport to be issued by or addressed to a bailee and purport to cover goods in the bailee's possession which are either identified or are fungible portions of an identified mass.

(16) "Fault" means wrongful act, omission or breach.

(17) "Fungible" with respect to goods or securities means goods or securities of which any unit is, by nature or usage of trade, the equivalent of any other like unit. Goods which are not fungible shall be deemed fungible for the purposes of this act to the extent that under a particular agreement or document unlike units are treated as equivalents.

(18) "Genuine" means free of forgery or counterfeiting.

(19) "Good faith" means honesty in fact in the conduct or transaction concerned.

(20) "Holder" means a person who is in possession of a document of title or an instrument or a certificated investment security drawn, issued or indorsed to him or to his order or to bearer or in blank.

(21) To "honor" is to pay or to accept and pay, or where a credit so engages to purchase or discount a draft complying with the terms of the credit.

(22) "Insolvency proceedings" includes any assignment for the benefit of creditors or other proceedings intended to liquidate or rehabilitate the estate of the person involved.

(23) A person is "insolvent" who either has ceased to pay his debts in the ordinary course of business or cannot pay his debts as they become due or is insolvent within the meaning of the federal bankruptcy law.

(24) "Money" means a medium of exchange authorized or adopted by a domestic or foreign government as a part of its currency.

(25) A person has "notice" of a fact when

(a) he has actual knowledge of it; or

(b) he has received a notice or notification of it; or

(c) from all the facts and circumstances known to him at the time in question he has reason to know that it exists.

A person "knows" or has "knowledge" of a fact when he has actual knowledge of it. "Discover" or "learn" or a word or phrase of similar import refers to knowledge rather than to reason to know. The time and circumstances under which a notice or notification may cease to be effective are not determined by this act.

(26) A person "notifies" or "gives" a notice or notification to another by taking such steps as may be reasonably required to inform the other in ordinary course whether or not such other actually comes to know of it. A person "receives" a notice or notification when

(a) it comes to his attention; or

(b) it is duly delivered at the place of business through which the contract was made or at any other place held out by him as the place for receipt of such communications.

(27) Notice, knowledge or a notice or notification received by an organization is effective for a particular transaction from the time when it is brought to the attention of the individual conducting that transaction, and in any event from the time when it would have been brought to his attention if the organization had exercised due diligence. An organization exercises due diligence if it maintains reasonable routines for communicating significant information to the person conducting the transaction and there is reasonable compliance with the routines. Due diligence does not require an individual acting for the organization to communicate information unless such communication is part of his regular duties or unless he has reason to know of the transaction and that the transaction would be materially affected by the information.

(28) "Organization" includes a corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership or association, two or more persons having a joint or common interest, or any other legal or commercial entity.

(29) "Party," as distinct from "third party," means a person who has engaged in a transaction or made an agreement within this act.

(30) "Person" includes an individual or an organization (See § 8.1-102).

(31) "Presumption" or "presumed" means that the trier of fact must find the existence of the fact presumed unless and until evidence is introduced which would support a finding of its nonexistence.

(32) "Purchase" includes taking by sale, discount, negotiation, mortgage, pledge, lien, issue or re-issue, gift or any other voluntary transaction creating an interest in property.

(33) "Purchaser" means a person who takes by purchase.

(34) "Remedy" means any remedial right to which an aggrieved party is entitled with or without resort to a tribunal.

(35) "Representative" includes an agent, an officer of a corporation or association, and a trustee, executor or administrator of an estate, or any other person empowered to act for another.

(36) "Rights" includes remedies.

(37) "Security interest" means an interest in personal property or fixtures which secures payment or performance of an obligation. The retention or reservation of title by a seller of goods notwithstanding shipment or delivery to the buyer as specified in § 8.2-401 is limited in effect to a reservation of a "security interest." The term also includes any interest of a buyer of accounts or chattel paper which is subject to Title 8.9. The special property interest of a buyer of goods on identification of such goods to a contract for sale under § 8.2-401 is not a "security interest," but a buyer may also acquire a "security interest" by complying with Title 8.9. Unless a lease or consignment is intended as security, reservation of title thereunder is not a "security interest" but a consignment is in any event subject to the provisions on consignment sales as specified in § 8.2-326. Whether a lease is intended as security is to be determined by the facts

of each case; however, (a) the inclusion of an option to purchase does not of itself make the lease one intended for security, and (b) an agreement that upon compliance with the terms of the lease the lessee shall become or has the option to become the owner of the property for no additional consideration or for a nominal consideration does make the lease one intended for security.

Whether a transaction creates a lease or security interest is determined by the facts of each case; however, a transaction creates a security interest if the consideration the lessee is to pay the lessor for the right to possession and use of the goods is an obligation for the term of the lease not subject to termination by the lessee, and

(a) the original term of the lease is equal to or greater than the remaining economic life of the goods,

(b) the lessee is bound to renew the lease for the remaining economic life of the goods or is bound to become the owner of the goods,

(c) the lessee has an option to renew the lease for the remaining economic life of the goods for no additional consideration or nominal additional consideration upon compliance with the lease agreement, or

(d) the lessee has an option to become the owner of the goods for no additional consideration or nominal additional consideration upon compliance with the lease agreement.

A transaction does not create a security interest merely because it provides that

(a) the present value of the consideration the lessee is obligated to pay the lessor for the right to possession and use of the goods is substantially equal to or is greater than the fair market value of the goods at the time the lease is entered into,

(b) the lessee assumes risk of loss of the goods, or agrees to pay taxes, insurance, filing, recording, or registration fees, or service or maintenance costs with respect to the goods,

(c) the lessee has an option to renew the lease or to become the owner of the goods,

(d) the lessee has an option to renew the lease for a fixed rent that is equal to or greater than the reasonably predictable fair market rent for the use of the goods for the term of the renewal at the time the option is to be performed, or

(e) the lessee has an option to become the owner of the goods for a fixed price that is equal to or greater than the reasonably predictable fair market value of the goods at the time the option is to be performed.

For purposes of this subsection (37):

(x) Additional consideration is not nominal if (i) when the option to renew the lease is granted to the lessee the rent is stated to be the fair market rent for the use of the goods for the term of the renewal determined at the time the option is to be performed, or (ii) when the option to become the owner of the goods is granted to the lessee the price is stated to be the fair market value of the goods determined at the time the option is to be performed. Additional consideration is nominal if it is less than the lessee's reasonably predictable cost of performing under the lease agreement if the option is not exercised;

(y) "Reasonably predictable" and "remaining economic life of the goods" are to be determined with reference to the facts and circumstances at the time the transaction is entered into; and

(z) "Present value" means the amount as of a date certain of one or more sums payable in the future, discounted to the date certain. The discount is determined by the interest rate specified by the parties if the rate is not manifestly unreasonable at the time the transaction is entered into; otherwise, the discount is determined by a commercially reasonable rate that takes into account the facts and circumstances of each case at the time the transaction was entered into.

(38) "Send" in connection with any writing or notice means to deposit in the mail or deliver for transmission by any other usual means of communication with postage or cost of transmission provided for and properly addressed and in the case of an instrument to an address specified thereon or otherwise agreed, or if there be none to any address reasonable

under the circumstances. The receipt of any writing or notice within the time at which it would have arrived if properly sent has the effect of a proper sending.

(39) "Signed" includes any symbol executed or adopted by a party with present intention to authenticate a writing.

(40) "Surety" includes guarantor.

(41) "Telegram" includes a message transmitted by radio, teletype, cable, any mechanical method of transmission, or the like.

(42) "Term" means that portion of an agreement which relates to a particular matter.

(43) "Unauthorized" signature or indorsement means one made without actual, implied or apparent authority and includes a forgery.

(44) "Value" . Except as otherwise provided with respect to negotiable instruments and bank collections (§§ 8.3-303, 8.4-208 and 8.4-209) a person gives "value" for rights if he acquires them

(a) in return for a binding commitment to extend credit or for the extension of immediately available credit whether or not drawn upon and whether or not a charge-back is provided for in the event of difficulties in collection; or

(b) as security for or in total or partial satisfaction of a pre-existing claim; or

(c) by accepting delivery pursuant to a pre-existing contract for purchase; or

(d) generally, in return for any consideration sufficient to support a simple contract.

(45) "Warehouse receipt" means a receipt issued by a person engaged in the business of storing goods for hire.

(46) "Written" or "writing" includes printing, typewriting or any other intentional reduction to tangible form.

#### OFFICIAL COMMENT

Uniform Statutory Source: Section 1-201(37), 1978 Official Text of the Act.

Changes: Substantially revised.

Purpose: This amendment to Section 1-201(37) is being promulgated at the same time that the Article on Leases (Article 2A) is being promulgated as an amendment to this Act.

One of the reasons it was decided to codify the law with respect to leases was to resolve an issue that has created considerable confusion in the courts: what is a lease? The confusion exists, in part, due to the last two sentences of the definition of security interest in the 1978 Official Text of the Act. Section 1-201(37). The confusion is compounded by the rather considerable change in the federal, state and local tax laws and accounting rules as they relate to leases of goods. The answer is important because the definition of lease determines not only the rights and remedies of the parties to the lease but also those of third parties. If a transaction creates a lease and not a security interest, the lessee's interest in the goods is limited to its leasehold estate; the residual interest in the goods belongs to the lessor. This has significant implications to the lessee's creditors. "On common law theory, the lessor, since he has not parted with title, is entitled to full protection against the lessee's creditors and trustee in bankruptcy...." 1 G. Gilmore, Security Interests in Personal Property § 3.6, at 76 (1965).

Under pre-Act chattel security law there was generally no requirement that the lessor file the lease, a financing statement, or the like, to enforce the lease agreement against the lessee or any third party; the Article on Secured Transactions (Article 9) did not change the common law in that respect. Coogan, Leasing and the Uniform Commercial Code, in Equipment Leasing - Leveraged Leasing 681, 700 n.25, 729 n.80 (2d ed. 1980). The Article on Leases (Article 2A) has not changed the law in that respect, except for leases of fixtures. Section 2A-309. An examination of the common law will not provide an adequate answer to the question of what is a lease. The definition of security interest in Section 1-201(37) of the 1978 Official Text of the Act provides that the Article on Secured Transactions (Article ..... 9)

governs security interests disguised as leases, i.e., leases intended as security; however, the definition is vague and outmoded.

Lease is defined in Article 2A as a transfer of the right to possession and use of goods for a term, in return for consideration. Section 2A-103(1)(j). The definition continues by stating that the retention or creation of a security interest is not a lease. Thus, the task of sharpening the line between true leases and security interests disguised as leases continues to be a function of this section.

The first paragraph of this definition is a revised version of the first five sentences of the 1978 Official Text of Section 1-201(37). The changes are modest in that they make a style change in the fourth sentence and delete the reference to lease in the fifth sentence. The balance of this definition is new, although it preserves elements of the last two sentences of the prior definition. The focus of the changes was to draw a sharper line between leases and security interests disguised as leases to create greater certainty in commercial transactions.

Prior to this amendment, Section 1-201(37) provided that whether a lease was intended as security (i.e., a security interest disguised as a lease) was to be determined from the facts of each case; however, (a) the inclusion of an option to purchase did not itself make the lease one intended for security, and (b) an agreement that upon compliance with the terms of the lease the lessee would become, or had the option to become, the owner of the property for no additional consideration, or for a nominal consideration, did make the lease one intended for security.

Reference to the intent of the parties to create a lease or security interest has led to unfortunate results. In discovering intent, courts have relied upon factors that were thought to be more consistent with sales or loans than leases. Most of these criteria, however, are as applicable to true leases as to security interests. Examples include the typical net lease provisions, a purported lessor's lack of storage facilities or its character as a financing party rather than a dealer in goods. Accordingly, amended Section 1-201(37) deletes all reference to the parties' intent.

The second paragraph of the new definition is taken from Section 1(2) of the Uniform Conditional Sales Act (act withdrawn 1943), modified to reflect current leasing practice. Thus, reference to the case law prior to this Act will provide a useful source of precedent. Gilmore, Security Law, Formalism and Article 9, 47 Neb. L. Rev. 659, 671 (1968). Whether a transaction creates a lease or a security interest continues to be determined by the facts of each case. The second paragraph further provides that a transaction creates a security interest if the lessee has an obligation to continue paying consideration for the term of the lease, if the obligation is not terminable by the lessee (thus correcting early statutory gloss, e.g. *In re Royer's Bakery, Inc.*, 1 U.C.C. Rep. Serv. (Callaghan) 342 (Bankr. E.D. Pa. 1963)) and if one of four additional tests is met. The first of these four tests, subparagraph (a), is that the original lease term is equal to or greater than the remaining economic life of the goods. The second of these tests, subparagraph (b), is that the lessee is either bound to renew the lease for the remaining economic life of the goods or to become the owner of the goods. *In re Gehrke Enters.*, 1 Bankr. 647, 651-52 (Bankr. W.D. Wis. 1979). The third of these tests, subparagraph (c), is whether the lessee has an option to renew the lease for the remaining economic life of the goods for no additional consideration or for nominal additional consideration, which is defined later in this section. *In re Celeryvale Transp.*, 44 Bankr. 1007, 1014-15 (Bankr. E.D. Tenn. 1984). The fourth of these tests, subparagraph (d), is whether the lessee has an option to become the owner of the goods for no additional consideration or for nominal additional consideration. All of these tests focus on economics, not the intent of the parties. *In re Berge*, 32 Bankr. 370, 371-73 (Bankr. W.D. Wis. 1983).

The focus on economics is reinforced by the next paragraph, which is new. It states that a transaction does not create a security interest merely because the transaction has certain characteristics listed therein. Subparagraph (a) has no statutory derivative; it states that a full payout lease does not per se create a security interest. *Rushton v. Shea*, 419 F. Supp. 1349, 1365 (D. Del. 1976). Subparagraph (b) provides the same regarding the provisions of the typical net lease. Compare *All-States Leasing Co. v. Ochs*, 42 Or. App. 319, 600 P.2d 899 (Ct. App. 1979) with *In re Tillery*, 571 F.2d 1361 (5th Cir. 1978). Subparagraph (c) restates and expands the provisions of former Section 1-201(37) to make clear that the option can be to buy or renew. Subparagraphs (d) and (e) treat fixed price options and provide that fair market value must be determined at the time the transaction is entered into. Compare *Arnold Mach. Co. v. Balls*, 624 P.2d 678 (Utah 1981) with *Aoki v. Shepherd Mach. Co.*, 665 F.2d 941 (9th Cir. 1982).

The relationship of the second paragraph of this subsection to the third paragraph of this subsection deserves to be explored. The fixed price purchase option provides a useful example. A fixed price purchase option in a lease does not of itself create a security interest. This is particularly true if the fixed price is equal to or greater than the reasonably predictable fair market value of the goods at the time the option is to be performed. A security interest is

created only if the option price is nominal and the conditions stated in the introduction to the second paragraph of this subsection are met. There is a set of purchase options whose fixed price is less than fair market value but greater than nominal that must be determined on the facts of each case to ascertain whether the transaction in which the option is included creates a lease or a security interest.

It was possible to provide for various other permutations and combinations with respect to options to purchase and renew. For example, this section could have stated a rule to govern the facts of *In re Marhoefer Packing Co.*, 674 F.2d 1139 (7th Cir. 1982). This was not done because it would unnecessarily complicate the definition. Further development of this rule is left to the courts.

The fourth paragraph provides definitions and rules of construction.

§ 8.9-113. Security interests arising under title on sales or under title leases.—A security interest arising solely under the title on sales (Title 8.2) or *the title on leases (Title 8.2A)* is subject to the provisions of this title except that to the extent that and so long as the debtor does not have or does not lawfully obtain possession of the goods

(a) no security agreement is necessary to make the security interest enforceable; and

(b) no filing is required to perfect the security interest; and

(c) the rights of the secured party on default by the debtor are governed by the title on sales (Title 8.2) or (ii) *by the title on leases (Title 8.2A) in the case of a security interest arising solely under such title*.

#### OFFICIAL COMMENT

Uniform Statutory Source: Section 9-113, 1978 Official Text of the Act.

Changes: This section is amended to include security interests arising under the Article on Leases (Article 2A), which is being promulgated at the same time as this amendment. Section 2A-508(5). After the effective date of the amendment to this section all references in the Act to Section 9-113 will be deemed to refer to this section, as amended. E.g., Sections 9-(203(1) and 9-302(1)(f). Cross Reference:

Article 2A, esp. Section 2A-508(5).

#### Definitional

#### Cross References:

“Agreement”. Section 1-201(3).

“Goods”. Section 2A-103(1)(h).

“Lease”. Section 2A-103(1)(j).

“Party”. Section 1-201(29).

“Rights”. Section 1-201(36).

“Sale”. Section 2-106(1).

“Security interest”. Section 1-201(37).

## SENATE BILL NO. 667

Offered January 18, 1991

*A BILL to amend and reenact §§ 8.1-105, 8.1-201 and 8.9-113 of the Code of Virginia and to amend the Code of Virginia by adding a title numbered 8.2A, consisting of parts numbered 1 through 5, containing sections numbered 8.2A-101 through 8.2A-532, creating within the Uniform Commercial Code a body of law with respect to the leasing of goods.*

Patrons—Calhoun, Benedetti and Holland, E.M.; Delegate: Heilig

Referred to the Committee for Courts of Justice

Be it enacted by the General Assembly of Virginia:

1. That §§ 8.1-105, 8.1-201 and 8.9-113 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding a title numbered 8.2A, consisting of parts numbered 1 through 5, containing sections numbered 8.2A-101 through 8.2A-532, as follows:

§ 8.1-105. Territorial application of the act; parties' power to choose applicable law.—(1) Except as provided hereafter in this section, when a transaction bears a reasonable relation to this Commonwealth and also to another state or nation the parties may agree that the law either of this Commonwealth or of such other state or nation shall govern their rights and duties. Failing such agreement this act applies to transactions bearing an appropriate relation to this Commonwealth.

(2) Where one of the following provisions of this act specifies the applicable law, that provision governs and a contrary agreement is effective only to the extent permitted by the law (including the conflict of laws rules) so specified:

Rights of creditors against sold goods. § 8.2-402.

*Applicability of the title on leases. §§ 8.2A-105 and 8.2A-106.*

Applicability of the title on bank deposits and collections. § 8.4-102.

Applicability of the title on funds transfers. § 8.4A-507.

Bulk transfers subject to the title on bulk transfers. § 8.6-102.

Applicability of the title on investment securities. § 8.8-106.

Perfection provisions of the title on secured transactions. § 8.9-103.

§ 8.1-201. General definitions.—Subject to additional definitions contained in the subsequent titles of this act which are applicable to specific titles or parts thereof, and unless the context otherwise requires, in this act:

(1) "Action" in the sense of a judicial proceeding includes recoupment, counterclaim, set-off, suit in equity and any other proceedings in which rights are determined.

(2) "Aggrieved party" means a party entitled to resort to a remedy.

(3) "Agreement" means the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance as provided in §§ 8.1-205 and 8.2-208. Whether an agreement has legal consequences is determined by the provisions of this act, if applicable; otherwise by the law of contracts as provided in § 8.1-103.

(4) "Bank" means any person engaged in the business of banking.

(5) "Bearer" means the person in possession of an instrument, document of title, or certificated security payable to bearer or indorsed in blank.

(6) "Bill of lading" means a document evidencing the receipt of goods for shipment issued by a person engaged in the business of transporting or forwarding goods, and includes an airbill. "Airbill" means a document serving for air transportation as a bill of lading does for marine or rail transportation, and includes an air consignment note or air waybill.

(7) "Branch" includes a separately incorporated foreign branch of a bank.

(8) "Burden of establishing" a fact means the burden of persuading the triers of fact

1 that the existence of the fact is more probable than its nonexistence.

2 (9) "Buyer in ordinary course of business" means a person who in good faith and  
3 without knowledge that the sale to him is in violation of the ownership rights or security  
4 interest of a third party in the goods buys in ordinary course from a person in the  
5 business of selling goods of that kind but does not include a pawnbroker. All persons who  
6 sell minerals or the like (including oil and gas) at wellhead or minehead shall be deemed  
7 to be persons in the business of selling goods of that kind. "Buying" may be for cash or by  
8 exchange of other property or on secured or unsecured credit and includes receiving goods  
9 or documents of title under a preexisting contract for sale but does not include a transfer  
10 in bulk or as security for or in total or partial satisfaction of a money debt.

11 (10) "Conspicuous": A term or clause is conspicuous when it is so written that a  
12 reasonable person against whom it is to operate ought to have noticed it. A printed heading  
13 in capitals (as: NONNEGOTIABLE BILL OF LADING) is conspicuous. Language in the body  
14 of a form is "conspicuous" if it is in larger or other contrasting type or color. But in a  
15 telegram any stated term is "conspicuous." Whether a term or clause is "conspicuous" or  
16 not is for decision by the court.

17 (11) "Contract" means the total legal obligation which results from the parties'  
18 agreement as affected by this act and any other applicable rules of law.

19 (12) "Creditor" includes a general creditor, a secured creditor, a lien creditor and any  
20 representative of creditors, including an assignee for the benefit of creditors, a trustee in  
21 bankruptcy, a receiver in equity and an executor or administrator of an insolvent debtor's  
22 or assignor's estate.

23 (13) "Defendant" includes a person in the position of defendant in a cross-action or  
24 counterclaim.

25 (14) "Delivery" with respect to instruments, documents of title, chattel paper or  
26 certificated securities means voluntary transfer of possession.

27 (15) "Document of title" includes bill of lading, dock warrant, dock receipt, warehouse  
28 receipt or order for the delivery of goods, and also any other document which in the  
29 regular course of business or financing is treated as adequately evidencing that the person  
30 in possession of it is entitled to receive, hold and dispose of the document and the goods it  
31 covers. To be a document of title a document must purport to be issued by or addressed  
32 to a bailee and purport to cover goods in the bailee's possession which are either identified  
33 or are fungible portions of an identified mass.

34 (16) "Fault" means wrongful act, omission or breach.

35 (17) "Fungible" with respect to goods or securities means goods or securities of which  
36 any unit is, by nature or usage of trade, the equivalent of any other like unit. Goods which  
37 are not fungible shall be deemed fungible for the purposes of this act to the extent that  
38 under a particular agreement or document unlike units are treated as equivalents.

39 (18) "Genuine" means free of forgery or counterfeiting.

40 (19) "Good faith" means honesty in fact in the conduct or transaction concerned.

41 (20) "Holder" means a person who is in possession of a document of title or an  
42 instrument or a certificated investment security drawn, issued or indorsed to him or to his  
43 order or to bearer or in blank.

44 (21) To "honor" is to pay or to accept and pay, or where a credit so engages to  
45 purchase or discount a draft complying with the terms of the credit.

46 (22) "Insolvency proceedings" includes any assignment for the benefit of creditors or  
47 other proceedings intended to liquidate or rehabilitate the estate of the person involved.

48 (23) A person is "insolvent" who either has ceased to pay his debts in the ordinary  
49 course of business or cannot pay his debts as they become due or is insolvent within the  
50 meaning of the federal bankruptcy law.

51 (24) "Money" means a medium of exchange authorized or adopted by a domestic or  
52 foreign government as a part of its currency.

53 (25) A person has "notice" of a fact when

54 (a) he has actual knowledge of it; or

1 (b) he has received a notice or notification of it; or

2 (c) from all the facts and circumstances known to him at the time in question he has  
3 reason to know that it exists.

4 A person "knows" or has "knowledge" of a fact when he has actual knowledge of it.  
5 "Discover" or "learn" or a word or phrase of similar import refers to knowledge rather  
6 than to reason to know. The time and circumstances under which a notice or notification  
7 may cease to be effective are not determined by this act.

8 (26) A person "notifies" or "gives" a notice or notification to another by taking such  
9 steps as may be reasonably required to inform the other in ordinary course whether or not  
10 such other actually comes to know of it. A person "receives" a notice or notification when

11 (a) it comes to his attention; or

12 (b) it is duly delivered at the place of business through which the contract was made.  
13 or at any other place held out by him as the place for receipt of such communications.

14 (27) Notice, knowledge or a notice or notification received by an organization is  
15 effective for a particular transaction from the time when it is brought to the attention of  
16 the individual conducting that transaction, and in any event from the time when it would  
17 have been brought to his attention if the organization had exercised due diligence. An  
18 organization exercises due diligence if it maintains reasonable routines for communicating  
19 significant information to the person conducting the transaction and there is reasonable  
20 compliance with the routines. Due diligence does not require an individual acting for the  
21 organization to communicate information unless such communication is part of his regular  
22 duties or unless he has reason to know of the transaction and that the transaction would  
23 be materially affected by the information.

24 (28) "Organization" includes a corporation, government or governmental subdivision or  
25 agency, business trust, estate, trust, partnership or association, two or more persons having  
26 a joint or common interest, or any other legal or commercial entity.

27 (29) "Party," as distinct from "third party," means a person who has engaged in a  
28 transaction or made an agreement within this act.

29 (30) "Person" includes an individual or an organization (See § 8.1-102).

30 (31) "Presumption" or "presumed" means that the trier of fact ~~must~~ *shall* find the  
31 existence of the fact presumed unless and until evidence is introduced which would support  
32 a finding of its nonexistence.

33 (32) "Purchase" includes taking by sale, discount, negotiation, mortgage, pledge, lien,  
34 issue or re-issue, gift or any other voluntary transaction creating an interest in property.

35 (33) "Purchaser" means a person who takes by purchase.

36 (34) "Remedy" means any remedial right to which an aggrieved party is entitled with  
37 or without resort to a tribunal.

38 (35) "Representative" includes an agent, an officer of a corporation or association, and  
39 a trustee, executor or administrator of an estate, or any other person empowered to act for  
40 another.

41 (36) "Rights" includes remedies.

42 (37) 1. "Security interest" means an interest in personal property or fixtures which  
43 secures payment or performance of an obligation. The retention or reservation of title by a  
44 seller of goods notwithstanding shipment or delivery to the buyer as specified in § 8.2-401  
45 is limited in effect to a reservation of a "security interest." The term also includes any  
46 interest of a buyer of accounts or chattel paper which is subject to Title 8.9. The special  
47 property interest of a buyer of goods on identification of such goods to a contract for sale  
48 under § 8.2-401 is not a "security interest," but a buyer may also acquire a "security  
49 interest" by complying with Title 8.9. Unless a lease or consignment is intended as security,  
50 reservation of title thereunder is not a "security interest" but a consignment is in any  
51 event subject to the provisions on consignment sales as specified in § 8.2-326. Whether a  
52 lease is intended as security is to be determined by the facts of each case; however, (a)  
53 the inclusion of an option to purchase does not of itself make the lease one intended for  
54 security, and (b) an agreement that upon compliance with the terms of the lease the lessee

1 shall become or has the option to become the owner of the property for no additional  
2 consideration or for a nominal consideration does make the lease one intended for security.

3 *2. Whether a transaction creates a lease or security interest is determined by the facts*  
4 *of each case; however, a transaction creates a security interest if the consideration the*  
5 *lessee is to pay the lessor for the right to possession and use of the goods is an obligation*  
6 *for the term of the lease not subject to termination by the lessee, and:*

7 *(a) The original term of the lease is equal to or greater than the remaining economic*  
8 *life of the goods;*

9 *(b) The lessee is bound to renew the lease for the remaining economic life of the goods*  
10 *or is bound to become the owner of the goods;*

11 *(c) The lessee has an option to renew the lease for the remaining economic life of the*  
12 *goods for no additional consideration or nominal additional consideration upon compliance*  
13 *with the lease agreement; or*

14 *(d) The lessee has an option to become the owner of the goods for no additional*  
15 *consideration or nominal additional consideration upon compliance with the lease*  
16 *agreement.*

17 *3. A transaction does not create a security interest merely because it provides that:*

18 *(a) The present value of the consideration the lessee is obligated to pay the lessor for*  
19 *the right to possession and use of the goods is substantially equal to or is greater than*  
20 *the fair market value of the goods at the time the lease is entered into;*

21 *(b) The lessee assumes risk of loss of the goods, or agrees to pay taxes, insurance,*  
22 *filing, recording, or registration fees, or service or maintenance costs with respect to the*  
23 *goods;*

24 *(c) The lessee has an option to renew the lease or to become the owner of the goods;*

25 *(d) The lessee has an option to renew the lease for a fixed rent that is equal to or*  
26 *greater than the reasonably predictable fair market rent for the use of the goods for the*  
27 *term of the renewal at the time the option is to be performed; or*

28 *(e) The lessee has an option to become the owner of the goods for a fixed price that is*  
29 *equal to or greater than the reasonably predictable fair market value of the goods at the*  
30 *time the option is to be performed.*

31 *4. For purposes of this definition:*

32 *(a) Additional consideration is not nominal if (i) when the option to renew the lease is*  
33 *granted to the lessee the rent is stated to be the fair market rent for the use of the goods*  
34 *for the term of the renewal determined at the time the option is to be performed, or (ii)*  
35 *when the option to become the owner of the goods is granted to the lessee the price is*  
36 *stated to be the fair market value of the goods determined at the time the option is to be*  
37 *performed. Additional consideration is nominal if it is less than the lessee's reasonably*  
38 *predictable cost of performing under the lease agreement if the option is not exercised;*

39 *(b) "Reasonably predictable" and "remaining economic life of the goods" are to be*  
40 *determined with reference to the facts and circumstances at the time the transaction is*  
41 *entered into; and*

42 *(c) "Present value" means the amount as of a date certain of one or more sums*  
43 *payable in the future, discounted to the date certain. The discount is determined by the*  
44 *interest rate specified by the parties if the rate is not manifestly unreasonable at the time*  
45 *the transaction is entered into; otherwise, the discount is determined by a commercially*  
46 *reasonable rate that takes into account the facts and circumstances of each case at the*  
47 *time the transaction was entered into.*

48 (38) "Send" in connection with any writing or notice means to deposit in the mail or  
49 deliver for transmission by any other usual means of communication with postage or cost  
50 of transmission provided for and properly addressed and in the case of an instrument to  
51 an address specified thereon or otherwise agreed, or if there be none to any address  
52 reasonable under the circumstances. The receipt of any writing or notice within the time at  
53 which it would have arrived if properly sent has the effect of a proper sending.

54 (39) "Signed" includes any symbol executed or adopted by a party with present

1 intention to authenticate a writing.

2 (40) "Surety" includes guarantor.

3 (41) "Telegram" includes a message transmitted by radio, teletype, cable, any  
4 mechanical method of transmission, or the like.

5 (42) "Term" means that portion of an agreement which relates to a particular matter.

6 (43) "Unauthorized" signature or indorsement means one made without actual, implied  
7 or apparent authority and includes a forgery.

8 (44) "Value". Except as otherwise provided with respect to negotiable instruments and  
9 bank collections (§§ 8.3-303, 8.4-208 and 8.4-209) a person gives "value" for rights if he  
10 acquires them

11 (a) in return for a binding commitment to extend credit or for the extension of  
12 immediately available credit whether or not drawn upon and whether or not a charge-back  
13 is provided for in the event of difficulties in collection; or

14 (b) as security for or in total or partial satisfaction of a pre-existing claim; or

15 (c) by accepting delivery pursuant to a pre-existing contract for purchase; or

16 (d) generally, in return for any consideration sufficient to support a simple contract.

17 (45) "Warehouse receipt" means a receipt issued by a person engaged in the business  
18 of storing goods for hire.

19 (46) "Written" or "writing" includes printing, typewriting or any other intentional  
20 reduction to tangible form.

21 *Title 8.2A.*

22 *Commercial Code — Leases.*

23 *PART 1.*

24 *General Provisions.*

25 *§ 8.2A-101. Short title.—This title shall be known and may be cited as the Uniform*  
26 *Commercial Code - Leases.*

27 *§ 8.2A-102. Scope.—This title applies to any transaction, regardless of form, that*  
28 *creates a lease.*

29 *§ 8.2A-103. Definitions and index of definitions.—(1) In this title unless the context*  
30 *otherwise requires:*

31 (a) "Buyer in ordinary course of business" means a person who in good faith and  
32 without knowledge that the sale to him or her is in violation of the ownership rights or  
33 security interest or leasehold interest of a third party in the goods, buys in ordinary  
34 course from a person in the business of selling goods of that kind but does not include a  
35 pawnbroker. "Buying" may be for cash or by exchange of other property or on secured or  
36 unsecured credit and includes receiving goods or documents of title under a pre-existing  
37 contract for sale but does not include a transfer in bulk or as security for or in total or  
38 partial satisfaction of a money debt.

39 (b) "Cancellation" occurs when either party puts an end to the lease contract for  
40 default by the other party.

41 (c) "Commercial unit" means such a unit of goods as by commercial usage is a single  
42 whole for purposes of lease and division of which materially impairs its character or value  
43 on the market or in use. A commercial unit may be a single article, as a machine, or a  
44 set of articles, as a suite of furniture or a line of machinery, or a quantity, as a gross or  
45 carload, or any other unit treated in use or in the relevant market as a single whole.

46 (d) "Conforming" goods or performance under a lease contract means goods or  
47 performance that are in accordance with the obligations under the lease contract.

48 (e) "Consumer lease" means a lease that a lessor regularly engaged in the business of  
49 leasing or selling makes to a lessee who is an individual and who takes under the lease  
50 primarily for a personal, family, or household purpose.

51 (f) "Fault" means wrongful act, omission, breach, or default.

52 (g) "Finance lease" means a lease with respect to which:

53 (i) The lessor does not select, manufacture, or supply the goods;

54 (ii) The lessor acquires the goods or the right to possession and use of the goods in

1 connection with the lease; and

2 (iii) One of the following occurs:

3 (A) The lessee receives a copy of the contract by which the lessor acquired the goods  
4 or the right to possession and use of the goods before signing the lease contract;

5 (B) The lessee's approval of the contract by which the lessor acquired the goods or the  
6 right to possession and use of the goods is a condition to effectiveness of the lease  
7 contract;

8 (C) The lessee, before signing the lease contract, receives an accurate and complete  
9 statement designating the promises and warranties, and any disclaimers of warranties,  
10 limitations or modifications of remedies, or liquidated damages, including those of a third  
11 party, such as the manufacturer of the goods, provided to the lessor by the person  
12 supplying the goods in connection with or as part of the contract by which the lessor  
13 acquired the goods or the right to possession and use of the goods; or

14 (D) If the lease is not a consumer lease, the lessor, before the lessee signs the lease  
15 contract, informs the lessee in writing (a) of the identity of the person supplying the goods  
16 to the lessor, unless the lessee has selected that person and directed the lessor to acquire  
17 the goods or the right to possession and use of the goods from that person, (b) that the  
18 lessee is entitled under this title to the promises and warranties, including those of any  
19 third party, provided to the lessor by the person supplying the goods in connection with  
20 or as part of the contract by which the lessor acquired the goods or the right to  
21 possession and use of the goods, and (c) that the lessee may communicate with the person  
22 supplying the goods to the lessor and receive an accurate and complete statement of those  
23 promises and warranties, including any disclaimers and limitations of them or of remedies.

24 (h) "Goods" means all things that are movable at the time of identification to the lease  
25 contract, or are fixtures (§ 8.2A-309), but the term does not include money, documents,  
26 instruments, accounts, chattel paper, general intangibles, or minerals or the like, including  
27 oil and gas, before extraction. The term also includes the unborn young of animals.

28 (i) "Installment lease contract" means a lease contract that authorizes or requires the  
29 delivery of goods in separate lots to be separately accepted, even though the lease  
30 contract contains a clause "each delivery is a separate lease" or its equivalent.

31 (j) "Lease" means a transfer of the right to possession and use of goods for a term in  
32 return for consideration, but a sale, including a sale on approval or a sale or return, or  
33 retention or creation of a security interest is not a lease. Unless the context clearly  
34 indicates otherwise, the term includes a sublease.

35 (k) "Lease agreement" means the bargain, with respect to the lease, of the lessor and  
36 the lessee in fact as found in their language or by implication from other circumstances  
37 including course of dealing or usage of trade or course of performance as provided in this  
38 title. Unless the context clearly indicates otherwise, the term includes a sublease  
39 agreement.

40 (l) "Lease contract" means the total legal obligation that results from the lease  
41 agreement as affected by this title and any other applicable rules of law. Unless the  
42 context clearly indicates otherwise, the term includes a sublease contract.

43 (m) "Leasehold interest" means the interest of the lessor or the lessee under a lease  
44 contract.

45 (n) "Lessee" means a person who acquires the right to possession and use of goods  
46 under a lease. Unless the context clearly indicates otherwise, the term includes a  
47 sublessee.

48 (o) "Lessee in ordinary course of business" means a person who in good faith and  
49 without knowledge that the lease to him or her is in violation of the ownership rights or  
50 security interest or leasehold interest of a third party in the goods leases in ordinary  
51 course from a person in the business of selling or leasing goods of that kind but does not  
52 include a pawnbroker. "Leasing" may be for cash or by exchange of other property or on  
53 secured or unsecured credit and includes receiving goods or documents of title under a  
54 pre-existing lease contract but does not include a transfer in bulk or as security for or in

1 *total or partial satisfaction of a money debt.*

2 (p) *"Lessor" means a person who transfers the right to possession and use of goods*  
3 *under a lease. Unless the context clearly indicates otherwise, the term includes a*  
4 *sublessor.*

5 (q) *"Lessor's residual interest" means the lessor's interest in the goods after expiration,*  
6 *termination, or cancellation of the lease contract.*

7 (r) *"Lien" means a charge against or interest in goods to secure payment of a debt or*  
8 *performance of an obligation, but the term does not include a security interest.*

9 (s) *"Lot" means a parcel or a single article that is the subject matter of a separate*  
10 *lease or delivery, whether or not it is sufficient to perform the lease contract.*

11 (t) *"Merchant lessee" means a lessee that is a merchant with respect to goods of the*  
12 *kind subject to the lease.*

13 (u) *"Present value" means the amount as of a date certain of one or more sums*  
14 *payable in the future, discounted to the date certain. The discount is determined by the*  
15 *interest rate specified by the parties if the rate was not manifestly unreasonable at the*  
16 *time the transaction was entered into; otherwise, the discount is determined by a*  
17 *commercially reasonable rate that takes into account the facts and circumstances of each*  
18 *case at the time the transaction was entered into.*

19 (v) *"Purchase" includes taking by sale, lease, mortgage, security interest, pledge, gift,*  
20 *or any other voluntary transaction creating an interest in goods.*

21 (w) *"Sublease" means a lease of goods the right to possession and use of which was*  
22 *acquired by the lessor as a lessee under an existing lease.*

23 (x) *"Supplier" means a person from whom a lessor buys or leases goods to be leased*  
24 *under a finance lease.*

25 (y) *"Supply contract" means a contract under which a lessor buys or leases goods to*  
26 *be leased.*

27 (z) *"Termination" occurs when either party pursuant to a power created by agreement*  
28 *or law puts an end to the lease contract otherwise than for default.*

29 (2) *Other definitions applying to this title and the sections in which they appear are:*

30 *"Accessions" § 8.2A-310(1).*

31 *"Construction mortgage" § 8.2A-309(1)(d).*

32 *"Encumbrance" § 8.2A-309(1)(e).*

33 *"Fixtures" § 8.2A-309(1)(a).*

34 *"Fixture filing" § 8.2A-309(1)(b).*

35 *"Purchase money lease" § 8.2A-309(1)(c).*

36 (3) *The following definitions in other titles apply to this title:*

37 *"Account" § 8.9-106.*

38 *"Between merchants" § 8.2-104(3).*

39 *"Buyer" § 8.2-103(1)(a).*

40 *"Chattel paper" § 8.9-105(1)(b).*

41 *"Consumer goods" § 8.9-109(1).*

42 *"Document" § 8.9-105(1)(f).*

43 *"Entrusting" § 8.2-403(3).*

44 *"General intangibles" § 8.9-106.*

45 *"Good faith" § 8.2-103(1)(b).*

46 *"Instrument" § 8.9-105(1)(i).*

47 *"Merchant" § 8.2-104(1).*

48 *"Mortgage" § 8.9-105(1)(j).*

49 *"Pursuant to commitment" § 8.9-105(1)(k).*

50 *"Receipt" § 8.2-103(1)(c).*

51 *"Sale" § 8.2-106(1).*

52 *"Sale on approval" § 8.2-326.*

53 *"Sale or return" § 8.2-326.*

54 *"Seller" § 8.2-103(1)(d).*

1     (4) In addition, Title 8.1 of this Code contains general definitions and principles of  
2 construction and interpretation applicable throughout this title.

3     § 8.2A-104. Leases subject to other law.—(1) A lease, although subject to this title, is  
4 also subject to any applicable:

5     (a) Certificate of title statute of this Commonwealth such as Article 2 (§ 46.2-616 et  
6 seq.) of Chapter 6 of Title 46.2 and Article 2 (§ 29.1-712 et seq.) of Chapter 7 of Title 29.1;

7     (b) Certificate of title statute of another jurisdiction (§ 8.2A-105); or

8     (c) Consumer protection statute of this Commonwealth, such as Chapter 17 (§ 59.1-196  
9 et seq.) of Title 59.1, or final consumer protection decision of a court of this  
10 Commonwealth existing on the effective date of this title.

11     (2) In case of conflict between this title, other than §§ 8.2A-105, 8.2A-304(3) and  
12 8.2A-305(3), and a statute or decision referred to in subsection (1) of this section, the  
13 statute or decision controls.

14     (3) Failure to comply with an applicable law has only the effect specified therein.

15     § 8.2A-105. Territorial application of title to goods covered by certificate of  
16 title.—Subject to the provisions of subsection (3) of § 8.2A-304 and subsection (3) of §  
17 8.2A-305, with respect to goods covered by a certificate of title issued under a statute of  
18 this Commonwealth or of another jurisdiction, compliance and the effect of compliance or  
19 noncompliance with a certificate of title statute are governed by the law (including the  
20 conflict of laws rules) of the jurisdiction issuing the certificate until the earlier of (a)  
21 surrender of the certificate, or (b) four months after the goods are removed from that  
22 jurisdiction and thereafter until a new certificate of title is issued by another jurisdiction.

23     § 8.2A-106. Limitation on power of parties to consumer lease to choose applicable law  
24 and judicial forum.—(1) If the law chosen by the parties to a consumer lease is that of a  
25 jurisdiction other than a jurisdiction in which the lessee resides at the time the lease  
26 agreement becomes enforceable or within 30 days thereafter or in which the goods are to  
27 be used, the choice is not enforceable.

28     (2) If the judicial forum chosen by the parties to a consumer lease is a forum that  
29 would not otherwise have jurisdiction over the lessee, the choice is not enforceable.

30     § 8.2A-107. Waiver or renunciation of claim or right after default.—Any claim or right  
31 arising out of an alleged default or breach of warranty may be discharged in whole or in  
32 part without consideration by a written waiver or renunciation signed and delivered by  
33 the aggrieved party.

34     § 8.2A-108. Unconscionability.—(1) If the court as a matter of law finds a lease  
35 contract or any clause of a lease contract to have been unconscionable at the time it was  
36 made, the court may refuse to enforce the lease contract, or it may enforce the remainder  
37 of the lease contract without the unconscionable clause, or it may so limit the application  
38 of any unconscionable clause as to avoid any unconscionable result.

39     (2) With respect to a consumer lease, if the court as a matter of law finds that a lease  
40 contract or any clause of a lease contract has been induced by unconscionable conduct or  
41 that unconscionable conduct has occurred in the collection of a claim arising from a lease  
42 contract, the court may grant appropriate relief.

43     (3) Before making a finding of unconscionability under subsection (1) or (2) of this  
44 section, the court, on its own motion or that of a party, shall afford the parties a  
45 reasonable opportunity to present evidence as to the setting, purpose, and effect of the  
46 lease contract or clause thereof, or of the conduct.

47     (4) In an action in which the lessee claims unconscionability with respect to a  
48 consumer lease:

49     (a) If the court finds unconscionability under subsection (1) or (2) of this section, the  
50 court shall award reasonable attorney's fees to the lessee.

51     (b) If the court does not find unconscionability and the lessee claiming  
52 unconscionability has brought or maintained an action he or she knew to be groundless,  
53 the court shall award reasonable attorney's fees to the party against whom the claim is  
54 made.

1 (c) In determining attorney's fees, the amount of the recovery on behalf of the claimant  
2 under subsections (1) and (2) of this section is not controlling.

3 § 8.2A-109. Option to accelerate at will.—(1) A term providing that one party or his or  
4 her successor in interest may accelerate payment or performance or require collateral or  
5 additional collateral "at will" or "when he or she deems himself or herself insecure" or in  
6 words of similar import must be construed to mean that he or she has power to do so  
7 only if he or she in good faith believes that the prospect of payment or performance is  
8 impaired.

9 (2) With respect to a consumer lease, the burden of establishing good faith under  
10 subsection (1) of this section is on the party who exercised the power; otherwise the  
11 burden of establishing lack of good faith is on the party against whom the power has  
12 been exercised.

### 13 PART 2.

#### 14 Formation and Construction of Lease Contract.

15 § 8.2A-201. Statute of Frauds.—(1) A lease contract is not enforceable by way of action  
16 or defense unless:

17 (a) The total payments to be made under the lease contract, excluding payments for  
18 options to renew or buy, are less than \$1,000; or

19 (b) There is a writing, signed by the party against whom enforcement is sought or by  
20 that party's authorized agent, sufficient to indicate that a lease contract has been made  
21 between the parties and to describe the goods leased and the lease term.

22 (2) Any description of leased goods or of the lease term is sufficient and satisfies  
23 subdivision (1)(b) of this section, whether or not it is specific, if it reasonably identifies  
24 what is described.

25 (3) A writing is not insufficient because it omits or incorrectly states a term agreed  
26 upon, but the lease contract is not enforceable under subdivision (1)(b) of this section  
27 beyond the lease term and the quantity of goods shown in the writing.

28 (4) A lease contract that does not satisfy the requirements of subsection (1) of this  
29 section, but which is valid in other respects, is enforceable if:

30 (a) The goods are to be specially manufactured or obtained for the lessee and are not  
31 suitable for lease or sale to others in the ordinary course of the lessor's business, and the  
32 lessor, before notice of repudiation is received and under circumstances that reasonably  
33 indicate that the goods are for the lessee, has made either a substantial beginning of their  
34 manufacture or commitments for their procurement;

35 (b) The party against whom enforcement is sought admits in that party's pleading,  
36 testimony or otherwise in court that a lease contract was made, but the lease contract is  
37 not enforceable under this provision beyond the quantity of goods admitted; or

38 (c) With respect to goods that have been received and accepted by the lessee.

39 (5) The lease term under a lease contract referred to in subsection (4) of this section is:

40 (a) If there is a writing signed by the party against whom enforcement is sought or by  
41 that party's authorized agent specifying the lease term, the term so specified;

42 (b) If the party against whom enforcement is sought admits in that party's pleading,  
43 testimony, or otherwise in court a lease term, the term so admitted; or

44 (c) A reasonable lease term.

45 § 8.2A-202. Final written expression: parol or extrinsic evidence.—Terms with respect  
46 to which the confirmatory memoranda of the parties agree or which are otherwise set  
47 forth in a writing intended by the parties as a final expression of their agreement with  
48 respect to such terms as are included therein may not be contradicted by evidence of any  
49 prior agreement or of a contemporaneous oral agreement but may be explained or  
50 supplemented:

51 (a) by course of dealing or usage of trade or by course of performance; and

52 (b) by evidence of consistent additional terms unless the court finds the writing to  
53 have been intended also as a complete and exclusive statement of the terms of the  
54 agreement.

1     § 8.2A-203. *Seals inoperative.*—*The affixing of a seal to a writing evidencing a lease*  
2 *contract or an offer to enter into a lease contract does not render the writing a sealed*  
3 *instrument and the law with respect to sealed instruments does not apply to the lease*  
4 *contract or offer.*

5     § 8.2A-204. *Formation in general.*—(1) *A lease contract may be made in any manner*  
6 *sufficient to show agreement, including conduct by both parties which recognizes the*  
7 *existence of a lease contract.*

8     (2) *An agreement sufficient to constitute a lease contract may be found although the*  
9 *moment of its making is undetermined.*

10    (3) *Although one or more terms are left open, a lease contract does not fail for*  
11 *indefiniteness if the parties have intended to make a lease contract and there is a*  
12 *reasonably certain basis for giving an appropriate remedy.*

13    § 8.2A-205. *Firm offers.*—*An offer by a merchant to lease goods to or from another*  
14 *person in a signed writing that by its terms gives assurance it will be held open is not*  
15 *revocable, for lack of consideration, during the time stated or, if no time is stated, for a*  
16 *reasonable time, but in no event may the period of irrevocability exceed three months.*  
17 *Any such term of assurance on a form supplied by the offeree must be separately signed*  
18 *by the offeror.*

19    § 8.2A-206. *Offer and acceptance in formation of lease contract.*—(1) *Unless otherwise*  
20 *unambiguously indicated by the language or circumstances, an offer to make a lease*  
21 *contract must be construed as inviting acceptance in any manner and by any medium*  
22 *reasonable in the circumstances.*

23    (2) *If the beginning of a requested performance is a reasonable mode of acceptance, an*  
24 *offeror who is not notified of acceptance within a reasonable time may treat the offer as*  
25 *having lapsed before acceptance.*

26    § 8.2A-207. *Course of performance or practical construction.*—(1) *If a lease contract*  
27 *involves repeated occasions for performance by either party with knowledge of the nature*  
28 *of the performance and opportunity for objection to it by the other, any course of*  
29 *performance accepted or acquiesced in without objection is relevant to determine the*  
30 *meaning of the lease agreement.*

31    (2) *The express terms of a lease agreement and any course of performance, as well as*  
32 *any course of dealing and usage of trade, must be construed whenever reasonable as*  
33 *consistent with each other; but if that construction is unreasonable, express terms control*  
34 *course of performance, course of performance controls both course of dealing and usage of*  
35 *trade, and course of dealing controls usage of trade.*

36    (3) *Subject to the provisions of § 8.2A-208 on modification and waiver, course of*  
37 *performance is relevant to show a waiver or modification of any term inconsistent with*  
38 *the course of performance.*

39    § 8.2A-208. *Modification, rescission and waiver.*—(1) *An agreement modifying a lease*  
40 *contract needs no consideration to be binding.*

41    (2) *A signed lease agreement that excludes modification or rescission except by a*  
42 *signed writing may not be otherwise modified or rescinded, but, except as between*  
43 *merchants, such a requirement on a form supplied by a merchant must be separately*  
44 *signed by the other party.*

45    (3) *Although an attempt at modification or rescission does not satisfy the requirements*  
46 *of subsection (2) of this section, it may operate as a waiver.*

47    (4) *A party who has made a waiver affecting an executory portion of a lease contract*  
48 *may retract the waiver by reasonable notification received by the other party that strict*  
49 *performance will be required of any term waived, unless the retraction would be unjust in*  
50 *view of a material change of position in reliance on the waiver.*

51    § 8.2A-209. *Lessee under finance lease as beneficiary of supply contract.*—(1) *The*  
52 *benefit of a supplier's promises to the lessor including those of any third party provided in*  
53 *connection with or as part of the supply contract and of all warranties, whether express*  
54 *or implied, under the supply contract, extends to the lessee to the extent of the lessee's*

1 leasehold interest under a finance lease related to the supply contract, but is subject to  
 2 the terms of the warranty and of the supply contract and all defenses or claims arising  
 3 therefrom.

4 (2) The extension of the benefit of a supplier's promises and of warranties to the lessee  
 5 (§ 8.2A-209(1)) does not: (i) modify the rights and obligations of the parties to the supply  
 6 contract, whether arising therefrom or otherwise, or (ii) impose any duty or liability under  
 7 the supply contract on the lessee.

8 (3) Any modification or rescission of the supply contract by the supplier and the lessor  
 9 is effective between the supplier and the lessee unless, before the modification or  
 10 rescission, the supplier has received notice that the lessee has entered into a finance lease  
 11 related to the supply contract. If the modification or rescission is effective between the  
 12 supplier and the lessee, the lessor is deemed to have assumed, in addition to the  
 13 obligations of the lessor to the lessee under the lease contract, promises of the supplier to  
 14 the lessor and warranties that were so modified or rescinded as they existed and were  
 15 available to the lessee before modification or rescission.

16 (4) In addition to the extension of the benefit of the supplier's promises and of  
 17 warranties to the lessee under subsection (1) of this section, the lessee retains all rights  
 18 that the lessee may have against the supplier which arise from an agreement between the  
 19 lessee and the supplier or under other law.

20 § 8.2A-210. Express warranties.—(1) Express warranties by the lessor are created as  
 21 follows:

22 (a) Any affirmation of fact or promise made by the lessor to the lessee which relates to  
 23 the goods and becomes part of the basis of the bargain creates an express warranty that  
 24 the goods will conform to the affirmation or promise.

25 (b) Any description of the goods which is made part of the basis of the bargain creates  
 26 an express warranty that the goods will conform to the description.

27 (c) Any sample or model that is made part of the basis of the bargain creates an  
 28 express warranty that the whole of the goods will conform to the sample or model.

29 (2) It is not necessary to the creation of an express warranty that the lessor use  
 30 formal words, such as "warranty" or "guarantee," or that the lessor have a specific  
 31 intention to make a warranty, but an affirmation merely of the value of the goods or a  
 32 statement purporting to be merely the lessor's opinion or commendation of the goods does  
 33 not create a warranty.

34 § 8.2A-211. Warranties against interference and against infringement; lessee's obligation  
 35 against infringement.—(1) There is in a lease contract a warranty that for the lease term  
 36 no person holds a claim to an interest in the goods that arose from an act or omission of  
 37 the lessor, other than a claim by way of infringement or the like, which will interfere with  
 38 the lessee's enjoyment of the leasehold interest.

39 (2) Except in a finance lease there is in a lease contract by a lessor who is a  
 40 merchant regularly dealing in goods of the kind a warranty that the goods are delivered  
 41 free of the rightful claim of any person by way of infringement or the like.

42 (3) A lessee who furnishes specifications to a lessor or a supplier shall hold the lessor  
 43 and the supplier harmless against any claim by way of infringement or the like that arises  
 44 out of compliance with the specifications.

45 § 8.2A-212. Implied warranty of merchantability.—(1) Except in a finance lease, a  
 46 warranty that the goods will be merchantable is implied in a lease contract if the lessor is  
 47 a merchant with respect to goods of that kind.

48 (2) Goods to be merchantable must be at least such as;

49 (a) Pass without objection in the trade under the description in the lease agreement;

50 (b) In the case of fungible goods, are of fair average quality within the description;

51 (c) Are fit for the ordinary purposes for which goods of that type are used;

52 (d) Run, within the variation permitted by the lease agreement, of even kind, quality,  
 53 and quantity within each unit and among all units involved;

54 (e) Are adequately contained, packaged, and labeled as the lease agreement may

1 require; and

2 (f) Conform to any promises or affirmations of fact made on the container or label.

3 (3) Other implied warranties may arise from course of dealing or usage of trade.

4 § 8.2A-213. Implied warranty of fitness for particular purpose.—Except in a finance  
5 lease, if the lessor at the time the lease contract is made has reason to know of any  
6 particular purpose for which the goods are required and that the lessee is relying on the  
7 lessor's skill or judgment to select or furnish suitable goods, there is in the lease contract  
8 an implied warranty that the goods will be fit for that purpose.

9 § 8.2A-214. Exclusion or modification of warranties.—(1) Words or conduct relevant to  
10 the creation of an express warranty and words or conduct tending to negate or limit a  
11 warranty must be construed wherever reasonable as consistent with each other; but,  
12 subject to the provisions of § 8.2A-202 on parol or extrinsic evidence, negation or  
13 limitation is inoperative to the extent that the construction is unreasonable.

14 (2) Subject to subsection (3) of this section, to exclude or modify the implied warranty  
15 of merchantability or any part of it the language must mention "merchantability," be by a  
16 writing, and be conspicuous. Subject to subsection (3) in this section, to exclude or modify  
17 any implied warranty of fitness the exclusion must be by a writing and be conspicuous.  
18 Language to exclude all implied warranties of fitness is sufficient if it is in writing, is  
19 conspicuous and states, for example, "There is no warranty that the goods will be fit for  
20 a particular purpose."

21 (3) Notwithstanding subsection (2) of this section, but subject to subsection (4) of this  
22 section,

23 (a) unless the circumstances indicate otherwise, all implied warranties are excluded by  
24 expressions like "as is," or "with all faults," or by other language that in common  
25 understanding calls the lessee's attention to the exclusion of warranties and makes plain  
26 that there is no implied warranty, if in writing and conspicuous;

27 (b) if the lessee before entering into the lease contract has examined the goods or the  
28 sample or model as fully as desired or has refused to examine the goods, there is no  
29 implied warranty with regard to defects that an examination ought in the circumstances  
30 to have revealed; and

31 (c) an implied warranty may also be excluded or modified by course of dealing, course  
32 of performance, or usage of trade.

33 (4) To exclude or modify a warranty against interference or against infringement (§  
34 8.2A-211) or any part of it, the language must be specific, be by a writing, and be  
35 conspicuous, unless the circumstances, including course of performance, course of dealing,  
36 or usage of trade, give the lessee reason to know that the goods are being leased subject  
37 to a claim or interest of any person.

38 § 8.2A-215. Cumulation and conflict of warranties express or implied.—Warranties,  
39 whether express or implied, must be construed as consistent with each other and as  
40 cumulative, but if that construction is unreasonable, the intention of the parties  
41 determines which warranty is dominant. In ascertaining that intention the following rules  
42 apply:

43 (a) Exact or technical specifications displace an inconsistent sample or model or  
44 general language of description.

45 (b) A sample from an existing bulk displaces inconsistent general language of  
46 description.

47 (c) Express warranties displace inconsistent implied warranties other than an implied  
48 warranty of fitness for a particular purpose.

49 § 8.2A-216. Third-party beneficiaries of express and implied warranties.—(1)  
50 ALTERNATIVE A

51 A warranty to or for the benefit of a lessee under this title, whether express or  
52 implied, extends to any natural person who is in the family or household of the lessee or  
53 who is a guest in the lessee's home if it is reasonable to expect that such person may  
54 use, consume, or be affected by the goods and who is injured in person by breach of the

1 warranty. This section does not displace principles of law and equity that extend a  
 2 warranty to or for the benefit of a lessee to other persons. The operation of this section  
 3 may not be excluded, modified, or limited, but an exclusion, modification, or limitation of  
 4 the warranty, including any with respect to rights and remedies, effective against the  
 5 lessee is also effective against any beneficiary designated under this section.

6 (2) *ALTERNATIVE B*

7 A warranty to or for the benefit of a lessee under this title, whether express or  
 8 implied, extends to any natural person who may reasonably be expected to use, consume,  
 9 or be affected by the goods and who is injured in person by breach of the warranty. This  
 10 section does not displace principles of law and equity that extend a warranty to or for  
 11 the benefit of a lessee to other persons. The operation of this section may not be  
 12 excluded, modified, or limited, but an exclusion, modification, or limitation of the  
 13 warranty, including any with respect to rights and remedies, effective against the lessee is  
 14 also effective against the beneficiary designated under this section.

15 (3) *ALTERNATIVE C*

16 A warranty to or for the benefit of a lessee under this title, whether express or  
 17 implied, extends to any person who may reasonably be expected to use, consume, or be  
 18 affected by the goods and who is injured by breach of the warranty. The operation of this  
 19 section may not be excluded, modified, or limited with respect to injury to the person of  
 20 an individual to whom the warranty extends, but an exclusion, modification, or limitation  
 21 of the warranty, including any with respect to rights and remedies, effective against the  
 22 lessee is also effective against the beneficiary designated under this section.

23 § 8.2A-217. *Identification.*—Identification of goods as goods to which a lease contract  
 24 refers may be made at any time and in any manner explicitly agreed to by the parties. In  
 25 the absence of explicit agreement, identification occurs when:

26 (a) The lease contract is made if the lease contract is for a lease of goods that are  
 27 existing and identified;

28 (b) The goods are shipped, marked, or otherwise designated by the lessor as goods to  
 29 which the lease contract refers, if the lease contract is for a lease of goods that are not  
 30 existing and identified; or

31 (c) The young are conceived, if the lease contract is for a lease of unborn young of  
 32 animals.

33 § 8.2A-218. *Insurance and proceeds.*—(1) A lessee obtains an insurable interest when  
 34 existing goods are identified to the lease contract even though the goods identified are  
 35 nonconforming and the lessee has an option to reject them.

36 (2) If a lessee has an insurable interest only by reason of the lessor's identification of  
 37 the goods, the lessor, until default or insolvency or notification to the lessee that  
 38 identification is final, may substitute other goods for those identified.

39 (3) Notwithstanding a lessee's insurable interest under subsections (1) and (2) of this  
 40 section, the lessor retains an insurable interest until an option to buy has been exercised  
 41 by the lessee and risk of loss has passed to the lessee.

42 (4) Nothing in this section impairs any insurable interest recognized under any other  
 43 statute or rule of law.

44 (5) The parties by agreement may determine that one or more parties have an  
 45 obligation to obtain and pay for insurance covering the goods and by agreement may  
 46 determine the beneficiary of the proceeds of the insurance.

47 § 8.2A-219. *Risk of loss.*—(1) Except in the case of a finance lease, risk of loss is  
 48 retained by the lessor and does not pass to the lessee. In the case of a finance lease, risk  
 49 of loss passes to the lessee.

50 (2) Subject to the provisions of this Title on the effect of default on risk of loss (§  
 51 8.2A-220), if risk of loss is to pass to the lessee and the time of passage is not stated, the  
 52 following rules apply:

53 (a) If the lease contract requires or authorizes the goods to be shipped by carrier

54 (i) and it does not require delivery at a particular destination, the risk of loss passes to

1 *the lessee when the goods are duly delivered to the carrier; but*

2 *(ii) if it does require delivery at a particular destination and the goods are there duly*  
 3 *tendered while in the possession of the carrier, the risk of loss passes to the lessee when*  
 4 *the goods are there duly so tendered as to enable the lessee to take delivery.*

5 *(b) If the goods are held by a bailee to be delivered without being moved, the risk of*  
 6 *loss passes to the lessee on acknowledgment by the bailee of the lessee's right to*  
 7 *possession of the goods.*

8 *(c) In any case not within subdivision (a) or (b) of this subsection, the risk of loss*  
 9 *passes to the lessee on the lessee's receipt of the goods if the lessor, or, in the case of a*  
 10 *finance lease, the supplier, is a merchant; otherwise the risk passes to the lessee on tender*  
 11 *of delivery.*

12 *§ 8.2A-220. Effect of default on risk of loss.—(1) Where risk of loss is to pass to the*  
 13 *lessee and the time of passage is not stated:*

14 *(a) If a tender or delivery of goods so fails to conform to the lease contract as to give*  
 15 *a right of rejection, the risk of their loss remains with the lessor, or, in the case of a*  
 16 *finance lease, the supplier, until cure or acceptance.*

17 *(b) If the lessee rightfully revokes acceptance, he or she, to the extent of any*  
 18 *deficiency in his or her effective insurance coverage, may treat the risk of loss as having*  
 19 *remained with the lessor from the beginning.*

20 *(2) Whether or not risk of loss is to pass to the lessee, if the lessee as to conforming*  
 21 *goods already identified to a lease contract repudiates or is otherwise in default under the*  
 22 *lease contract, the lessor, or, in the case of a finance lease, the supplier, to the extent of*  
 23 *any deficiency in his or her effective insurance coverage may treat the risk of loss as*  
 24 *resting on the lessee for a commercially reasonable time.*

25 *§ 8.2A-221. Casualty to identified goods.—If a lease contract requires goods identified*  
 26 *when the lease contract is made, and the goods suffer casualty without fault of the lessee,*  
 27 *the lessor or the supplier before delivery, or the goods suffer casualty before risk of loss*  
 28 *passes to the lessee pursuant to the lease agreement or § 8.2A-219, then if:*

29 *(a) The loss is total, the lease contract is avoided; and*

30 *(b) The loss is partial or the goods have so deteriorated as to no longer conform to the*  
 31 *lease contract, the lessee may nevertheless demand inspection and at his or her option*  
 32 *either treat the lease contract as avoided or, except in a finance lease that is not a*  
 33 *consumer lease, accept the goods with due allowance from the rent payable for the*  
 34 *balance of the lease term for the deterioration or the deficiency in quantity but without*  
 35 *further right against the lessor.*

### 36 *PART 3.*

#### 37 *Effect of lease contract.*

38 *§ 8.2A-301. Enforceability of lease contract.—Except as otherwise provided in this title,*  
 39 *a lease contract is effective and enforceable according to its terms between the parties,*  
 40 *against purchasers of the goods and against creditors of the parties.*

41 *§ 8.2A-302. Title to and possession of goods.— Except as otherwise provided in this*  
 42 *title, each provision of this Article applies whether the lessor or a third party has title to*  
 43 *the goods, and whether the lessor, the lessee, or a third party has possession of the goods,*  
 44 *notwithstanding any statute or rule of law that possession or the absence of possession is*  
 45 *fraudulent.*

46 *§ 8.2A-303. Alienability of party's interest under lease contract or of lessor's residual*  
 47 *interest in goods; delegation of performance; transfer of rights.—(1) As used in this section,*  
 48 *"creation of a security interest" includes the sale of a lease contract that is subject to*  
 49 *Title 8.9, Secured Transactions, by reason of subdivision (1) (b) of § 8.9-102.*

50 *(2) Except as provided in subsections (3) and (4) of this section, a provision in a lease*  
 51 *agreement which (i) prohibits the voluntary or involuntary transfer, including a transfer by*  
 52 *sale, sublease, creation or enforcement of a security interest, or attachment, levy, or other*  
 53 *judicial process, of an interest of a party under the lease contract or of the lessor's*  
 54 *residual interest in the goods, or (ii) makes such a transfer an event of default, gives rise*

- 1 to the rights and remedies provided in subsection (5) of this section, but a transfer that is  
 2 prohibited or is an event of default under the lease agreement is otherwise effective.
- 3 (3) A provision in a lease agreement which (i) prohibits the creation or enforcement of  
 4 a security interest in an interest of a party under the lease contract or in the lessor's  
 5 residual interest in the goods, or (ii) makes such a transfer an event of default, is not  
 6 enforceable unless, and then only to the extent that, there is an actual transfer by the  
 7 lessee of the lessee's right of possession or use of the goods in violation of the provision  
 8 or an actual delegation of a material performance of either party to the lease contract in  
 9 violation of the provision. Neither the granting nor the enforcement of a security interest  
 10 in (i) the lessor's interest under the lease contract or (ii) the lessor's residual interest in the  
 11 goods is a transfer that materially impairs the prospect of obtaining return performance  
 12 by, materially changes the duty of, or materially increases the burden or risk imposed on,  
 13 the lessee within the purview of subsection (5) of this section unless, and then only to the  
 14 extent that, there is an actual delegation of a material performance of the lessor.
- 15 (4) A provision in a lease agreement which (i) prohibits a transfer of a right to  
 16 damages for default with respect to the whole lease contract or of a right to payment  
 17 arising out of the transferor's due performance of the transferor's entire obligation, or (ii)  
 18 makes such a transfer an event of default, is not enforceable, and such a transfer is not a  
 19 transfer that materially impairs the prospect of obtaining return performance by,  
 20 materially changes the duty of, or materially increases the burden or risk imposed on, the  
 21 other party to the lease contract within the purview of subsection (5) of this section .
- 22 (5) Subject to subsections (3) and (4) of this section if:
- 23 (a) A transfer is made which is made an event of default under a lease agreement, the  
 24 party to the lease contract not making the transfer, unless that party waives the default  
 25 or otherwise agrees, has the rights and remedies described in subsection (2) of § 8.2A-501;
- 26 (b) Subdivision (a) of this subsection is not applicable and if a transfer is made that (i)  
 27 is prohibited under a lease agreement or (ii) materially impairs the prospect of obtaining  
 28 return performance by, materially changes the duty of, or materially increases the burden  
 29 or risk imposed on, the other party to the lease contract, unless the party not making the  
 30 transfer agrees at any time to the transfer in the lease contract or otherwise, then, except  
 31 as limited by contract, (i) the transferor is liable to the party not making the transfer for  
 32 damages caused by the transfer to the extent that the damages could not reasonably be  
 33 prevented by the party not making the transfer and (ii) a court having jurisdiction may  
 34 grant other appropriate relief, including cancellation of the lease contract or an injunction  
 35 against the transfer.
- 36 (6) A transfer of "the lease" or of "all my rights under the lease," or a transfer in  
 37 similar general terms, is a transfer of rights and, unless the language or the  
 38 circumstances, as in a transfer for security, indicate the contrary, the transfer is a  
 39 delegation of duties by the transferor to the transferee. Acceptance by the transferee  
 40 constitutes a promise by the transferee to perform those duties. The promise is enforceable  
 41 by either the transferor or the other party to the lease contract.
- 42 (7) Unless otherwise agreed by the lessor and the lessee, a delegation of performance  
 43 does not relieve the transferor as against the other party of any duty to perform or of  
 44 any liability for default.
- 45 (8) In a consumer lease, to prohibit the transfer of an interest of a party under the  
 46 lease contract or to make a transfer an event of default, the language shall be specific, by  
 47 a writing, and conspicuous.
- 48 § 8.2A-304. Subsequent lease of goods by lessor.—(1) Subject to § 8.2A-303, a  
 49 subsequent lessee from a lessor of goods under an existing lease contract obtains, to the  
 50 extent of the leasehold interest transferred, the leasehold interest in the goods that the  
 51 lessor had or had power to transfer, and except as provided in subsection (2) of this  
 52 section and subsection (4) of § 8.2A-527, takes subject to the existing lease contract. A  
 53 lessor with voidable title has power to transfer a good leasehold interest to a good faith  
 54 subsequent lessee for value, but only to the extent set forth in the preceding sentence. If

1 goods have been delivered under a transaction of purchase the lessor has that power even  
2 though:

- 3 (a) The lessor's transferor was deceived as to the identity of the lessor;  
4 (b) The delivery was in exchange for a check which is later dishonored;  
5 (c) It was agreed that the transaction was to be a "cash sale"; or  
6 (d) The delivery was procured through fraud punishable as larcenous under the  
7 criminal law.

8 (2) A subsequent lessee in the ordinary course of business from a lessor who is a  
9 merchant dealing in goods of that kind to whom the goods were entrusted by the existing  
10 lessee of that lessor before the interest of the subsequent lessee became enforceable  
11 against that lessor obtains, to the extent of the leasehold interest transferred, all of that  
12 lessor's and the existing lessee's rights to the goods, and takes free of the existing lease  
13 contract.

14 (3) A subsequent lessee from the lessor of goods that are subject to an existing lease  
15 contract and are covered by a certificate of title issued under a statute of this  
16 Commonwealth or of another jurisdiction takes no greater rights than those provided both  
17 by this section and by the certificate of title statute.

18 § 8.2A-305. Sale or sublease of goods by lessee.—(1) Subject to the provisions of §  
19 8.2A-303, a buyer or sublessee from the lessee of goods under an existing lease contract  
20 obtains, to the extent of the interest transferred, the leasehold interest in the goods that  
21 the lessee had or had power to transfer, and except as provided in subsection (2) of this  
22 section and subsection (4) of § 8.2A-511, takes subject to the existing lease contract. A  
23 lessee with a voidable leasehold interest has power to transfer a good leasehold interest to  
24 a good faith buyer for value or a good faith sublessee for value, but only to the extent  
25 set forth in the preceding sentence. When goods have been delivered under a transaction  
26 of lease the lessee has that power even though:

- 27 (a) The lessor was deceived as to the identity of the lessee;  
28 (b) The delivery was in exchange for a check which is later dishonored; or  
29 (c) The delivery was procured through fraud punishable as larcenous under the criminal  
30 law.

31 (2) A buyer in the ordinary course of business or a sublessee in the ordinary course of  
32 business from a lessee who is a merchant dealing in goods of that kind to whom the  
33 goods were entrusted by the lessor obtains, to the extent of the interest transferred, all of  
34 the lessor's and lessee's rights to the goods, and takes free of the existing lease contract.

35 (3) A buyer or sublessee from the lessee of goods that are subject to an existing lease  
36 contract and are covered by a certificate of title issued under a statute of this  
37 Commonwealth or of another jurisdiction takes no greater rights than those provided both  
38 by this section and by the certificate of title statute.

39 § 8.2A-306. Priority of certain liens arising by operation of law.—If a person in the  
40 ordinary course of his or her business furnishes services or materials with respect to goods  
41 subject to a lease contract, a lien upon those goods in the possession of that person given  
42 by statute or rule of law for those materials or services takes priority over any interest of  
43 the lessor or lessee under the lease contract or this title unless the lien is created by  
44 statute and the statute provides otherwise or unless the lien is created by rule of law and  
45 the rule of law provides otherwise.

46 § 8.2A-307. Priority of liens arising by attachment or levy on, security interests in, and  
47 other claims to goods.—(1) Except as otherwise provided in § 8.2A-306, a creditor of a  
48 lessee takes subject to the lease contract.

49 (2) Except as otherwise provided in subsections (3) and (4) of this section and in §§  
50 8.2A-306 and 8.2A-308, a creditor of a lessor takes subject to the lease contract unless:

- 51 (a) The creditor holds a lien that attached to the goods before the lease contract  
52 became enforceable;  
53 (b) The creditor holds a security interest in the goods and the lessee did not give value  
54 and receive delivery of the goods without knowledge of the security interest; or

1 (c) The creditor holds a security interest in the goods which was perfected (§ 8.9-303)  
2 before the lease contract became enforceable.

3 (3) A lessee in the ordinary course of business takes the leasehold interest free of a  
4 security interest in the goods created by the lessor even though the security interest is  
5 perfected (§ 8.9-303) and the lessee knows of its existence.

6 (4) A lessee other than a lessee in the ordinary course of business takes the leasehold  
7 interest free of a security interest to the extent that it secures future advances made after  
8 the secured party acquires knowledge of the lease or more than forty-five days after the  
9 lease contract becomes enforceable, whichever first occurs, unless the future advances are  
10 made pursuant to a commitment entered into without knowledge of the lease and before  
11 the expiration of the forty-five day period.

12 § 8.2A-308. Special rights of creditors.—(1) A creditor of a lessor in possession of goods  
13 subject to a lease contract may treat the lease contract as void if as against the creditor  
14 retention of possession by the lessor is fraudulent under any statute or rule of law, but  
15 retention of possession in good faith and current course of trade by the lessor for a  
16 commercially reasonable time after the lease contract becomes enforceable is not  
17 fraudulent.

18 (2) Nothing in this title impairs the rights of creditors of a lessor if the lease contract  
19 (a) becomes enforceable, not in current course of trade but in satisfaction of or as security  
20 for a pre-existing claim for money, security, or the like, and (b) is made under  
21 circumstances which under any statute or rule of law apart from this title would  
22 constitute the transaction a fraudulent transfer or voidable preference.

23 (3) A creditor of a seller may treat a sale or an identification of goods to a contract  
24 for sale as void if as against the creditor retention of possession by the seller is fraudulent  
25 under any statute or rule of law, but retention of possession of the goods pursuant to a  
26 lease contract entered into by the seller as lessee and the buyer as lessor in connection  
27 with the sale or identification of the goods is not fraudulent if the buyer bought for value  
28 and in good faith.

29 § 8.2A-309. Lessor's and lessee's rights when goods become fixtures.—(1) In this section:

30 (a) Goods are "fixtures" when they become so related to particular real estate that an  
31 interest in them arises under real estate law;

32 (b) A "fixture filing" is the filing, in the office where a mortgage on the real estate  
33 would be filed or recorded, of a financing statement covering goods that are or are to  
34 become fixtures and conforming to the requirements of subsection (5) of § 8.9-402;

35 (c) A lease is a "purchase money lease" unless the lessee has possession or use of the  
36 goods or the right to possession or use of the goods before the lease agreement is  
37 enforceable;

38 (d) A mortgage is a "construction mortgage" to the extent it secures an obligation  
39 incurred for the construction of an improvement on land including the acquisition cost of  
40 the land, if the recorded writing so indicates; and

41 (e) "Encumbrance" includes real estate mortgages and other liens on real estate and all  
42 other rights in real estate that are not ownership interests.

43 (2) Under this title a lease may be of goods that are fixtures or may continue in goods  
44 that become fixtures, but no lease exists under this title of ordinary building materials  
45 incorporated into an improvement on land.

46 (3) This title does not prevent creation of a lease of fixtures pursuant to real estate  
47 law.

48 (4) The perfected interest of a lessor of fixtures has priority over a conflicting interest  
49 of an encumbrancer or owner of the real estate if:

50 (a) The lease is a purchase money lease, the conflicting interest of the encumbrancer or  
51 owner arises before the goods become fixtures, the interest of the lessor is perfected by a  
52 fixture filing before the goods become fixtures or within ten days thereafter, and the  
53 lessee has an interest of record in the real estate or is in possession of the real estate; or

54 (b) The interest of the lessor is perfected by a fixture filing before the interest of the

1 *encumbrancer or owner is of record, the lessor's interest has priority over any conflicting*  
2 *interest of a predecessor in title of the encumbrancer or owner, and the lessee has an*  
3 *interest of record in the real estate or is in possession of the real estate.*

4 *(5) The interest of a lessor of fixtures, whether or not perfected, has priority over the*  
5 *conflicting interest of an encumbrancer or owner of the real estate if:*

6 *(a) The fixtures are readily removable factory or office machines, readily removable*  
7 *equipment that is not primarily used or leased for use in the operation of the real estate,*  
8 *or readily removable replacements of domestic appliances that are goods subject to a*  
9 *consumer lease, and before the goods become fixtures the lease contract is enforceable;*

10 *(b) The conflicting interest is a lien on the real estate obtained by legal or equitable*  
11 *proceedings after the lease contract is enforceable;*

12 *(c) The encumbrancer or owner has consented in writing to the lease or has disclaimed*  
13 *an interest in the goods as fixtures; or*

14 *(d) The lessee has a right to remove the goods as against the encumbrancer or owner.*  
15 *If the lessee's right to remove terminates, the priority of the interest of the lessor*  
16 *continues for a reasonable time.*

17 *(6) Notwithstanding subdivision (4)(a) of this section but otherwise subject to*  
18 *subsections (4) and (5) of this section, the interest of a lessor of fixtures, including the*  
19 *lessor's residual interest, is subordinate to the conflicting interest of an encumbrancer of*  
20 *the real estate under a construction mortgage recorded before the goods become fixtures if*  
21 *the goods become fixtures before the completion of the construction. To the extent given*  
22 *to refinance a construction mortgage, the conflicting interest of an encumbrancer of the*  
23 *real estate under a mortgage has this priority to the same extent as the encumbrancer of*  
24 *the real estate under the construction mortgage.*

25 *(7) In cases not within the preceding subsections, priority between the interest of a*  
26 *lessor of fixtures, including the lessor's residual interest, and the conflicting interest of an*  
27 *encumbrancer or owner of the real estate who is not the lessee is determined by the*  
28 *priority rules governing conflicting interests in real estate.*

29 *(8) If the interest of a lessor of fixtures, including the lessor's residual interest, has*  
30 *priority over all conflicting interests of all owners and encumbrancers of the real estate,*  
31 *the lessor or the lessee may (i) on default, expiration, termination, or cancellation of the*  
32 *lease agreement but subject to the lease agreement and this title, or (ii) if necessary to*  
33 *enforce other rights and remedies of the lessor or lessee under this title, remove the goods*  
34 *from the real estate, free and clear of all conflicting interests of all owners and*  
35 *encumbrancers of the real estate, but the lessor or lessee must reimburse any*  
36 *encumbrancer or owner of the real estate who is not the lessee and who has not*  
37 *otherwise agreed for the cost of repair of any physical injury, but not for any diminution*  
38 *in value of the real estate caused by the absence of the goods removed or by any*  
39 *necessity of replacing them. A person entitled to reimbursement may refuse permission to*  
40 *remove until the party seeking removal gives adequate security for the performance of*  
41 *this obligation.*

42 *(9) Even though the lease agreement does not create a security interest, the interest of*  
43 *a lessor of fixtures, including the lessor's residual interest, is perfected by filing a*  
44 *financing statement as a fixture filing for leased goods that are or are to become fixtures*  
45 *in accordance with the relevant provisions of the title on secured transactions (Title 8.9).*

46 *§ 8.2A-310. Lessor's and lessee's rights when goods become accessions.—(1) Goods are*  
47 *"accessions" when they are installed in or affixed to other goods.*

48 *(2) The interest of a lessor or a lessee under a lease contract entered into before the*  
49 *goods became accessions is superior to all interests in the whole except as stated in*  
50 *subsection (4) of this section.*

51 *(3) The interest of a lessor or a lessee under a lease contract entered into at the time*  
52 *or after the goods became accessions is superior to all subsequently acquired interests in*  
53 *the whole except as stated in subsection (4) of this section but is subordinate to interests*  
54 *in the whole existing at the time the lease contract was made unless the holders of such*

1 interests in the whole have in writing consented to the lease or disclaimed an interest in  
2 the goods as part of the whole.

3 (4) The interest of a lessor or a lessee under a lease contract described in subsection  
4 (2) or (3) of this section is subordinate to the interest of:

5 (a) A buyer in the ordinary course of business or a lessee in the ordinary course of  
6 business of any interest in the whole acquired after the goods became accessions; or

7 (b) A creditor with a security interest in the whole perfected before the lease contract  
8 was made to the extent that the creditor makes subsequent advances without knowledge  
9 of the lease contract.

10 (5) When under subsections (2) or (3) and (4) of this section a lessor or a lessee of  
11 accessions holds an interest that is superior to all interests in the whole, the lessor or the  
12 lessee may (a) on default, expiration, termination, or cancellation of the lease contract by  
13 the other party but subject to the provisions of the lease contract and this title, or (b) if  
14 necessary to enforce his or her other rights and remedies under this title, remove the  
15 goods from the whole, free and clear of all interests in the whole, but he or she shall  
16 reimburse any holder of an interest in the whole who is not the lessee and who has not  
17 otherwise agreed for the cost of repair of any physical injury but not for any diminution  
18 in value of the whole caused by the absence of the goods removed or by any necessity for  
19 replacing them. A person entitled to reimbursement may refuse permission to remove until  
20 the party seeking removal gives adequate security for the performance of this obligation.

21 § 8.2A-311. Priority subject to subordination.—Nothing in this title prevents  
22 subordination by agreement by any person entitled to priority.

23 PART 4.

24 Performance of Lease Contract; Repudiated, Substituted and Excused.

25 § 8.2A-401. Insecurity: adequate assurance of performance.—(1) A lease contract  
26 imposes an obligation on each party that the other's expectation of receiving due  
27 performance will not be impaired.

28 (2) If reasonable grounds for insecurity arise with respect to the performance of either  
29 party, the insecure party may demand in writing adequate assurance of due performance.  
30 Until the insecure party receives that assurance, if commercially reasonable the insecure  
31 party may suspend any performance for which he or she has not already received the  
32 agreed return.

33 (3) A repudiation of the lease contract occurs if assurance of due performance adequate  
34 under the circumstances of the particular case is not provided to the insecure party  
35 within a reasonable time, not to exceed thirty days after receipt of a demand by the other  
36 party.

37 (4) Between merchants, the reasonableness of grounds for insecurity and the adequacy  
38 of any assurance offered shall be determined according to commercial standards.

39 (5) Acceptance of any nonconforming delivery or payment does not prejudice the  
40 aggrieved party's right to demand adequate assurance of future performance.

41 § 8.2A-402. Anticipatory repudiation.—If either party repudiates a lease contract with  
42 respect to a performance not yet due under the lease contract, the loss of which  
43 performance will substantially impair the value of the lease contract to the other, the  
44 aggrieved party may:

45 (a) For a commercially reasonable time, await retraction of repudiation and  
46 performance by the repudiating party;

47 (b) Make demand pursuant to § 8.2A-401 and await assurance of future performance  
48 adequate under the circumstances of the particular case; or

49 (c) Resort to any right or remedy upon default under the lease contract or this title,  
50 even though the aggrieved party has notified the repudiating party that the aggrieved  
51 party would await the repudiating party's performance and assurance and has urged  
52 retraction. In addition, whether or not the aggrieved party is pursuing one of the  
53 foregoing remedies, the aggrieved party may suspend performance or, if the aggrieved  
54 party is the lessor, proceed in accordance with the provisions of this title on the lessor's

1 right to identify goods to the lease contract notwithstanding default or to salvage  
2 unfinished goods (§ 8.2A-524).

3 § 8.2A-403. Retraction of anticipatory repudiation.—(1) Until the repudiating party's  
4 next performance is due, the repudiating party can retract the repudiation unless, since  
5 the repudiation, the aggrieved party has cancelled the lease contract or materially changed  
6 the aggrieved party's position or otherwise indicated that the aggrieved party considers  
7 the repudiation final.

8 (2) Retraction may be by any method that clearly indicates to the aggrieved party that  
9 the repudiating party intends to perform under the lease contract and includes any  
10 assurance demanded under § 8.2A-401.

11 (3) Retraction reinstates a repudiating party's rights under a lease contract with due  
12 excuse and allowance to the aggrieved party for any delay occasioned by the repudiation.

13 § 8.2A-404. Substituted performance.—(1) If without fault of the lessee, the lessor and  
14 the supplier, the agreed berthing, loading, or unloading facilities fail or the agreed type of  
15 carrier becomes unavailable or the agreed manner of delivery otherwise becomes  
16 commercially impracticable, but a commercially reasonable substitute is available, the  
17 substitute performance shall be tendered and accepted.

18 (2) If the agreed means or manner of payment fails because of domestic or foreign  
19 governmental regulation:

20 (a) The lessor may withhold or stop delivery or cause the supplier to withhold or stop  
21 delivery unless the lessee provides a means or manner of payment that is commercially a  
22 substantial equivalent; and

23 (b) If delivery has already been taken, payment by the means or in the manner  
24 provided by the regulation discharges the lessee's obligation unless the regulation is  
25 discriminatory, oppressive, or predatory.

26 § 8.2A-405. Excused performance.—Subject to § 8.2A-404 on substituted performance,  
27 the following rules apply:

28 (a) Delay in delivery or nondelivery in whole or in part by a lessor or a supplier who  
29 complies with subdivision (b) and (c) of this section is not a default under the lease  
30 contract if performance as agreed has been made impracticable by the occurrence of a  
31 contingency the nonoccurrence of which was a basic assumption on which the lease  
32 contract was made or by compliance in good faith with any applicable foreign or domestic  
33 governmental regulation or order, whether or not the regulation or order later proves to  
34 be invalid.

35 (b) If the causes mentioned in subdivision (a) of this section affect only part of the  
36 lessor's or the supplier's capacity to perform, the lessor or supplier shall allocate  
37 production and deliveries among his customers but at his option may include regular  
38 customers not then under contract for sale or lease as well as his own requirements for  
39 further manufacture. The lessor or supplier may so allocate in any manner that is fair and  
40 reasonable.

41 (c) The lessor seasonably shall notify the lessee and in the case of a finance lease the  
42 supplier seasonably shall notify the lessor and the lessee, if known, that there will be  
43 delay or nondelivery and, if allocation is required under subdivision (b) of this section, of  
44 the estimated quota thus made available for the lessee.

45 § 8.2A-406. Procedure on excused performance.—(1) If the lessee receives notification of  
46 a material or indefinite delay or an allocation justified under § 8.2A-405, the lessee may by  
47 written notification to the lessor as to any goods involved, and with respect to all of the  
48 goods if under an installment lease contract the value of the whole lease contract is  
49 substantially impaired (§ 8.2A-510):

50 (a) Terminate the lease contract (pursuant to subsection (2) of § 8.2A-505; or

51 (b) Except in a finance lease that is not a consumer lease, modify the lease contract  
52 by accepting the available quota in substitution, with due allowance from the rent payable  
53 for the balance of the lease term for the deficiency but without further right against the  
54 lessor.

1 (2) If, after receipt of a notification from the lessor under § 8.2A-405, the lessee fails so  
2 to modify the lease agreement within a reasonable time not exceeding thirty days, the  
3 lease contract lapses with respect to any deliveries affected.

4 § 8.2A-407. Irrevocable promises: finance leases.—(1) In the case of a finance lease that  
5 is not a consumer lease the lessee's promises under the lease contract become irrevocable  
6 and independent upon the lessee's acceptance of the goods.

7 (2) A promise that has become irrevocable and independent under subsection (1) of this  
8 section is:

9 (a) Effective and enforceable between the parties, and by or against third parties  
10 including assignees of the parties; and

11 (b) Not subject to cancellation, termination, modification, repudiation, excuse, or  
12 substitution without the consent of the party to whom the promise runs.

13 (3) This section does not affect the validity under any other law or a covenant in any  
14 lease contract making the lessee's promises acceptance of the goods.

15 PART 5.

16 Default.

17 A. In General

18 § 8.2A-501. Default; procedure.—(1) Whether the lessor or the lessee is in default under  
19 a lease contract is determined by the lease agreement and this title.

20 (2) If the lessor or the lessee is in default under the lease contract, the party seeking  
21 enforcement has rights and remedies as provided in this title and, except as limited by  
22 this title, as provided in the lease agreement.

23 (3) If the lessor or the lessee is in default under the lease contract, the party seeking  
24 enforcement may reduce the party's claim to judgment, or otherwise enforce the lease  
25 contract by self-help or any available judicial procedure or nonjudicial procedure, including  
26 administrative proceeding, arbitration, or the like, in accordance with this title.

27 (4) Except as otherwise provided in subsection (1) of § 8.1-106(1) or this title or the  
28 lease agreement, the rights and remedies referred to in subsections (2) and (3) of this  
29 section are cumulative.

30 (5) If the lease agreement covers both real property and goods, the party seeking  
31 enforcement may proceed under this part as to the goods, or under other applicable law  
32 as to both the real property and the goods in accordance with that party's rights and  
33 remedies in respect of the real property, in which case this part does not apply.

34 § 8.2A-502. Notice after default.—Except as otherwise provided in this title or the lease  
35 agreement, the lessor or lessee in default under the lease contract is not entitled to notice  
36 of default or notice of enforcement from the other party to the lease agreement.

37 § 8.2A-503. Modification or impairment of rights and remedies.—(1) Except as otherwise  
38 provided in this title, the lease agreement may include rights and remedies for default in  
39 addition to or in substitution for those provided in this title and may limit or alter the  
40 measure of damages recoverable under this title.

41 (2) Resort to a remedy provided under this title or in the lease agreement is optional  
42 unless the remedy is expressly agreed to be exclusive. If circumstances cause an exclusive  
43 or limited remedy to fail of its essential purpose, or provision for an exclusive remedy is  
44 unconscionable, remedy may be had as provided in this title.

45 (3) Consequential damages may be liquidated under § 8.2A-504, or may otherwise be  
46 limited, altered, or excluded unless the limitation, alteration, or exclusion is  
47 unconscionable. Limitation, alteration, or exclusion of consequential damages for injury to  
48 the person in the case of consumer goods is prima facie unconscionable but limitation,  
49 alteration or exclusion of damages where the loss is commercial is not prima facie  
50 unconscionable.

51 (4) Rights and remedies on default by the lessor or the lessee with respect to any  
52 obligation or promise collateral or ancillary to the lease contract are not impaired by this  
53 title.

54 § 8.2A-504. Liquidation of damages.—(1) Damages payable by either party for default,

1 or any other act or omission, including indemnity for loss or diminution of anticipated tax  
2 benefits or loss or damage to lessor's residual interest, may be liquidated in the lease  
3 agreement but only at an amount or by a formula that is reasonable in light of the then  
4 anticipated harm caused by the default or other act or omission.

5 (2) If the lease agreement provides for liquidation of damages, and such provision does  
6 not comply with subsection (1) of this section, or such provision is an exclusive or limited  
7 remedy that circumstances cause to fail of its essential purpose, remedy may be had as  
8 provided in this title.

9 (3) If the lessor justifiably withholds or stops delivery of goods because of the lessee's  
10 default or insolvency, under §§ 8.2A-525 or 8.2A-526, the lessee is entitled to restitution of  
11 any amount by which the sum of his or her payments exceeds:

12 (a) The amount to which the lessor is entitled by virtue of terms liquidating the  
13 lessor's damages in accordance with subsection (1) of this section; or

14 (b) In the absence of those terms, twenty percent of the then present value of the total  
15 rent the lessee was obligated to pay for the balance of the lease term, or, in the case of a  
16 consumer lease, the lesser of such amount or \$500.

17 (4) A lessee's right to restitution under subsection (3) of this section is subject to offset  
18 to the extent the lessor establishes:

19 (a) A right to recover damages under the provisions of this Article other than  
20 subsection (1) of this section; and

21 (b) The amount or value of any benefits received by the lessee directly or indirectly by  
22 reason of the lease contract.

23 § 8.2A-505. Cancellation and termination and effect of cancellation, termination,  
24 rescission, or fraud on rights and remedies.—(1) On cancellation of the lease contract, all  
25 obligations that are still executory on both sides are discharged, but any right based on  
26 prior default or performance survives, and the cancelling party also retains any remedy  
27 for default of the whole lease contract or any unperformed balance.

28 (2) On termination of the lease contract, all obligations that are still executory on both  
29 sides are discharged but any right based on prior default or performance survives.

30 (3) Unless the contrary intention clearly appears, expressions of "cancellation,"  
31 "rescission," or the like of the lease contract may not be construed as a renunciation or  
32 discharge of any claim in damages for an antecedent default.

33 (4) Rights and remedies for material misrepresentation or fraud include all rights and  
34 remedies available under this title for default.

35 (5) Neither rescission nor a claim for rescission of the lease contract nor rejection or  
36 return of the goods may bar or be deemed inconsistent with a claim for damages or other  
37 right or remedy.

38 § 8.2A-506. Statute of limitation.—(1) An action for default under a lease contract,  
39 including breach of warranty or indemnity, shall be commenced within four years after the  
40 cause of action accrued. By the original lease contract the parties may reduce the period  
41 of limitation to not less than one year.

42 (2) A cause of action for default accrues when the act or omission on which the  
43 default or breach of warranty is based is or should have been discovered by the aggrieved  
44 party, or when the default occurs, whichever is later. A cause of action for indemnity  
45 accrues when the act or omission on which the claim for indemnity is based is or should  
46 have been discovered by the indemnified party, whichever is later.

47 (3) If an action commenced within the time limited by subsection (1) of this section is  
48 so terminated as to leave available a remedy by another action for the same default or  
49 breach of warranty or indemnity, the other action may be commenced after the expiration  
50 of the time limited and within six months after the termination of the first action unless  
51 the termination resulted from dismissal for failure or neglect to prosecute.

52 (4) This section does not alter the law on tolling of the statute of limitations nor does  
53 it apply to causes of action that have accrued before this title becomes effective.

54 § 8.2A-507. Proof of market rent; time and place.—(1) Damages based on market rent

1 as provided in §§ 8.2A-519 or 8.2A-528 are determined according to the rent for the use of  
 2 the goods concerned for a lease term identical to the remaining lease term of the original  
 3 lease agreement and prevailing at the times specified in §§ 8.2A-519 and 8.2A-528.

4 (2) If evidence of rent for the use of the goods concerned for a lease term identical to  
 5 the remaining lease term of the original lease agreement and prevailing at the times or  
 6 places described in this title is not readily available, the rent prevailing within any  
 7 reasonable time before or after the time described or at any other place or for a different  
 8 lease term which in commercial judgment or under usage of trade would serve as a  
 9 reasonable substitute for the one described may be used, making any proper allowance for  
 10 the difference, including the cost of transporting the goods to or from the other place.

11 (3) Evidence of a relevant rent prevailing at a time or place or for a lease term other  
 12 than the one described in this title offered by one party is not admissible unless and until  
 13 he or she has given the other party notice the court finds sufficient to prevent unfair  
 14 surprise.

15 (4) If the prevailing rent or value of any goods regularly leased in any established  
 16 market is in issue, reports in official publications or trade journals or in newspapers or  
 17 periodicals of general circulation published as the reports of that market are admissible in  
 18 evidence. The circumstances of the preparation of the report may be shown to affect its  
 19 weight but not its admissibility.

#### 20 B. DEFAULT BY LESSOR

21 § 8.2A-508. Lessee's remedies.—(1) If a lessor fails to deliver the goods in conformity to  
 22 the lease contract (§ 8.2A-509) or repudiates the lease contract (§ 8.2A-402), or a lessee  
 23 rightfully rejects the goods (§ 8.2A-509) or justifiably revokes acceptance of the goods (§  
 24 8.2A-517), then with respect to any goods involved, and with respect to all of the goods if  
 25 under an installment lease contract the value of the whole lease contract is substantially  
 26 impaired (§ 8.2A-510), the lessor is in default under the lease contract and the lessee may:

27 (a) Cancel the lease contract (subsection (1) of § 8.2A-505);

28 (b) Recover so much of the rent and security as has been paid, and is just under the  
 29 circumstances;

30 (c) Cover and recover damages as to all goods affected whether or not they have been  
 31 identified to the lease contract (§§ 8.2A-518 and 8.2A-520), or recover damages for  
 32 nondelivery (§§ 8.2A-519 and 8.2A-520); or

33 (d) Exercise any other rights or pursue any other remedies provided in the lease  
 34 contract.

35 (2) If a lessor fails to deliver the goods in conformity to the lease contract or  
 36 repudiates the lease contract, the lessee may also:

37 (a) If the goods have been identified, recover them (§ 8.2A-522); or

38 (b) In a proper case, obtain specific performance or recover the goods (§ 8.2A-521).

39 (3) If a lessor is otherwise in default under a lease contract, the lessee may exercise  
 40 the rights and pursue the remedies provided in the lease contract, which may include a  
 41 right to cancel the lease, and in subsection (3) of § 8.2A-519.

42 (4) If a lessor has breached a warranty, whether express or implied, the lessee may  
 43 recover damages (subsection (4) of § 8.2A-519).

44 (5) On rightful rejection or justifiable revocation of acceptance, a lessee has a security  
 45 interest in goods in the lessee's possession or control for any rent and security that has  
 46 been paid and any expenses reasonably incurred in their inspection, receipt,  
 47 transportation, and care and custody and may hold those goods and dispose of them in  
 48 good faith and in a commercially reasonable manner, subject to subsection (5) of §  
 49 8.2A-527.

50 (6) Subject to the provisions of § 8.2A-407, a lessee, on notifying the lessor of the  
 51 lessee's intention to do so, may deduct all or any part of the damages resulting from any  
 52 default under the lease contract from any part of the rent still due under the same lease  
 53 contract.

54 § 8.2A-509. Lessee's rights on improper delivery; rightful rejection.—(1) Subject to the

1 provisions of § 8.2A-510 on default in installment lease contracts, if the goods or the  
2 tender or delivery fail in any respect to conform to the lease contract, the lessee may  
3 reject or accept the goods or accept any commercial unit or units and reject the rest of  
4 the goods.

5 (2) Rejection of goods is ineffective unless it is within a reasonable time after tender or  
6 delivery of the goods and the lessee seasonably notifies the lessor.

7 § 8.2A-510. Installment lease contracts; rejection and default.—(1) Under an installment  
8 lease contract a lessee may reject any delivery that is nonconforming if the nonconformity  
9 substantially impairs the value of that delivery and cannot be cured or the nonconformity  
10 is a defect in the required documents; but if the nonconformity does not fall within  
11 subsection (2) of this section and the lessor or the supplier gives adequate assurance of its  
12 cure, the lessee must accept that delivery.

13 (2) Whenever nonconformity or default with respect to one or more deliveries  
14 substantially impairs the value of the installment lease contract as a whole there is a  
15 default with respect to the whole. But, the aggrieved party reinstates the installment lease  
16 contract as a whole if the aggrieved party accepts a nonconforming delivery without  
17 seasonably notifying of cancellation or brings an action with respect only to past deliveries  
18 or demands performance as to future deliveries.

19 § 8.2A-511. Merchant lessee's duties as to rightfully rejected goods.—(1) Subject to any  
20 security interest of a lessee (subsection (5) of § 8.2A-508), if a lessor or a supplier has no  
21 agent or place of business at the market of rejection, a merchant lessee, after rejection of  
22 goods in his or her possession or control, shall follow any reasonable instructions received  
23 from the lessor or the supplier with respect to the goods. In the absence of those  
24 instructions, a merchant lessee shall make reasonable efforts to sell, lease, or otherwise  
25 dispose of the goods for the lessor's account if they threaten to decline in value speedily.  
26 Instructions are not reasonable if on demand indemnity for expenses is not forthcoming.

27 (2) If a merchant lessee as mentioned in subsection (1) of this section or any other  
28 lessee (§ 8.2A-512) disposes of goods, he or she is entitled to reimbursement either from  
29 the lessor or the supplier or out of the proceeds for reasonable expenses of caring for and  
30 disposing of the goods and, if the expenses include no disposition commission, to such  
31 commission as is usual in the trade, or if there is none, to a reasonable sum not  
32 exceeding ten percent of the gross proceeds.

33 (3) In complying with this section or § 8.2A-512, the lessee is held only to good faith.  
34 Good faith conduct hereunder is neither acceptance or conversion nor the basis of an  
35 action for damages.

36 (4) A purchaser who purchases in good faith from a lessee pursuant to this section or  
37 § 8.2A-512 takes the goods free of any rights of the lessor and the supplier even though  
38 the lessee fails to comply with one or more of the requirements of this title.

39 § 8.2A-512. Lessee's duties as to rightfully rejected goods.—(1) Except as otherwise  
40 provided with respect to goods that threaten to decline in value speedily (§ 8.2A-511) and  
41 subject to any security interest of a lessee (subsection (5) of § 8.2A-508):

42 (a) The lessee, after rejection of goods in the lessee's possession, shall hold them with  
43 reasonable care at the lessor's or the supplier's disposition for a reasonable time after the  
44 lessee's seasonable notification of rejection;

45 (b) If the lessor or the supplier gives no instructions within a reasonable time after  
46 notification of rejection, the lessee may store the rejected goods for the lessor's or the  
47 supplier's account or ship them to the lessor or the supplier or dispose of them for the  
48 lessor's or the supplier's account with reimbursement in the manner provided in §  
49 8.2A-511; but

50 (c) The lessee has no further obligations with regard to goods rightfully rejected.

51 (2) Action by the lessee pursuant to subsection (1) of this section is not acceptance or  
52 conversion.

53 § 8.2A-513. Cure by lessor of improper tender or delivery; replacement.—(1) If any  
54 tender or delivery by the lessor or the supplier is rejected because nonconforming and the

1 *time for performance has not yet expired, the lessor or the supplier may seasonably notify*  
 2 *the lessee of the lessor's or the supplier's intention to cure and may then make a*  
 3 *conforming delivery within the time provided in the lease contract.*

4 *(2) If the lessee rejects a nonconforming tender that the lessor or the supplier had*  
 5 *reasonable grounds to believe would be acceptable with or without money allowance, the*  
 6 *lessor or the supplier may have a further reasonable time to substitute a conforming*  
 7 *tender if he seasonably notifies the lessee.*

8 *§ 8.2A-514. Waiver of lessee's objections.—(1) In rejecting goods, a lessee's failure to*  
 9 *state a particular defect that is ascertainable by reasonable inspection precludes the lessee*  
 10 *from relying on the defect to justify rejection or to establish default:*

11 *(a) If, stated seasonably, the lessor or the supplier could have cured it (§ 8.2A-513); or*

12 *(b) Between merchants if the lessor or the supplier after rejection has made a request*  
 13 *in writing for a full and final written statement of all defects on which the lessee proposes*  
 14 *to rely.*

15 *(2) A lessee's failure to reserve rights when paying rent or other consideration against*  
 16 *documents precludes recovery of the payment for defects apparent on the face of the*  
 17 *documents.*

18 *§ 8.2A-515. Acceptance of goods.—(1) Acceptance of goods occurs after the lessee has*  
 19 *had a reasonable opportunity to inspect the goods and*

20 *(a) The lessee signifies or acts with respect to the goods in a manner that signifies to*  
 21 *the lessor or the supplier that the goods are conforming or that the lessee will take or*  
 22 *retain them in spite of their nonconformity; or*

23 *(b) The lessee fails to make an effective rejection of the goods under subsection (2) of §*  
 24 *8.2A-509.*

25 *(2) Acceptance of a part of any commercial unit is acceptance of that entire unit.*

26 *§ 8.2A-516. Effect of acceptance of goods; notice of default; burden of establishing*  
 27 *default after acceptance; notice of claim or litigation to person answerable.—(1) A lessee*  
 28 *shall pay rent for any goods accepted in accordance with the lease contract, with due*  
 29 *allowance for goods rightfully rejected or not delivered.*

30 *(2) A lessee's acceptance of goods precludes rejection of the goods accepted. In the*  
 31 *case of a finance lease, if made with knowledge of a nonconformity, acceptance cannot be*  
 32 *revoked because of it. In any other case, if made with knowledge of a nonconformity,*  
 33 *acceptance cannot be revoked because of it unless the acceptance was on the reasonable*  
 34 *assumption that the nonconformity would be seasonably cured. Acceptance does not of*  
 35 *itself impair any other remedy provided by this title or the lease agreement for*  
 36 *nonconformity.*

37 *(3) If a tender has been accepted:*

38 *(a) Within a reasonable time after the lessee discovers or should have discovered any*  
 39 *default, the lessee shall notify the lessor and the supplier, if any, or be barred from any*  
 40 *remedy against the party not notified;*

41 *(b) Except in the case of a consumer lease, within a reasonable time after the lessee*  
 42 *receives notice of litigation for infringement or the like (§ 8.2A-211) the lessee shall notify*  
 43 *the lessor or be barred from any remedy for liability established by the litigation; and*

44 *(c) The burden is on the lessee to establish any default.*

45 *(4) If a lessee is sued for breach of a warranty or other obligation for which a lessor*  
 46 *or a supplier is answerable the following apply:*

47 *(a) The lessee may give the lessor or the supplier, or both, written notice of the*  
 48 *litigation. If the notice states that the person notified may come in and defend and that if*  
 49 *the lessor or the supplier does not do so that person will be bound in any action against*  
 50 *that person by the lessee by any determination of fact common to the two litigations,*  
 51 *then unless the person notified after seasonable receipt of the notice does come in and*  
 52 *defend that person is so bound.*

53 *(b) The lessor or the supplier may demand in writing that the lessee turn over control*  
 54 *of the litigation including settlement if the claim is one for infringement or the like (§*

1 8.2A-211) or else be barred from any remedy. If the demand states that the lessor or the  
2 supplier agrees to bear all expense and to satisfy any adverse judgment, then unless the  
3 lessee after seasonable receipt of the demand does turn over control the lessee is so  
4 barred.

5 (5) Subsections (3) and (4) of this section apply to any obligation of a lessee to hold the  
6 lessor or the supplier harmless against infringement or the like (§ 8.2A-211).

7 § 8.2A-517. Revocation of acceptance of goods.—(1) A lessee may revoke acceptance of  
8 a lot or commercial unit whose nonconformity substantially impairs its value to the lessee  
9 if the lessee has accepted it:

10 (a) Except in the case of a finance lease, on the reasonable assumption that its  
11 nonconformity would be cured and it has not been seasonably cured; or

12 (b) Without discovery of the nonconformity if the lessee's acceptance was reasonably  
13 induced either by the lessor's assurances or, except in the case of a finance lease, by the  
14 difficulty of discovery before acceptance.

15 (2) Except in the case of a finance lease that is not a consumer lease, a lessee may  
16 revoke acceptance of a lot or commercial unit if the lessor defaults under the lease  
17 contract and the default substantially impairs the value of that lot or commercial unit to  
18 the lessee.

19 (3) If the lease agreement so provides, the lessee may revoke acceptance of a lot or  
20 commercial unit because of other defaults by the lessor.

21 (4) Revocation of acceptance must occur within a reasonable time after the lessee  
22 discovers or should have discovered the ground for it and before any substantial change  
23 in condition of the goods which is not caused by the nonconformity. Revocation is not  
24 effective until the lessee notifies the lessor.

25 (5) A lessee who so revokes has the same rights and duties with regard to the goods  
26 involved as if the lessee had rejected them.

27 § 8.2A-518. Cover; substitute goods.—(1) After default by a lessor under the lease  
28 contract of the type described in subsection (1) of § 8.2A-508, or, if agreed, after other  
29 default by the lessor, the lessee may cover by making any purchase or lease of or  
30 contract to purchase or lease goods in substitution for those due from the lessor.

31 (2) Except as otherwise provided with respect to damages liquidated in the lease  
32 agreement (§ 8.2A-504) or otherwise determined pursuant to agreement of the parties  
33 (subsection (3) of § 8.1-102 and § 8.2A-503), if a lessee's cover is by lease agreement  
34 substantially similar to the original lease agreement and the new lease agreement is made  
35 in good faith and in a commercially reasonable manner, the lessee may recover from the  
36 lessor as damages (i) the present value, as of the date of the commencement of the term  
37 of the new lease agreement, of the rent under the new lease agreement applicable to that  
38 period of the new lease term which is comparable to the then remaining term of the  
39 original lease agreement minus the present value as of the same date of the total rent for  
40 the then remaining lease term of the original lease agreement, and (ii) any incidental or  
41 consequential damages less expenses saved in consequence of the lessor's default.

42 (3) If a lessee's cover is by lease agreement that for any reason does not qualify for  
43 treatment under subsection (2) of this section, or is by purchase or otherwise, the lessee  
44 may recover from the lessor as if the lessee had elected not to cover and § 8.2A-519  
45 governs.

46 § 8.2A-519. Lessee's damages for nondelivery, repudiation, default, and breach of  
47 warranty in regard to accepted goods.—(1) Except as otherwise provided with respect to  
48 damages liquidated in the lease agreement (§ 8.2A-504) or otherwise determined pursuant  
49 to agreement of the parties (subsection (3) of § 8.1-102 and § 8.2A-503), if a lessee elects  
50 not to cover or a lessee elects to cover and the cover is by lease agreement that for any  
51 reason does not qualify for treatment under subsection (2) of § 8.2A-518, or is by purchase  
52 or otherwise, the measure of damages for nondelivery or repudiation by the lessor or for  
53 rejection or revocation of acceptance by the lessee is the present value as of the date of  
54 the default, of the then market rent minus the present value as of the same date of the

1 original rent, computed for the remaining lease term of the original lease agreement,  
2 together with incidental and consequential damages, less expenses saved in consequence of  
3 the lessor's default.

4 (2) Market rent is to be determined as of the place for tender or, in cases of rejection  
5 after arrival or revocation of acceptance, as of the place of arrival.

6 (3) Except as otherwise agreed, the lessee has accepted goods and given notification  
7 (subsection (3) of § 8.2A-516), the measure of damages for nonconforming tender or  
8 delivery or other default by a lessor is the loss resulting in the ordinary course of events  
9 from the lessor's default as determined in any manner that is reasonable together with  
10 incidental and consequential damages, less expenses saved in consequence of the lessor's  
11 default.

12 (4) Except as otherwise agreed, the measure of damages for breach of warranty is the  
13 present value at the time and place of acceptance of the difference between the value of  
14 the use of the goods accepted and the value if they had been as warranted for the lease  
15 term, unless special circumstances show proximate damages of a different amount,  
16 together with incidental and consequential damages, less expenses saved in consequence of  
17 the lessor's default or breach of warranty.

18 § 8.2A-520. Lessee's incidental and consequential damages.—(1) Incidental damages  
19 resulting from a lessor's default include expenses reasonably incurred in inspection, receipt,  
20 transportation, and care and custody of goods rightfully rejected or goods the acceptance  
21 of which is justifiably revoked, any commercially reasonable charges, expenses or  
22 commissions in connection with effecting cover, and any other reasonable expense incident  
23 to the default.

24 (2) Consequential damages resulting from a lessor's default include:

25 (a) Any loss resulting from general or particular requirements and needs of which the  
26 lessor at the time of contracting had reason to know and which could not reasonably be  
27 prevented by cover or otherwise; and

28 (b) Injury to person or property proximately resulting from any breach of warranty.

29 § 8.2A-521. Lessee's right to specific performance or other similar rights.—(1) Specific  
30 performance may be decreed if the goods are unique or in other proper circumstances.

31 (2) A decree for specific performance may include any terms and conditions as to  
32 payment of the rent, damages, or other relief that the court deems just.

33 (3) A lessee has a right of detinue, sequestration, claim and delivery, or the like for  
34 goods identified to the lease contract if after reasonable effort the lessee is unable to  
35 effect cover for those goods or the circumstances reasonably indicate that the effort will  
36 be unavailing.

37 § 8.2A-522. Lessee's right to goods on lessor's insolvency.—

38 (1) Subject to subsection (2) of this section and even though the goods have not been  
39 shipped, a lessee who has paid a part or all of the rent and security for goods identified  
40 to a lease contract (§ 8.2A-217) on making and keeping good a tender of any unpaid  
41 portion of the rent and security due under the lease contract may recover the goods  
42 identified from the lessor if the lessor becomes insolvent within ten days after receipt of  
43 the first installment of rent and security.

44 (2) A lessee acquires the right to recover goods identified to a lease contract only if  
45 they conform to the lease contract.

#### 46 C. DEFAULT BY LESSEE

47 § 8.2A-523. Lessor's remedies.—(1) If a lessee wrongfully rejects or revokes acceptance  
48 of goods or fails to make a payment when due or repudiates with respect to a part or  
49 the whole, then, with respect to any goods involved, and with respect to all of the goods  
50 if under an installment lease contract the value of the whole lease contract is substantially  
51 impaired (§ 8.2A-510), the lessee is in default under the lease contract and the lessor may:

52 (a) Cancel the lease contract (subsection (1) of § 8.2A-505);

53 (b) Proceed respecting goods not identified to the lease contract (§ 8.2A-524);

54 (c) Withhold delivery of the goods and take possession of goods previously delivered (§

1 8.2A-525);

2 (d) Stop delivery of the goods by any bailee (§ 8.2A-526);

3 (e) Dispose of the goods and recover damages (§ 8.2A-527), or retain the goods and  
4 recover damages (§ 8.2A-528), or in a proper case recover rent (§ 8.2A-529); or

5 (f) Exercise any other rights or pursue any other remedies provided in the lease  
6 contract.

7 (2) If a lessor does not fully exercise a right or obtain a remedy to which the lessor is  
8 entitled under subsection (1) of this section, the lessor may recover the loss resulting in  
9 the ordinary course of events from the lessee's default as determined in any reasonable  
10 manner, together with incidental damages, less expenses saved in consequence of the  
11 lessee's default.

12 (3) If a lessee is otherwise in default under a lease contract, the lessor may exercise  
13 the rights and pursue the remedies provided in the lease contract which may include a  
14 right to cancel the lease. In addition, unless otherwise provided in the lease contract if:

15 (a) The default substantially impairs the value of the lease contract to the lessor, the  
16 lessor may exercise the rights and pursue the remedies provided in subsection (1) or (2) of  
17 this section; or

18 (b) The default does not substantially impair the value of the lease contract to the  
19 lessor, the lessor may recover as provided in subsection (2) of this section.

20 § 8.2A-524. Lessor's right to identify goods to lease contract.—(1) A lessor aggrieved  
21 under subsection (1) of § 8.2A-523 may:

22 (a) Identify to the lease contract conforming goods not already identified if at the time  
23 the lessor learned of the default they were in the lessor's or the supplier's possession or  
24 control; and

25 (b) Dispose of goods (subsection (1) of § 8.2A-527) that demonstrably have been  
26 intended for the particular lease contract even though those goods are unfinished.

27 (2) If the goods are unfinished, in the exercise of reasonable commercial judgment for  
28 the purposes of avoiding loss and of effective realization, an aggrieved lessor or the  
29 supplier may either complete manufacture and wholly identify the goods to the lease  
30 contract or cease manufacture and lease, sell, or otherwise dispose of the goods for scrap  
31 or salvage value or proceed in any other reasonable manner.

32 § 8.2A-525. Lessor's right to possession of goods.—(1) If a lessor discovers the lessee to  
33 be insolvent, the lessor may refuse to deliver the goods.

34 (2) After a default by the lessee under the lease contract of the type described in  
35 subsection (1) of § 8.2A-523 or subdivision (3)(a) of § 8.2A-523 or, if agreed, after other  
36 default by the lessee, the lessor has the right to take possession of the goods. If the lease  
37 contract so provides, the lessor may require the lessee to assemble the goods and make  
38 them available to the lessor at a place to be designated by the lessor which is reasonably  
39 convenient to both parties. Without removal, the lessor may render unusable any goods  
40 employed in trade or business, and may dispose of goods on the lessee's premises (§  
41 8.2A-527).

42 (3) The lessor may proceed under subsection (2) of this section without judicial process  
43 if it can be done without breach of the peace or the lessor may proceed by action.

44 § 8.2A-526. Lessor's stoppage of delivery in transit or otherwise.—(1) A lessor may stop  
45 delivery of goods in the possession of a carrier or other bailee if the lessor discovers the  
46 lessee to be insolvent and may stop delivery of carload, truckload, planeload, or larger  
47 shipments of express or freight if the lessee repudiates or fails to make a payment due  
48 before delivery, whether for rent, security or otherwise under the lease contract, or for  
49 any other reason the lessor has a right to withhold or take possession of the goods.

50 (2) In pursuing its remedies under subsection (1) of this section, the lessor may stop  
51 delivery until:

52 (a) Receipt of the goods by the lessee;

53 (b) Acknowledgment to the lessee by any bailee of the goods, except a carrier, that the  
54 bailee holds the goods for the lessee; or

1 (c) Such an acknowledgment to the lessee by a carrier via reshipment or as  
2 warehouseman.

3 (3) (a) To stop delivery, a lessor shall so notify as to enable the bailee by reasonable  
4 diligence to prevent delivery of the goods.

5 (b) After notification, the bailee shall hold and deliver the goods according to the  
6 directions of the lessor, but the lessor is liable to the bailee for any ensuing charges or  
7 damages.

8 (c) A carrier who has issued a nonnegotiable bill of lading is not obliged to obey a  
9 notification to stop received from a person other than the consignor.

10 § 8.2A-527. Lessor's rights to dispose of goods.—(1) After a default by a lessee under  
11 the lease contract of the type described in subsection (1) of § 8.2A-523 or subsection (3)(a)  
12 of § 8.2A-523 or after the lessor refuses to deliver or takes possession of goods (§ 8.2A-525  
13 or § 8.2A-526), or, it agreed, after other default by a lessee, the lessor may dispose of the  
14 goods concerned or the undelivered balance thereof by lease, sale or otherwise.

15 (2) Except as otherwise provided with respect to damages liquidated in the lease  
16 agreement (§ 8.2A-504) or otherwise determined pursuant to agreement of the parties  
17 (subsection (3) of § 8.1-102 and § 8.2A-503), if the disposition is by lease agreement  
18 substantially similar to the original lease agreement and the new lease agreement is made  
19 in good faith and in a commercially reasonable manner, the lessor may recover from the  
20 lessee as damages (i) accrued and unpaid rent as of the date of the commencement of the  
21 term of the new lease agreement, (ii) the present value, as of the same date of the total  
22 rent for the then remaining lease term of the original lease agreement minus the present  
23 value, as of the same date, of the rent under the new lease agreement applicable to that  
24 period of the new lease term which is comparable to the then remaining term of the  
25 original lease agreement, and (iii) any incidental damages allowed under § 8.2A-530, less  
26 expenses saved in consequence of the lessee's default.

27 (3) If the lessor's disposition is by lease agreement that for any reason does not qualify  
28 for treatment under subsection (2) of this section, or is by sale or otherwise, the lessor  
29 may recover from the lessee as if the lessor had elected not to dispose of the goods and §  
30 8.2A-528 governs.

31 (4) A subsequent buyer or lessee who buys or leases from the lessor in good faith for  
32 value as a result of a disposition under this section takes the goods free of the original  
33 lease contract and any rights of the original lessee even though the lessor fails to comply  
34 with one or more of the requirements of this title.

35 (5) The lessor is not accountable to the lessee for any profit made on any disposition.  
36 A lessee who has rightfully rejected or justifiably revoked acceptance shall account to the  
37 lessor for any excess over the amount of the lessee's security interest (subsection (5) of §  
38 8.2A-508).

39 § 8.2A-528. Lessor's damages for nonacceptance or repudiation.—(1) Except as  
40 otherwise provided with respect to damages liquidated in the lease agreement (§ 8.2A-504)  
41 or otherwise determined pursuant to agreement of the parties (subsection (3) of § 8.1-102  
42 and § 8.2A-503), if a lessor elects to retain the goods or a lessor elects to dispose of the  
43 goods and disposition is by lease agreement that for any reason does not qualify for  
44 treatment under subsection (2) of § 8.2A-527, or is by sale or otherwise, the lessor may  
45 recover from the lessee as damages for a default of the type described in subsection (1) of  
46 § 8.2A-523 or subdivision (3)(a) of § 8.2A-523, or, if agreed, for other default of the lessee  
47 (i) accrued and unpaid rent as of the date of default if the lessee has never taken  
48 possession of the goods or, if the lessee has taken possession of the goods, as of the date  
49 the lessor repossessed the goods or an earlier date on which the lessee makes a tender of  
50 the goods to the lessor, (ii) the present value as of the date determined under clause (i) of  
51 the total rent for the then remaining lease term of the original lease agreement minus the  
52 present value as of the same date of the market rent at the place where the goods are  
53 located computed for the same lease term, and (iii) any incidental damages allowed under  
54 § 8.2A-530, less expenses saved in consequence of the lessee's default.

1 (2) If the measure of damages provided in subsection (1) of this section is inadequate  
2 to put a lessor in as good a position as performance would have, the measure of damages  
3 is the present value of the profit, including reasonable overhead, the lessor would have  
4 made from full performance by the lessee, together with any incidental damages allowed  
5 under § 8.2A-530, due allowance for costs reasonably incurred and due credit for payments  
6 or proceeds of disposition.

7 § 8.2A-529. Lessor's action for the rent.—(1) After default by the lessee under the lease  
8 contract of the type described in subsection (1) of § 8.2A-523 or subdivision (3)(a) of §  
9 8.2A-523 or, if agreed, after other default by the lessee, if the lessor complies with  
10 subsection (2) of this section, the lessor may recover from the lessee as damages:

11 (a) For goods accepted by the lessee and not repossessed by or tendered to the lessor,  
12 and for conforming goods lost or damaged within a commercially reasonable time after  
13 risk of loss passes to the lessee (§ 8.2A-219), (i) accrued and unpaid rent as of the date of  
14 entry of judgment in favor of the lessor, (ii) the present value as of the same date of the  
15 rent for the then remaining lease term of the lease agreement, and (iii) any incidental  
16 damages allowed under § 8.2A-530, less expenses saved in consequence of the lessee's  
17 default; and

18 (b) For goods identified to the lease contract if the lessor is unable after reasonable  
19 effort to dispose of them at a reasonable price or the circumstances reasonably indicate  
20 that effort will be unavailing, (i) accrued and unpaid rent as of the date of entry of  
21 judgment in favor of the lessor, (ii) the present value as of the same date of the rent for  
22 the then remaining lease term of the lease agreement, and (iii) any incidental damages  
23 allowed under § 8.2A-530, less expenses saved in consequence of the lessee's default.

24 (2) Except as provided in subsection (3) of this section, the lessor shall hold for the  
25 lessee for the remaining lease term of the lease agreement any goods that have been  
26 identified to the lease contract and are in the lessor's control.

27 (3) The lessor may dispose of the goods at any time before collection of the judgment  
28 for damages obtained pursuant to subsection (1) of this section. If the disposition is before  
29 the end of the remaining lease term of the lease agreement, the lessor's recovery against  
30 the lessee for damages will be governed by § 8.2A-527 or § 8.2A-528, and the lessor will  
31 cause an appropriate credit to be provided against a judgment for damages to the extent  
32 that the amount of the judgment exceeds the recovery available pursuant to § 8.2A-527 or  
33 § 8.2A-528.

34 (4) Payment of the judgment for damages obtained pursuant to subsection (1) of this  
35 section entitles the lessee to use and possession of the goods not then disposed of for the  
36 remaining lease term of the lease agreement.

37 (5) After a lessee has wrongfully rejected or revoked acceptance of goods, has failed to  
38 pay rent then due, or has repudiated (§ 8.2A-402), a lessor who is held not entitled to rent  
39 under this section shall nevertheless be awarded damages for nonacceptance under §§  
40 8.2A-527 and 8.2A-528.

41 § 8.2A-530. Lessor's incidental damages.—Incidental damages to an aggrieved lessor  
42 include any commercially reasonable charges, expenses, or commissions incurred in  
43 stopping delivery, in the transportation, care and custody of goods after the lessee's  
44 default, in connection with return or disposition of the goods, or otherwise resulting from  
45 the default.

46 § 8.2A-531. Standing to sue third parties for injury to goods.—(1) If a third party so  
47 deals with goods that have been identified to a lease contract as to cause actionable  
48 injury to a party to the lease contract (a) the lessor has a right of action against the third  
49 party, and (b) the lessee also has a right of action against the third party if the lessee:

50 (i) Has a security interest in the goods;

51 (ii) Has an insurable interest in the goods; or

52 (iii) Bears the risk of loss under the lease contract or has since the injury assumed that  
53 risk as against the lessor and the goods have been converted or destroyed.

54 (2) If at the time of the injury the party plaintiff did not bear the risk of loss as

1 against the other party to the lease contract and there is no arrangement between them  
2 for disposition of the recovery, his suit or settlement, subject to his own interest, is as a  
3 fiduciary for the other party to the lease contract.

4 (3) Either party with the consent of the other may sue for the benefit of whom it may  
5 concern.

6 § 8.2A-532. Lessor's rights to residual interest.—In addition to any other recovery  
7 permitted by this title or other law, the lessor may recover from the lessee an amount  
8 that will fully compensate the lessor for any loss of or damage to the lessor's residual  
9 interest in the goods caused by the default of the lessee.

10 § 8.9-113. Security interests arising under title on sales or under title leases.—A security  
11 interest arising solely under the title on sales (Title 8.2) or the title on leases (Title 8.2A) is  
12 subject to the provisions of this title except that to the extent that and so long as the  
13 debtor does not have or does not lawfully obtain possession of the goods

14 (a) no security agreement is necessary to make the security interest enforceable; and

15 (b) no filing is required to perfect the security interest; and

16 (c) the rights of the secured party on default by the debtor are governed by the title  
17 on sales (Title 8.2) or by the title on leases (Title 8.2A) in the case of a security interest  
18 arising solely under such title .

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<b>Official Use By Clerks</b>	
<p><b>Passed By The Senate</b></p> <p>without amendment <input type="checkbox"/></p> <p>with amendment <input type="checkbox"/></p> <p>substitute <input type="checkbox"/></p> <p>substitute w/amdt <input type="checkbox"/></p>	<p style="text-align: center;"><b>Passed By</b></p> <p><b>The House of Delegates</b></p> <p>without amendment <input type="checkbox"/></p> <p>with amendment <input type="checkbox"/></p> <p>substitute <input type="checkbox"/></p> <p>substitute w/amdt <input type="checkbox"/></p>
Date: _____	Date: _____
Clerk of the Senate	Clerk of the House of Delegates