

ARTICLE 2A
-D R A F T-
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1 **PART 1.**

2 **GENERAL PROVISIONS**

3 **SECTION 2A-101. SHORT TITLE.** This article may be cited as the Uniform
4 Commercial Code - Leases.

5 **SECTION 2A-102. DEFINITIONS AND INDEX OF DEFINITIONS.**

6 (a) In this article :

7 (1) "Authenticate" means to execute or adopt a symbol, including a digital
8 signal, ~~and identifier, or other symbol,~~ or to do an act that encrypts a record or an
9 electronic message in whole or part, with present intent to sign [or authenticate]
10 ~~[otherwise conform]] establish the authenticity of, or signify a party's acceptance and~~
11 ~~adoption of,~~ a record or term that contains the authentication or to which a record
12 containing the authentication refers.

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

21 (3) "Cancellation" means an act by either party which ends a lease contract
22 because of a default by the other party.

23 (4) "Commercial unit" means a unit of goods which by commercial usage is a
24 single whole for purposes of lease and whose division ~~of which~~ materially impairs its

1 character or value on the market or in use. A commercial unit may be a single article,
2 such as a machine; a set of articles, such as a suite of furniture or a line of machinery;
3 a quantity, such as a gross or carload; or any other unit treated in use or in the relevant
4 market as a single whole.

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

7 (6) "Consumer lease" means a lease that a lessor regularly engaged in the
8 business of leasing or selling makes to a lessee who is an individual and who, at the
9 time of contracting, intends to use the leased goods primarily for a personal, family, or
10 household use.

11 Drafting Comment

12 Revised Article 2 defines "consumer goods" and does not include a dollar cap in the
13 definition. Some states have not included a dollar cap in present 2A and states which have
14 adopted a dollar cap have stated varying amounts. If a state wishes to include a dollar cap, the
15 cap should be inserted here. Any cap probably should be set high enough to bring within the
16 definition most automobile leasing transactions for personal, family, or household use.

17 Revised Article 2, January, 97 draft, also has a definition of consumer' "'Consumer'
18 means an individual who buys or contracts to buy goods, that at the time of contracting, are
19 intended by the buyer primarily for personal family or household use." I don't believe we use
20 the term "consumer" anywhere in Article 2A, except as a part of the phrase "consumer lease",
21 so I don't think we need the separate definition. I don't know whether Article 2 needs it.

22 (7) "Electronic agent" means a computer program designed, selected, or
23 programmed by a party to initiate or respond to electronic messages or performances
24 without review by an individual. The term does not include a common carrier employed
25 or used in that capacity.

26 (8) "Electronic message" means a record stored, generated, or transmitted
27 for purposes of communication to another party or an electronic agent by electronic,
28 optical, or similar means. The term includes electronic data interchange, electronic
29 mail, facsimile, telex, telecopying, and similar communications.

1 (9) "Electronic transaction" means a transaction in which the parties
2 contemplate that a contract will be formed by means of an electronics message in
3 which the messages of one or both of ~~the~~ parties will not be reviewed by an individual.

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

5 (A) the lessor does not select, manufacture, or supply the goods;

6 (B) the lessor acquires the goods or the right to possession and use
7 of the goods in connection with the lease or, in the case of goods that have
8 been previously leased by the lessor, in connection with another lease; and

9 (C) one of the following occurs:

10 (i) the lessee receives a copy of the agreement by which the lessor
11 acquired, or proposes to acquire, the goods or the right to possession and
12 use of the goods before signing the lease agreement;

13 (ii) the lessee's approval of the agreement or of the general
14 contractual terms under which the lessor acquired or proposes to acquire the
15 goods or the right to possession and use of the goods is a condition to the
16 effectiveness of the lease contract;

17 (iii) the lessee, before signing the lease agreement, receives an
18 accurate and complete statement designating the promises and warranties,
19 and any disclaimers of warranties, limitations or modifications of remedies, or
20 liquidated damages, including those of a third party, such as the manufacturer
21 of the goods, provided to the lessor by the person supplying the goods in
22 connection with or as part of the contract by which the lessor acquired the
23 goods or the right to possession and use of the goods; or

1 (iv) if the lease is not a consumer lease, the lessor, before the
2 lessee signs the lease agreement, informs the lessee in writing:

3 (I) of the identity of the person supplying the goods to the lessor,
4 unless the lessee has selected that person and directed the lessor to acquire
5 the goods or the right to possession and use of the goods from that person;

6 (II) that the lessee is entitled under this article to the promises and
7 warranties, including those of any third party, provided to the lessor by the
8 person supplying the goods in connection with or as part of the contract by
9 which the lessor acquired the goods or the right to possession and use of the
10 goods; and

11 (III) that the lessee may communicate with the person supplying the
12 goods to the lessor and receive an accurate and complete statement of those
13 promises and warranties, including any disclaimers and limitations of them, or
14 a statement of remedies.

15 Drafting Comment

16 The charges shown in the definition of finance lease were suggested by Jim White.
17 Several people had noted that finance lessors perhaps should be able to have that status as to
18 goods which come back from the original lessee either because of default by the lessee, or at
19 the end of the lease term. However, at a discussion with about 20 members of the Leasing
20 Subcommittee of the UCC Committee of the Business Law Section at the ABA meeting in
21 Atlanta, there was no support for giving finance lease status to the second lease. Incidentally,
22 no one there, apparently, structures deals to fit the definition of finance lease.

23 However, the Ed. Huddleson-Equipment Leasing Association memorandum (ELA
24 memorandum) urges the White revision, plus some additional revisions discussed on page 8 of
25 the ELA memorandum.

26 (11) "Good faith" means honesty in fact and the observance of reasonable
27 commercial standards of fair dealing.

28 (12) "Goods" means all things that are movable at the time of identification to
29 the lease contract, or are fixtures. The term includes the unborn young of animals. The

1 term does not include money, documents, instruments, accounts, chattel paper,
2 general intangibles, or minerals, or the like, including oil and gas, before extraction

3 Drafting Comment

4 The final comments should state that Article 2A does not apply to oil and gas leases.

5 Drafting Comment

6 Definition of "installment lease" is moved to 2A-726 on, following Article 2.

7 (13) "Lease" means a transfer of the right to possession and use of goods for
8 a term in return for consideration. The term includes a sublease unless the context
9 clearly indicates otherwise. The term does not include a sale, including a sale on
10 approval or a sale or return, or retention or creation of a security interest.

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

16 (15) "Lease contract" means the total legal obligation resulting from the lease
17 agreement as affected by this article and other applicable rules of law. The term
18 includes a sublease contract unless the context clearly indicates otherwise.

19 Drafting Comment

20 At the coordinating meeting, it was suggested that the two above definitions be moved
21 to Article 1. It is probably not necessary that those two definitions specifically refer to
22 subleases; the definition of lease does so, and is probably sufficient to bring subleases fully
23 within the act. When Article 1 is revised, the definitions will probably be deleted here.

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

1 (17) "Lessee" means a person that acquires the right to possession and use
2 of goods under a lease. The term includes a sublessee unless the context clearly
3 indicates otherwise.

4 (18) "Lessee in ordinary course of business" means a person that in good
5 faith and without knowledge that its lease is in violation of ownership rights, security
6 interest, or leasehold interest of a third party in the goods leased in ordinary course
7 from a person in the business of selling or leasing goods of that kind. The term does
8 not include a pawnbroker. "Leasing" may be for cash or by exchange of other property
9 or on secured or unsecured credit and includes receiving goods or documents of title
10 under a pre-existing lease contract but does not include a transfer in bulk or as security
11 for or in total or partial satisfaction of a money debt.

12 Drafting Comment

13 Definition (18) will be moved to Article 1 when that Article is revised.

14 (19) "Lessor" means a person that transfers the right to possession and use
15 of goods under a lease. The term includes a sublessor unless the context clearly
16 indicates otherwise.

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

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

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

1 (23) "Record", as a noun, means information that is inscribed on a tangible
2 medium or that is stored in an electronic or other medium and is retrievable in
3 perceivable form.

4 (25) "Standard form" means a record prepared by one party in advance for
5 general and ~~routine~~ repeated use which substantially consists of standard terms and is
6 used in a transaction without negotiation or customization of, or changes in, the
7 substantial majority of the standard terms. Negotiation or customization of price,
8 quantity, method of payment, time of delivery, or method of delivery does not preclude
9 a record from being a standard form.

10 (26) "Standard terms" means ~~a terms~~ prepared in advance for general and
11 ~~routine~~ repeated use by one party.

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

14 (28) "Supplier" means a person from which a lessor buys or leases goods to
15 be leased under a finance lease.

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

18 (30) "Termination" means an act by a party, pursuant to a power created by
19 agreement or law, which puts an ~~ends to~~ a lease contract for a reason other than
20 default by the other party.

21 (b) The following definitions in other articles apply to this article:

22 "Account". Section 9-103(a).

23 "Between merchants". Section 2-102(2).

24 "Buyer". Section 2-102(3).

"Chattel paper". Section 9-102(a)(3).
"Consumer goods". Section 9-106(a).
"Document". Section 9-102(a)(12).
"Entrusting". Section 2-404(d).
"General intangibles". Section 9-103(b).
"Good faith". Section 2-102(a)(19).
"Instrument". Section 9-102(a)(20).
"Merchant". Section 2-102(21).
"Mortgage". Section 9-102(a)(22).
"Pursuant to commitment". Section 9-102(a)(27).
"Receipt". Section 2-102(23).
"Sale". Section 2-102(27).
"Sale on approval". Section 2-406(a)(2)
"Sale or return". Section 2-406(a)(1)
"Seller". Section 2-103(1)(d).

Drafting Comment

The citations to other articles have been corrected to the revised articles.

(c) In addition, Article 1 contains general definitions and principles of construction ~~and~~
~~interpretation~~ that apply to this article.

~~SECTION 2A-103. MANIFESTING ASSENT; OPPORTUNITY TO REVIEW~~

~~—— (a) —— A party manifests assent to a record or particular term if, after having an
opportunity to review the record or that term, the party or its electronic agent:~~

1 ~~_____ (1) authenticates the record or term or engages in other affirmative conduct,~~
2 ~~and the record provides or the circumstances clearly indicate that the conduct~~
3 ~~constitutes agreement to the record or term; and~~

4 ~~_____ (2) _____ had an opportunity to decline to authenticate the record or term or~~
5 ~~engage in affirmative conduct after having an opportunity to review the record or the~~
6 ~~term.~~

7 ~~_____ (b) _____ The mere retention of a record without objection is not a manifestation of~~
8 ~~assent.~~

9 ~~_____ (c) _____ A party's conduct does not manifest assent to a record or, if assent to a~~
10 ~~particular term in addition to assent to a record is required, to that term unless the record or~~
11 ~~term was called to the party's attention before the party acted and, in the case of a term, the~~
12 ~~party's conduct relates specifically to the term.~~

13 ~~_____ (d) _____ A party or electronic agent has an opportunity to review a record or term if the~~
14 ~~record or term is made available in a manner designed to call attention to the record or term~~
15 ~~before assent to it. However, if assent to a particular term in a record is required, the record~~
16 ~~must be presented in such a manner that the term is conspicuous in the normal course of initial~~
17 ~~use, or preparation to use, the goods.~~

18 **SECTION 2A-103. SCOPE.**

19 ~~_____ (a) Except as otherwise provided in this article, this article applies to any:~~

20 ~~_____ (1) [transaction] [contract], regardless of form, in which a lease of goods~~
21 ~~predominates; and~~

22 ~~_____ (2) claim that the goods leased under a contract in which a lease of goods~~
23 ~~does not predominate fail to conform to the terms of the contract.~~

24 ~~(a) This Article applies to any transaction, regardless of form, that creates a lease.~~

1 (b) If a transaction involves information and goods that are not copies of the
2 information or documentation pertaining to the information, this article applies to the aspects of
3 the transaction and their performance and rights in the goods, but article 2B applies to the
4 aspects of the transaction involving the information and copies or documentation of the
5 information.

6 (2-103, page 7)

7
8 Drafting Comment--January, 1997

9 The Article 2 drafting committee has stricken the version of subsection (a) which was
10 copied above. The subsection in Article 2 now reads: "Unless the context otherwise requires,
11 this Article applies to transactions in goods." I assume we don't want the qualification. The
12 above version of subsection (a) returns to present Article 2A-103.

13 The January, 1997 version of 2-103 states the except as provided in subsection (b) if
14 another article applies to a transaction governed by Article 2, Article 2 does not apply to the part
15 of the transaction governed by the other Article. I assume that we do not wish to adopt that
16 rule. We state some rules which are different that the Article 9 rules--arguably they don't
17 overlap with Article 9, but it may be better no to create the argument.

18 **SECTION 2A-104. TRANSACTIONS SUBJECT TO OTHER LAW.**

19 (a) A transaction subject to this article is also subject to any applicable:

20 (1) certificate of title statute of this State: [list any certificate of title statutes
21 covering automobiles, trailers, mobile homes, boats, farm tractors, and the like];

22 (2) certificate-of-title statute of another jurisdiction;

23 (3) final consumer protection decision of a court of this State existing on the
24 effective date of this article or consumer protection statute of this State; or

25 [(4) List any other ~~statute~~ law of this State to which Article 2A is subject.]

26 (b) In case of conflict between this article, other than Sections 2A-105, 2A-401(c), and
27 2A-402(c), and a statute or decision referred to in subsection (a), the statute or decision
28 controls.

(c) Failure to comply with an applicable law has only the effect specified therein. [(c)
Failure to comply with a statute or decision referred to in subsection (a) does not of itself
constitute a breach of a lease contract or affect the applicability of this article]
(2-104, page 8)

Drafting Comment - January, 1997

See the notes to Article 2-104 in the January, 1997 draft of Article 2, particularly
Comment 2 which questions the desirability of making Article 2 subject to state certificate of title
laws.

New bracketed subsection (c) is from the January draft of Article 2. Is that a more
precise statement of the intention of subsection (c)?

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

Subject to Sections 2A-401(c) and 2A-402(c), 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 the time the certificate ceases to be effective under the law of that jurisdiction or the time
the goods subsequently become covered by another certificate of title from another jurisdiction.

Drafting Comment

2A-105 is conformed to the new rules of Article 9.

**SECTION 2A-106. LIMITATION ON POWER OF PARTIES TO CONSUMER
LEASE TO CHOOSE APPLICABLE LAW OR JUDICIAL FORUM.**

(a) 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

1 enforceable or within 30 days thereafter, or in which the goods are to be used, the choice is not
2 enforceable.

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

5 Drafting Comment

6 The ELA memorandum, page 10, asks that this section specifically state that choice of
7 law/forum selection clauses are valid in commercial leases. Choice of law is dealt with in 1-105,
8 and probably should not be separately addressed in Article 2A. Article 1 presently does not
9 deal with forum selection. Probably that issue should be dealt with, if at all, in Article 1, not in
10 2A.

11 **SECTION 2A-107. UNCONSCIONABILITY.**

12 (a) If ~~the~~ a court as a matter of law finds a lease contract or any term thereof to have
13 been unconscionable at the time it was made, the court may refuse to enforce the contract,
14 enforce the remainder of the contract without the unconscionable term, or so limit the
15 application of any unconscionable term as to avoid an unconscionable result.

16 (b) With respect to a consumer lease, if the court as a matter of law finds that a lease
17 contract or any term thereof to have been induced by unconscionable conduct or that
18 unconscionable conduct has occurred in the collection of a claim arising from the lease
19 contract, the court may grant appropriate relief.

20 (c) Before making a finding of unconscionability under subsection (a) or (b), the court,
21 on motion of a party or its own motion, shall afford the parties a reasonable opportunity to
22 present evidence as to the setting, purpose, and effect of the lease contract or term thereof, or
23 of the conduct.

24 (d) In an action in which a lessee claims unconscionability with respect to a consumer
25 lease:

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

3 (2) If the court does not find unconscionability and the lessee claiming
4 unconscionability has brought or maintained an action the lessee knew to be
5 groundless, the court shall award reasonable attorney's fees to the party against which
6 the claim is made.

7 (3) In determining attorney's fees, the amount of the recovery on behalf of the
8 claimant under subsections (a) and (b) is not controlling.

9 (2-105, page 10)

10 Drafting Comment

11 In the October, 1996 meeting, the Drafting Committee voted to retain present 2A-108
12 (n0w 2A-107) with the slight word change in subsection (c).

13 **SECTION 2A-108. OPTION TO ACCELERATE AT WILL.**

14 (a) A term in a lease agreement providing that one party or its successor in interest
15 may accelerate payment or performance or require collateral or additional collateral "at will" or
16 "when it deems itself insecure" or words of similar import must be construed to mean that the
17 party has power to do so only if it in good faith believes that the prospect of payment or
18 performance is impaired.

19 (b) With respect to a consumer lease, the burden of establishing good faith under
20 subsection (a) is on the party that exercised the power. Otherwise, the burden of establishing
21 lack of good faith is on the party against which the power has been exercised.

22 **PART 2.**

23 **FORMATION OF LEASE CONTRACT**

24 **SECTION 2A-201. STATUTE OF FRAUDS.**

1 (a) Except as otherwise provided in this section, [a lease contract] [an agreement for
2 the lease of goods which is otherwise valid as a contract] is not enforceable by way of action or
3 defense unless:

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

6 (2) there is a record, authenticated by the party against which enforcement is
7 sought or by ~~that party's authorized~~ his agent, sufficient to indicate that a lease contract
8 has been made between the parties and to describe the goods leased and the duration
9 of the lease.

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

13 (c) A record is not insufficient because it omits or incorrectly states a term agreed
14 upon, but a lease contract is not enforceable under subsection (1)(b) beyond the duration of the
15 lease and the quantity of goods ~~shown~~ agreed to in the authenticated record.

16 (d) An otherwise valid lease contract that does not satisfy the requirements of
17 subsection (a), ~~but which is valid in other respects~~, is enforceable:

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

1 (2) if the party against which enforcement is sought admits in its a pleading,
2 testimony, or otherwise in court that a lease contract was made, but the lease contract
3 is not enforceable under this provision beyond the quantity of goods admitted; or

4 [(3) with respect to goods that have been received and accepted by the
5 lessee.]

6 [(3) to the extent that performance has been tendered by one party and
7 accepted by the other party;]

8 [(4) to the extent of an agreement enforceable under this section by which the
9 parties waive the requirements of this section as to future transactions.]

10 [(e) By an agreement that is enforceable under this section, the parties may waive the
11 requirements of this section as to future transactions]

12 (f) A contract enforceable under this section is not unenforceable merely because it is
13 not capable of being performed within one year after its making.

14 (f) The duration of a lease under a contract referred to in subsection (d) is:

15 (1) if there is a record authenticated by the party against whom enforcement
16 is sought or by that party's authorized agent specifying the duration of the lease, the
17 period so specified;

18 (2) if the party against which enforcement is sought admits in that party's
19 pleading, testimony, or otherwise in court, the duration of the lease, the period so
20 admitted; or

21 (3) a reasonable duration.

22 (g) The affixing of a seal to a record evidencing a contract or offer does not make the
23 record a sealed instrument. The law with respect to sealed instruments does not apply to the
24 contract or offer.

(2-201, page 14)

Drafting Comment - January, 1997

The Article 2 Drafting Committee has reinstated the statute of frauds in its latest draft. The minor language changes above follow Article 2.

The second bracketed (d)(3) would make the part performance rule apply both to acceptance of goods by the lessee and payments accepted by the lessor. Present 2A did not follow present Article 2 regarding payments. Do we wish to adhere to the original 2A decision?

New bracketed (d)(4) and the new unlettered bracketed section following it are alternative ways of stating the rule that the parties can, by an agreement which satisfies the statute of frauds, waive the statute of frauds as to future transactions. That rule probably first surfaced in Article 2B. The (d)(4) formulation is from Article 2, the following separate subsection is from 2B. The article 2 formulation seems ungrammatical. In the October meeting, Ed Huddleston proposed a similar rule for Article 2A.

We probably should pick up subsection (e) which negates the one year statute of frauds as to lease contracts. That follows article 2.

New subsection (g) follows Article 2 in stating the rule in the statute of frauds section, rather than having a separate section. therefore, 2A-203 is stricken.

**SECTION 2A-202. FINAL WRITTEN EXPRESSION: PAROL OR
EXTRINSIC EVIDENCE.**

(a) Terms on which the confirmatory memoranda of the parties agree, or which are otherwise set forth in a record intended by the parties as a final expression of their agreement with respect to the included terms, may not be contradicted by evidence of a previous agreement or contemporaneous oral agreement. However, the terms may be explained ~~or~~ and, in addition, terms may be supplemented by evidence of:

(1) course of performance, usage of trade, or course of dealing; and

(2) noncontradictory additional terms unless the court finds that the record was intended as a complete and exclusive statement of the terms of the agreement.

(b) In determining whether the parties intended a record to be final or complete and exclusive with respect to some or all of the terms, the following rules apply:

1 (1) The court shall consider all evidence relevant to intention of the parties to
2 integrate the record. ~~including evidence of a previous agreement or representation or of~~
3 ~~a contemporaneous oral agreement or representation.~~

4 (2) Except in a consumer contract, a contractual term indicating that the
5 record completely embodies the agreement of the parties is presumed to state the
6 intention of the parties on the issue.

7 (2-201, page 16)

8 Drafting Comment - January, 1997

9 At the October, 1996 meeting, the committee voted, by a small margin, to retain
10 subsection (b).

11 **~~SECTION 2A-203. SEAL INOPERATIVE.~~** ~~The affixing of a seal to a writing evidencing~~
12 ~~a lease contract or an offer to enter into a lease contract does not render the writing a sealed~~
13 ~~instrument. The law with respect to sealed instruments does not apply to the lease contract or~~
14 ~~offer.~~

15 Drafting Comment - January, 1997

16 This section, following Article 2, is a part of 2-201.

17 **SECTION 2A-203. FORMATION IN GENERAL.**

18 (a) A lease contract may be made in any manner sufficient to show agreement,
19 including by offer and acceptance or conduct of both parties recognizing the existence of a
20 contract.

21 (b) If the parties so intend, an agreement sufficient to make a lease contract may be
22 found even if the time when the agreement was made it cannot be determined ~~when the~~
23 ~~agreement was made~~ or one or more terms are left open or to be agreed upon.

24 (c) Although ~~Even if~~ one or more terms are left open, a lease contract does not fail for
25 indefiniteness if there is a reasonably certain basis for an appropriate remedy.

1 (2-203, page 19)

2 Drafting Comment - January, 1997

3
4 At the October, 1996 meeting, the Drafting Committee voted not to include references
5 to standard form contracting.

6 See 2-203(d) in the January 1997 draft of Article 2.

7 **SECTION 2A-204. FIRM OFFER.**

8 An offer by a merchant to lease goods to or from another person made in an
9 authenticated record that by its terms gives assurance the offer will be held open is not
10 revocable for lack of consideration during the period time stated. If a period time is not stated,
11 the offer is irrevocable for a reasonable time not exceeding 90 days. A [standard term] [term] of
12 assurance in a ~~standard form~~ record supplied by the offeree is ineffective unless the ~~offeree~~
13 ~~manifests assent to the term~~ is conspicuous.

14 (2-204, page 20)

15 **SECTION 2A-205. OFFER AND ACCEPTANCE IN FORMATION OF**
16 **LEASE CONTRACT.**

17 (a) Unless otherwise unambiguously indicated by the language or circumstances, an
18 offer to make a lease contract invites acceptance in any manner and by any medium
19 reasonable in the circumstances.

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

23 (2-205, page 21)

24 **~~SECTION 2A-207 STANDARD FORMS.~~**

1 ~~—— (a) Subject to subsection (b), if all or part of a lease agreement is contained in a~~
2 ~~standard form and the party that did not prepare the form manifests assent to it, that party~~
3 ~~adopts all of the terms contained in the form as part of the contract except unconscionable~~
4 ~~terms.~~

5 ~~—— (b) If a consumer has manifested assent to a standard form, a term contained in the~~
6 ~~form that the consumer could not reasonably have expected is not part of the lease contract~~
7 ~~unless the consumer expressly agrees to it.~~

8 ~~—— (c) A term adopted under subsection (a) becomes part of the lease contract without~~
9 ~~regard to the knowledge or understanding of individual terms by the party assenting to the~~
10 ~~standard form and whether or not the party read the form.~~

11 ~~—— (d) A term of a standard form which is unenforceable under other provisions of this~~
12 ~~article, such as a provision that requires conspicuous language or express agreement to a~~
13 ~~term, does not become part of the lease contract unless those other provisions are satisfied.~~

14 **SECTION 2A-206. STANDARD FORM RECORDS.**

15 (a) Where a consumer authenticates a standard form or engages in other affirmative
16 conduct that appears to agree to the terms of a standard form, [standard terms] terms that a
17 reasonable consumer in a transaction of this type would not expect to appear in the form are
18 not part of the agreement.

19 (b) When a consumer claims that a [standard term] term is excluded under subsection
20 (a), the court shall afford the parties a reasonable and expeditious opportunity to present
21 evidence on whether the term was reasonably expected. Evidence may include but is not
22 limited to:

23 (1) Efforts by the party preparing the form to inform the consumer of the
24 terms, including:

1 (A) The setting and circumstances in which the form was or in the
2 ordinary court of business is presented to the consumer;

3 (B) Whether the term was called to the consumer's attention in fact
4 or in the ordinary course of business or through a prior course of dealing
5 between the parties;

6 (C) The degree to which the seller, or any other person on the
7 seller's behalf, publicized the terms of the type of sale involved, including the
8 term in dispute;

9 (D) The degree to which the consumer knew of and understood the
10 terms prior to the authentication or other affirmative conduct; and

11 (2) Facts from other sources that are relevant to the consumer's reasonable
12 expectations, including:

13 (A) The nature and price of the described goods;

14 (B) The expectations of other consumers in similar types of
15 transactions;

16 (C) Usages, standards and common practices with respect to goods
17 of the same type or description;

18 (D) Previous purchases made from other sellers of goods of the
19 same type or description;

20 (E) Characteristics particular to the consumer involved, such as lack
21 or education or more than average knowledge about the type of transaction
22 involved.

23 (c) Issues arising under subsection (b) shall be decided by the court as a matter of
24 law. If the seller establishes that a reasonable consumer had reason to know of the contested

1 term and authenticated or engaged in other affirmative conduct of agreement, a prima facie
2 case is established that the term is part of the agreement.

3 (d) If the seller complies with other requirements in this Article for including terms in a
4 consumer contract, nothing in this section will exclude such terms.

5 (2-206, page 23)

6 Drafting Comment - January, 1997

7 In our October meeting, we had decided to include the section dealing with standard
8 forms pending further consideration. We were to tell the Article 2 Committee that we had
9 problems with the section. The Article 2 Committee has now substantially reworked that
10 section. The new Article version is set out above.

11 **SECTION 2A-207. ELECTRONIC TRANSACTIONS: FORMATION.**

12 ~~(a) In an electronic transaction, if an electronic message initiated by one party evokes~~
13 ~~an electronic response by the other or its electronic agent, a lease contract is formed when the~~
14 ~~initiating party receives a message manifesting acceptance.~~

15 ~~———— (b) A lease contract is formed under subsection (a) even if no individual representing~~
16 ~~either party was aware of or reviewed the initial message or response or the action manifesting~~
17 ~~acceptance of the contract. Electronic records exchanged in an electronic transaction are~~
18 ~~effective when received in a form and at a location capable of processing the record even if no~~
19 ~~individual is aware of their receipt.~~

20 ~~———— (c) In determining when an electronic message sent to another party is received by~~
21 ~~that party, the following rules apply:~~

22 ~~———— (1) If the recipient of the message, whether or not recorded, has designated~~
23 ~~an information system for the purpose of receiving electronic messages, receipt occurs~~
24 ~~when the message enters the designated information system.~~

1 ~~_____ (2) If the intended recipient has not designated an information system for~~
2 ~~receipt of electronic records, receipt occurs when the record enters any information~~
3 ~~system of the intended recipient.~~

4 ~~_____ (d) An electronic agent acts within the scope of its agency if its performance is~~
5 ~~consistent with the functions intended by the party that utilizes the electronic agency.~~

6 **SECTION 2A-207. ELECTRONIC TRANSACTIONS AND MESSAGES:**

7 **CONTRACT FORMATION.**

8 (a) If an electronic message initiated by a party or an electronic agent evokes an
9 electronic message in response and the messages reflect or can be attributed with the intent to
10 be bound, a contract exists when:

11 (1) the response is received if the response consists of furnishing requested
12 information or notice of access to the information and the originating message did not
13 prohibit that form of response; or

14 (2) the sender of the originating message receives as electronic message
15 signifying acceptance.

16 (b) In an electronic transaction, a contract is formed although no individual
17 representing either party was aware of or reviewed the initial message, response, reply,
18 information, or action signifying acceptance.

19 (c) An electronic message is effective when received, even if no individual is aware of
20 its receipt.

21 (Based on 2B-206)

22 Drafting Comment - January, 1997

23 Probably some additional sections dealing with electronic contracted will be needed.
24 Article 2B contains sections on attribution of electronic records, and so on. We will wait for
25 Article 2 decisions on additional inclusions.

1 **PART 3.**

2 **CONSTRUCTION OF LEASE CONTRACT**

3 **SECTION 2A-301. COURSE OF PERFORMANCE OR PRACTICAL**
4 **CONSTRUCTION.**

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

9 (b) Express terms of a lease agreement, course of performance, course of dealing,
10 and usage of trade must be construed whenever reasonable as consistent with each other.
11 However, if that construction is unreasonable:

12 (1) express terms prevail over course of performance, course of dealing, and
13 usage of trade;

14 (2) course of performance controls over course of dealing and usage of
15 trade; and

16 (3) course of dealing controls over usage of trade.

17 (c) Subject to Section 2A-302, course of performance is relevant to show a waiver or
18 modification of a term inconsistent with the course of performance.

19 (2-209, page 31)

20 **Drafting Comment**

21 This section will probably be moved to Article 1.

22 **SECTION 2A-302. MODIFICATION, RESCISSION, AND WAIVER.**

23 (a) A good-faith agreement modifying a lease contract is binding without
24 consideration.

1 (b) Except in a consumer lease contract or as otherwise provided in subsection (d), a
2 lease agreement that contains a term prohibiting modification or rescission except by a signed
3 record may not be otherwise modified or rescinded. However, a party whose language or
4 ~~conduct in modifying or rescinding a lease contract~~ is inconsistent with a term requiring a
5 signed record to modify or rescind the contract may not assert the term if the language or
6 conduct induced the other party to change its position reasonably and in good faith.

7 (c) A contractual ~~term of a lease agreement~~ may be waived. Language or a course of
8 performance between the parties is relevant to show a waiver of any term inconsistent with that
9 language or course of performance. The waiver of an executory portion of a contract may be
10 retracted by reasonable notification received by the other party that strict performance is
11 required of a term waived unless the waiver induced the other party to change its position
12 reasonably and in good faith.

13 (2-210, page 32)

14 Drafting Comment-January, 1997

15 Since a statute of frauds has been included in Article 2, the section on modification and
16 waiver has also been amended to add a reference to the statute of frauds. Presently, 2-210(b)
17 reads : "If the agreement modifying the contract or the contract as modified are within Section
18 2-201, the requirements of the statute of frauds must be satisfied." The present Article 2A
19 section makes no reference to the statute of frauds. I believe it is better not to refer to the
20 statute of frauds in the modification section, and leave those issues to the statute of frauds
21 section (2A-201). However, perhaps Article 2A should conform to whatever Article 2 does.

22 At the October meeting, the Committee expressed displeasure with the failure of
23 revised 2-210 to retain the rule that a waiver can be retracted unless retraction would be unjust
24 because of a material change of position by the other party. The Article 2 draft still refers merely
25 to "change of position reasonably and in good faith." There is no reference to the materiality of
26 the change of position. Such we return to the present Code language under which a waiver can
27 be retracted "unless the retraction would be unjust in view of a material change of position in
28 reliance on the waiver:?"

29 **SECTION 2A-303. LESSEE UNDER FINANCE LEASE AS**
30 **BENEFICIARY OF SUPPLY CONTRACT.**

1 (a) The benefit of a supplier's promises to the lessor under the supply contract and of
2 all warranties, whether express or implied, including those of any third party provided in
3 connection with or as part of the supply contract, extends to the lessee to the extent of the
4 lessee's leasehold interest under a finance lease related to the supply contract but is subject to
5 the terms of the warranty and of the supply contract and all defenses or claims arising
6 therefrom. The lessee's remedies against the supplier or other third parties are limited to those
7 consistent with the lessor's interest in the goods unless the lessor otherwise consents.

8 (b) The extension of the benefit of a supplier's promises and of warranties to the
9 lessee does not modify the rights and obligations of the parties to the supply contract, whether
10 arising therefrom or otherwise, or impose any duty or liability under the supply contract on the
11 lessee.

12 (c) A modification or rescission of a supply contract by the supplier and the lessor is
13 effective between the supplier and the lessee unless, before the modification or rescission, the
14 supplier has received notice that the lessee has entered into a finance lease related to the
15 supply contract. If the modification or rescission is effective between the supplier and the
16 lessee, the lessor assumes by operation of law, in addition to the obligations of the lessor to the
17 lessee under the lease contract, the promises of the supplier to the lessor and warranties that
18 were so modified or rescinded as they existed and were available to the lessee before
19 modification or rescission.

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

24 Drafting Comment

1 The last sentence of subsection (a) is intended to preclude remedies such as
2 revocation of acceptance, which affect the finance lessor's interest, unless the lessor consents.

3 **SECTION 2A-304. IDENTIFICATION.**

4 Identification of goods as goods to which a lease contract refers may be made at any
5 time and in any manner expressly agreed to by the parties. In the absence of express
6 agreement, identification occurs when:

7 (1) the lease contract is made, if the contract is for the lease of existing and described
8 goods;

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

12 (3) young are conceived, if the lease contract is for a lease of unborn young of
13 animals.

14 (2-502, page 66)

15 **SECTION 2A-305. INSURANCE AND PROCEEDS.**

16 (a) A lessee obtains an insurable interest in existing goods identified to the lease
17 contract even if the goods are nonconforming and the lessee has an option to return or reject
18 them.

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

22 (c) The lessor also retains an insurable interest until an option to buy has been
23 exercised by the lessee and risk of loss has passed to the lessee.

24 (d) This section does not impair any insurable interest recognized under any other
25 statute or rule of law.

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

4 (2-502, page 66)

5 **SECTION 2A-306. RISK OF LOSS.**

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

8 (b) If under the lease agreement risk of loss will pass to the lessee but the agreement
9 does not specify when the risk passes, then except as otherwise provided in subsections (c)
10 through (e), risk of loss passes to the lessee upon receipt of the goods. If the lessee does not
11 intend to take possession, risk of loss passes to the lessee when it receives control of the
12 goods.

13 (c) If a lease contract requires or authorizes a lessor to ship goods by carrier, the
14 following rules apply:

15 (1) If the contract does not require delivery at a particular destination, risk of
16 loss passes to the lessee when the goods are delivered to the carrier.

17 (2) If the contract requires delivery at a particular destination and the goods
18 arrive there in the possession of the carrier, risk of loss passes to the lessee when the
19 goods are so tendered as to enable the lessee to take delivery.

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

23 (e) If a tender of delivery of goods fails to conform to this article or to the lease
24 contract, the risk of loss remains on the lessor until cure or acceptance.

1 (2-612, page 88)

2 Drafting Comment - January, 1997

3 At the October, 1966, Committee meeting, the Committee asked that subsection (b)
4 contain some language referring to the failure of the agreement to specify when risk passes if
5 under the agreement risk is to pass to the lessee.

6 **SECTION 2A-307. CASUALTY TO IDENTIFIED GOODS.**

7 If the parties to a lease contract assume the continued existence and eventual delivery
8 to the lessee of goods identified when the lease contract is made and the goods suffer casualty
9 without fault of the lessee, the lessor, or the supplier before delivery, or if the goods suffer
10 casualty before risk of loss passes to the lessee pursuant to the lease agreement or Section
11 2A-306, the following rules apply:

12 (1) If the loss occurs before the goods are delivered to the lessee, the lessor
13 or supplier shall seasonably notify the lessee of the nature and extent of the loss.

14 (2) If the loss is total, the lease contract is avoided.

15 (3) If the loss is partial or the goods no longer conform to the lease contract,
16 the lessee may nevertheless demand inspection and may treat the lease contract as
17 avoided or, except in a finance lease that is not a consumer lease, accept or retain the
18 goods with due allowance from the rent payable for the balance of the lease term for
19 the nonconformity but without further right against the lessor.

20 (2-714, page 117)

21 Drafting Comment

22 Addition of the words "or retain" in subdivision (3) is not required for conformity to
23 Article 2.

24 **2A-308. TERMINATION; SURVIVAL OF OBLIGATIONS.**

25 (a) Except as otherwise provided in subsection (b), on termination of a lease contract,
26 all obligations that are still executory on both sides are discharged.

1 (b) The following survive termination of a lease contract:

2 (1) a right based on a previous default or performance of the contract or
3 under an indemnity;

4 (2) a limitation on the scope, manner, method, or location of the exercise of
5 rights in the goods;

6 (3) an obligation to return or dispose of goods, which obligation must be
7 promptly performed;

8 (4) a choice of law or forum;

9 (5) an obligation to arbitrate or otherwise resolve disputes through alternative
10 dispute resolution procedures.

11 (6) a term limiting the time for commencing an action or for providing notice;
12 and

13 (7) any right, remedy, or obligation stated in the agreement as surviving.
14 (2-310, page 42).

15 Drafting Comment - January, 1997

16 Present 2A addresses termination in the section on Termination and Cancellation
17 (present 2A-505(2)). That section merely says : "On termination of the lease contract, all
18 obligations that are still executory on both sides are discharged, but any right based on prior
19 default or performance survives." The revised version of present 2A-505 (2A-709) deals only
20 with cancellation.

21 **SECTION 2-309. TERMINATION; NOTIFICATION**

22 (a) A party may not terminate a lease contract, except on the happening of an
23 agreement event unless the other party receives reasonable notification of the termination.

24 (b) An agreement dispensing with notification is invalid if its operation is
25 unconscionable. However, an agreement specifying standards for the nature and timing of
26 notification is enforceable if the standards are not manifestly unreasonable.

(2-311, page 43)

Drafting Comment - January, 1997

Present Article 2A did not pick up the provision from present Article 2. Should we do so now?

PART 4.

EFFECT OF LEASE CONTRACT

SECTION 2A-401. 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.

SECTION 2A-402. TITLE TO AND POSSESSION OF GOODS.

Except as otherwise provided in this article, this article applies whether the lessor or a third party has title to the goods, or 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.

(2-501, page 64)

SECTION 2A-403. ALIENABILITY OF PARTY'S INTEREST UNDER LEASE CONTRACT OR OF LESSOR'S RESIDUAL INTEREST IN GOODS; DELEGATION OF PERFORMANCE; TRANSFER OF RIGHTS.

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

(b) Except as otherwise provided in subsections (c) and (d), a term in a lease agreement which 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

1 process, of an interest of a party under the lease contract or of the lessor's residual interest in
2 the goods, or which makes such a transfer an event of default, gives rise to the rights and
3 remedies provided in subsection (e). However, a transfer that is prohibited or is an event of
4 default under the lease agreement is otherwise effective.

5 (c) In a consumer lease, to prohibit the transfer of an interest of a party under the
6 lease contract or to make a transfer an event of default, the language must be specific, be in a
7 record, and be conspicuous.

8 (d) A term of a lease agreement which prohibits the creation or enforcement of a
9 security interest in an interest of a party under the lease contract or in the lessor's residual
10 interest in the goods, or which makes such a transfer an event of default, is enforceable only to
11 the extent that there is a transfer by the lessee of the lessee's right of possession or use of the
12 goods in violation of the provision or a delegation of a material performance of either party to
13 the lease contract in violation of the provision. Neither the granting nor the enforcement of a
14 security interest in the lessor's interest under the lease contract, or the lessor's residual interest
15 in the goods, is a transfer that materially impairs the prospect of obtaining return performance
16 by, materially changes the duty of, or materially increases the burden or risk imposed on, the
17 lessee within the meaning of subsection (e) unless, and only to the extent that, there is a
18 delegation of a material performance of the lessor.

19 (e) A term of a lease agreement which prohibits a transfer of a right to damages for
20 default with respect to the whole lease contract or of a right to payment arising out of the
21 transferor's due performance of the transferor's entire obligation, or which makes such a
22 transfer an event of default, is not enforceable. Such a transfer is not a transfer that materially
23 impairs the prospect of obtaining return performance by, materially changes the duty of, or

1 materially increases the burden or risk imposed on, the other party to the lease contract within
2 the meaning of subsection (e).

3 (f) Subject to subsections (c) and (d):

4 (1) if a transfer is made that is an event of default under a lease agreement,
5 the other party to the lease contract has the rights and remedies described in
6 Section 2A-702(b) unless that party waives the default or otherwise agrees; and

7 (2) if paragraph (1) does not apply and a transfer is made that is prohibited
8 under a lease agreement or materially impairs the prospect of obtaining return
9 performance by, materially changes the duty of, or materially increases the burden or
10 risk imposed on, the other party to the lease contract, unless the party not making the
11 transfer agrees at any time to the transfer in the lease contract or otherwise, unless
12 limited by contract:

13 (A) the transferor is liable to the party not making the transfer for
14 damages caused by the transfer to the extent that the damages could not
15 reasonably be prevented by the party not making the transfer; and

16 (B) a court having jurisdiction may grant other appropriate relief,
17 including cancellation of the lease contract or an injunction against the
18 transfer.

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

(h) 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 liability for default.

(2-503, page 68)

SECTION 2A-404. SUBSEQUENT LEASE OF GOODS BY LESSOR.

(a) Subject to Section 2A-403, 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 otherwise provided in subsections (b) and (c) and Section 2A-720(d), takes subject to the existing lease contract.

(b) A lessor with voidable rights or title acquired in a transaction of purchase from a transferor that has relinquished possession or control has power to transfer a good leasehold interest to a good-faith subsequent lessee for value until the seller regains possession or control, but only to the extent provided in subsection (a). ~~A purchase described in subsection (a)~~

(c) For purposes of this section, a purchase includes a transaction in which:

- (1) the transferor was deceived as to the identity of the lessor;
- (2) the delivery was in exchange for a check later dishonored;
- (3) it was agreed that the transaction was to be a "cash sale"; or
- (4) the delivery was procured through fraud punishable under the criminal law.

(d) A subsequent lessee in the ordinary course of business from a lessor that is a merchant dealing in goods of that kind to which the goods were entrusted by the existing lessee of that lessor before the interest of the subsequent lessee became enforceable against that

1 lessor obtains, to the extent of the leasehold interest transferred, all rights to the goods of that
2 lessor and the existing lessee, and takes free of the existing lease contract.

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

7 (2-504, page 70)

8 **SECTION 2A-405. SALE OR SUBLEASE OF GOODS BY LESSEE.**

9 (a) Subject to Section 2A-403, a buyer or sublessee from the lessee of goods under an
10 existing lease contract obtains, to the extent of the interest transferred, the leasehold interest in
11 the goods that the lessee had or had power to transfer, and except as otherwise provided in
12 subsection (b) and Section 2A-727(e), takes subject to the existing lease contract.

13 (b) A lessee with a voidable leasehold interest acquired in a lease transaction from a
14 lessor that has relinquished possession or control has power to transfer a good leasehold
15 interest to a good faith buyer for value or a good faith sublessee for value unless the lessor
16 regains possession or control, but only to the extent provided in subsection (a). ~~A lease~~
17 ~~transaction under this subsection~~

18 (c) For purposes of this section, a purchase includes a lease in which:

19 (1) the lessor was deceived as to the identity of the lessee;

20 (2) the delivery was in exchange for a check later dishonored; or

21 (3) the delivery was procured through fraud punishable under the
22 criminal law.

23 (d) A buyer in the ordinary course of business or a sublessee in the ordinary course of
24 business from a lessee that is a merchant dealing in goods of that kind to which 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.

(e) 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 State or of another jurisdiction takes no greater rights than those provided both by this section and by the certificate-of-title statute.

(2-504, page 70)

**SECTION 2A-406. PRIORITY OF CERTAIN LIENS ARISING BY
OPERATION OF LAW.**

If a person in the ordinary course of its 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 has 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 the lien is created by rule of law and the rule of law provides otherwise.

**SECTION 2A-407. PRIORITY OF LIENS ARISING BY ATTACHMENT OR
LEVY ON, SECURITY INTERESTS IN, AND OTHER CLAIMS TO GOODS.**

(a) Except as otherwise provided in Section 2A-406, a creditor of a lessee takes subject to the lease contract.

(b) Except as otherwise provided in subsections (c) and (d) and Sections 2A-406 and 2A-408, a creditor of a lessor takes subject to the lease contract unless:

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

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

4 (3) the creditor holds a security interest in the goods which was perfected
5 Under Article 9 before the lease contract became enforceable.

6 (c) A lessee in the ordinary course of business takes the leasehold interest free of a
7 security interest in the goods created by the lessor even if the security interest is perfected
8 under Article 9 and the lessee knows of its existence.

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

15 Drafting Comment - January, 1997

16 Subsections(b)(2), (b)(3), (c) and (d) of 2A-407 will be included in Article 9 when the
17 Article 9 revision is complete. The Article 9 package of amendments should include repeal of
18 those parts of 2A-407. The Article 9 Drafting Committee will be told that the 2A Committee is
19 happy with the substance of the rules be transferred to Article 9.

20 **SECTION 2A-408. SPECIAL RIGHTS OF CREDITORS.**

21 (a) Except as otherwise provided in subsections (b) and (c), the rights of creditors of
22 the lessor with respect to goods identified to a lease contract and retained by the lessor are
23 subject to the lessee's rights under Sections 2A-708, 2A-722(d), and 2A-737 if the lessee's
24 rights vest before a creditor's claim in re attaches to the goods.

25 (b) A creditor of a lessor in possession of goods subject to a lease contract may treat
26 the lease contract as void or voidable, if, as against the creditor, retention of possession by the

1 lessor is fraudulent or void or voidable under any statute or rule of law. However, it is not
2 fraudulent for a lessor, for a commercially reasonable time after the lease becomes
3 enforceable, to retain possession in good faith and current course of trade.

4 (c) Except as otherwise provided in subsection (a), this article does not impair the
5 rights: ~~(1) of a creditor of the lessor under Article 9 or (2) of a lessor, if the lease contract in a~~
6 case in which identification to the lease contract or delivery is made not other than in current
7 course of trade but in satisfaction of or as security for a preexisting claim for money, security, or
8 the like, and under circumstances in which, [such] that ~~under any statute or rule of law other~~
9 ~~than this article~~, the transaction would constitute a fraudulent transfer or voidable preference
10 under any statute or rule of law other than this section.

11 (d) A creditor of a seller may treat a sale or an identification of goods to a contract for
12 sale as void or voidable if, as against the creditor, retention of possession by the seller is
13 fraudulent or void or voidable under any statute or rule of law. However, it is not fraudulent for
14 a seller to retain possession of the goods pursuant to a lease contract entered into by the seller
15 as lessee and the buyer as lessor in connection with the sale or identification of the goods if the
16 buyer bought for value and in good faith. (2-405, page 72)

17 **SECTION 2A-409. RIGHTS OF LESSOR AND LESSEE WHEN**
18 **GOODS BECOME FIXTURES.**

19 (a) In this section:

20 (1) goods are "fixtures" when they become so related to particular real estate
21 that an interest in them arises under real estate law;

22 (2) a "fixture filing" is the filing in the office where a mortgage on the real
23 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 subsection (a) of Section 9-402;

(3) 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;

(4) a mortgage is a "construction mortgage" to the extent that 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

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

(b) 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.

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

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

(1) the lease is a purchase money lease, the 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

(2) 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

1 conflicting interest of a predecessor in title of the encumbrancer or owner, and the
2 lessee has an interest of record in the real estate or is in possession of the real estate.

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

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

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

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

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

17 (f) Notwithstanding subsection (d)(1) but otherwise subject to subsections (d) and (e),
18 the interest of a lessor of fixtures, including the lessor's residual interest, is subordinate to the
19 conflicting interest of an encumbrancer of the real estate under a construction mortgage
20 recorded before the goods become fixtures if the goods become fixtures before the completion
21 of the construction. To the extent given to refinance a construction mortgage, the interest of an
22 encumbrancer of the real estate under a mortgage has this priority to the same extent as the
23 the construction mortgage.

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

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

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

20 Note to Style Committee. 2A-409 is a copy of present 9-313. I don't see the value in
21 rearranging and changing the definitions in 9-313 which will just confuse readers when they try
22 to compare the two sections to see whether they are in fact identical. When Article 9 is styled,
23 this section should follow Article 9. I began to make the suggested changes, but ran into trouble
24 with the definition of construction mortgage. It is necessary that the "to the extent that" idea be
25 in the statute somewhere. If it isn't in the definition, it has to be in a substantive section.

1 **SECTION 2A-410. LESSOR'S AND LESSEE'S RIGHTS WHEN GOODS BECOME**
2 **ACCESSIONS.**

3 (a) Goods are "accessions" when they are installed in or affixed to other goods.

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

7 (c) The interest of a lessor or a lessee under a lease contract entered into at the time
8 or after the goods became accessions is valid against all persons subsequently acquiring
9 interests in the whole except as stated in subsection (4) but is invalid against any person with
10 an interest in the whole that has not in writing consented to the lease or disclaimed an interest
11 in the goods as part of the whole.

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

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

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

20 Drafting Comment - January, 1997

21 Original 2A, following original Article 9, provided in subsection (d) that interests of
22 lessees or lessor under subsections (a) and (b) are "subordinate to" security the interests stated
23 in subsection (c). The Article 9 revision states that the interests "do not take priority over."

24 The 2A Committee rejected the Article 9 change because it is not as precise as the
25 original language.

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

12 Note to Style Committee, 2A-410 also is copied from Article 9. When Article 9 is styled,
13 this section should be styled. As to both this section and 9-409, perhaps Style can take an early
14 look at those sections in Article 9 and deal with the reporters there. 2A is just tagging along as
15 to these two sections.

16 **SECTION 2A-411. PRIORITY SUBJECT TO SUBORDINATION.**

17 Nothing in this article prevents subordination by agreement by any person entitled to
18 priority.

19 **PART 5**

20 **WARRANTIES**

21 **SECTION 2A-501. DEFINITIONS.**

22 In this part:

23 (1) "Damage" means all loss resulting from a breach of warranty—The term including
24 injury to a person or property.

(2) "Goods" includes a component incorporated in substantially the same condition in other goods.

(3) "Immediate lessee" means a lessee in privity of contract with the lessor.

(4) "Remote lessee" means a lessee from a lessor in the distributive chain other than the lessor or seller against which a claim for breach of warranty is asserted.

(2-401, page 48)

SECTION 2A-502. EXPRESS WARRANTIES.

~~—— (a) An affirmation of fact or promise made by the lessor to the immediate lessee which relates to the goods and becomes part of the agreement, or any description of the goods or sample or model that becomes part of the agreement creates an express warranty that the goods will conform to the affirmation, promise, or description or that the whole of the goods will conform to the sample or model. To create an express warranty, it is not necessary that the lessor use formal words, such as "warrant" or "guarantee, or have a specific intent to make a warranty.~~

~~—— (b) Any affirmation of fact, promise, description, sample, or model made described in subsection (a) becomes part of the lease contract unless a reasonable person in the position of the immediate lessee would believe otherwise or would believe that any affirmation, promise, or statement made was merely of the value of the goods or purported to be merely the lessor's opinion or commendation of the goods.~~

SECTION 2A-502. IMPLIED WARRANTIES AGAINST INTERFERENCE AND AGAINST INFRINGEMENT; LESSEE'S OBLIGATION AGAINST INFRINGEMENT.

(a) Except in a finance lease and ~~as otherwise provided in~~ subject to subsection (d), ~~there is in a lease contract an implied~~ contains a warranty by a lessor that for the duration of the

1 lease no person holds a claim to or interest [or apparent claim or interest,] in the goods which
2 will interfere with the lessee's enjoyment of its leasehold interest [or unreasonably expose the
3 lessee to litigation].

4 (b) Except as otherwise provided in subsection (d), in a finance lease contract there
5 is an implied warranty by the lessor that for the duration of the lease no person holds a claim or
6 interest [or apparent claim or interest] in the goods that arose from an act or omission of the
7 lessor which will interfere with the lessee's enjoyment of its leasehold interest [or unreasonably
8 expose the lessee to litigation].

9 (c) Except in a finance lease, there is in a lease contract by a lessor that is a merchant
10 regularly dealing in goods of the kind an implied warranty that the goods ~~are~~ will be delivered
11 free of the rightful claim of ~~any person~~ a third party by way of infringement or the like.
12 However, a lessee that furnishes specifications to the lessor shall hold the lessor harmless
13 against any claim of infringement or the like that arises out of compliance with the
14 specifications.

15 (d) A warranty under subsections (a) through (c) may be disclaimed or modified only
16 by ~~specific~~ express language or by circumstances giving the lessee reason to know that the
17 lessor purports to transfer only such right as the lessor or a third party may have. Language in
18 a record is sufficient to disclaim warranties under this section if it is conspicuous and states
19 "There is no warranty against third party claims that may interfere with lessee's enjoyment of his
20 leasehold interest or against infringement in this lease", or words of similar import.

21 ~~—— (e) A lessee that furnishes specifications to a lessor or a supplier holds the lessor and~~
22 ~~the supplier harmless against any claim that arises out of compliance with the specifications.~~

23 (e) A lessor's warranty under this section, made to an immediate lessee, extends to
24 any remote lessee that may be reasonably expected to lease the goods and that suffers

1 damage from breach of the warranty. The rights and remedies of a remote lessee against the
2 lessor for breach of the warranty are determined by the enforceable terms of the ~~agreement~~
3 contract between the lessor and the immediate lessee and this article. (2-402, page 48)

4 Drafting Comment

5 The warranties under present 2A-211 are too narrow. A non-finance lessor presently
6 warrants only against its own conduct which affects lessee's quite enjoyment of the lease, and
7 finance lessors seem to make no warranty even against their own acts, though a court could
8 probably deal with that. Present 2A-214(4) states the rules for disclaimer of warranties under
9 this section.

10 Drafting Comment - January, 1997

11 Should the section give protection against "unreasonable exposure to litigation" in
12 cases where the third party claimant has an apparent title or interest which is in fact not valid?
13 The January draft of the Article 2 section (2-402) provides a warranty that "the title conveyed is
14 good and uncontested and its transfer is rightful and does not unreasonably expose the buyer
15 to litigation."

16 **SECTION 2-503. EXPRESS WARRANTIES TO IMMEDIATE BUYER**

17 (a) If a seller makes an affirmation of fact that describes or relates to the goods,
18 provides a sample or model, or makes a promise to the immediate buyer, the affirmation,
19 sample, model or promise becomes part of the agreement with the immediate buyer unless a
20 reasonable person in the position of the immediate buyer would believe otherwise or would
21 believe that the affirmation was merely of the value of the goods or purported to be merely the
22 seller's commendation of the goods.

23 (b) If the affirmation, sample, model or promise becomes part of the agreement, the
24 seller has an obligation to the immediate buyer that the goods will conform to the affirmation or
25 model, that the whole of the goods will conform to the sample, or that the promised
26 performance will be provided. The obligation is breached if the goods do not conform to any
27 affirmation, sample or model at [tender of delivery] the time the risk of loss passes to the
28 immediate buyer, or if the promised performance is not given when due.

1 (b) A seller's obligation to the immediate buyer under this section may be created:

2 (1) in a medium for communication to the public, including advertising;

3 (2) even though the seller does not use formal words, such as "warranty" or
4 "guarantee." (2-403, page 51)

5 Drafting Comment

6 At the October, 1996 meeting, the Drafting Committee voted not to include in 2A-304
7 the specific references in 2-313 to warranty by remote lessors because of doubts that there are
8 in fact any remote lessors who make express warranties on which remote lessees rely.

9 **SECTION 2A-504. IMPLIED WARRANTY OF MERCHANTABILITY.**

10 (a) Except in a finance lease and subject to Section 2A-506, ~~in a lease contract there~~
11 ~~is an implied~~ a warranty that goods are merchantable is implied in a contract for their lease if
12 the lessor is a merchant with respect to goods of that kind.

13 (b) To be merchantable, goods, at a minimum, must:

14 (1) pass without objection in the trade under the agreed description;

15 (2) in the case of fungible goods, be of fair, average quality within the
16 description;

17 (3) be fit for the ordinary purposes for which goods of that description are
18 used;

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

21 (5) be adequately contained, packaged, and labeled as the lease agreement
22 or circumstances may require; and

23 (6) conform to any promises or affirmations of fact, if any, made on the
24 container or label.

1 (c) Subject to 2A-506, ~~other~~ implied warranties other than described in this section
2 may arise from course of dealing or usage of trade. (2-405, page 56)

3 **SECTION 2A-505. IMPLIED WARRANTY OF FITNESS FOR PARTICULAR**
4 **PURPOSE.**

5 Except in a finance lease and subject to Section 2A-506, if a lessor at the time of
6 contracting, ~~the lessor~~ has reason to know of any particular purpose for which the goods are
7 required and that the lessee is relying on the lessor's skill or judgment to select or furnish
8 suitable goods, there is an implied warranty that the goods are fit for that purpose.
9 (2-406, page 58)

10 **SECTION 2A-506. EXCLUSION OR MODIFICATION OF WARRANTIES.**

11 (a) Language or conduct relevant to the creation of an express warranty and language
12 or conduct ~~or~~ tending to disclaim or modify an express warranty must be construed as
13 consistent with each other, if such construction is reasonable. Subject to Section 2A-202 with
14 regard to parol or extrinsic evidence, ~~if such a construction is unreasonable~~, language or
15 conduct disclaiming or modifying an express warranty is ~~inoperative~~ ineffective ~~to that the~~
16 extent that such a construction is unreasonable.

17 (b) Except in a consumer lease, if language in an agreement is intended [construed] to
18 disclaim or modify an implied warranty, the following rules apply:

19 (1) All implied warranties are disclaimed or modified by language [or
20 expressions] that under the circumstances call the lessee's attention to the disclaimer
21 or modification of the warranties and states that the implied warranties have been
22 disclaimed or modified.

1 (2) [Subject to Section 2A-206,] conspicuous language contained in a record
2 that negates or modifies an implied warranty is sufficient to satisfy paragraph (1) in the
3 following cases:

4 (A) A disclaimer or modification of the implied warranty of
5 merchantability is sufficient if the language mentions merchantability or states
6 "These goods may not be fit for their ordinary purpose", or ~~language is~~ is of
7 similar import.

8 (B) A disclaimer or modification of the implied warranty of fitness is
9 sufficient if the language states that "There are no warranties that these
10 goods will conform to the purposes for which they are leased made known to
11 the lessor", or ~~words is~~ is of similar import.

12 (C) ~~In the case of used goods, expressions~~ Language like "as is" or
13 "with all faults" ~~are~~ is sufficient to disclaim or modify an implied warranty.

14 (3) If the lessee, ~~whether or not a consumer lessee~~, before entering into the
15 lease contract has examined the goods, sample, or model as fully as desired or ~~refuses~~
16 has declined to examine ~~the goods~~ them, there is no implied warranty with regard to
17 conditions that an examination in the circumstances would have revealed.

18 (4) An implied warranty may be disclaimed or modified by course of
19 performance, course of dealing, or usage of trade.

20 (c) ~~In addition to the requirements of Section 2A-207,~~ Language in a consumer lease
21 purporting to disclaim or modify the implied warranty of merchantability or the implied warranty
22 of fitness for particular purpose is ineffective unless the buyer has expressly agreed to it.

23 (d) Remedies for breach of warranty may be limited in accordance with this article with
24 respect to liquidation or limitation of damages and contractual modification of remedy.

(2-407, page 58)

SECTION 2A-507. CUMULATION AND CONFLICT OF WARRANTIES.

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

(1) Exact or technical specifications prevail over an inconsistent sample or model or general language of description.

(2) A sample from an existing bulk prevails over inconsistent general language of description.

(3) Except in a consumer lease, an express warranty prevails over inconsistent implied warranties other than an implied warranty of fitness for a particular purpose.

(2-408, page 61)

SECTION 2A-508. EXTENSION OF EXPRESS OR IMPLIED WARRANTIES.

(a) A lessor's express or implied warranty made to an immediate lessee extends to any remote lessee of, or person or transferee that may reasonably be expected to use or be affected by the goods and is damaged by breach of the warranty. The rights and remedies against the lessor for breach of a warranty extended under this subsection are determined by the enforceable terms of the contract between the lessor and the immediate lessee and this article. except that the lessor shall not be liable for loss of profits.

~~(b) If a lessor makes an express warranty to a remote lessee under Section 2A-502, or for other reasons the remote lessee may enforce a claim for breach of warranty directly against the lessor, the following rules apply:~~

~~—————(1) The remote lessee may maintain an action against the lessor without regard to the terms of the contract between the lessor and the immediate lessee.~~

1 ~~_____ (2) The remote lessee's rights and remedies against the lessor are~~
2 ~~determined under this article, subject to the following rules:~~

3 ~~_____ (A) The remedies of rejection and revocation of acceptance are not~~
4 ~~available.~~

5 ~~_____ (B) The time for giving a required notice begins to run when the~~
6 ~~remote lessee receives the goods.~~

7 ~~_____ (c) This section supplements and remedies of third party beneficiaries and assignees~~
8 ~~under the law of contracts or of persons to which use of goods is transferred by operation of~~
9 ~~law. _____ (d) A seller may not disclaim or limit the operation of this section.~~

10 ~~_____ (b) This section does not displace:~~

11 ~~(1) the rights and remedies of third party beneficiaries and assignees under~~
12 ~~the law of contracts or of persons to whom goods are transferred by operation of law.~~

13 ~~(2) principles of law and equity that extend a warranty to or for the benefit of~~
14 ~~a remote lessee, transferee, or other person.~~

15 ~~(c) The operation of this section may not be excluded, modified, or limited, but a~~
16 ~~disclaimer or modification of a warranty or the limitation of rights and remedies effective against~~
17 ~~the lessor is also effective against the remote lessee or transferee.~~

18 (2-409, page 62)

19 Drafting Comment - January, 1997

20 See January, 1997 Draft of Article 2, pages 62-64 for a discussion of the above
21 provision.

22 **~~SECTION 2A-509. INJURY TO PERSON OR PROPERTY RESULTING FROM~~**
23 **~~BREACH OF WARRANTY.~~**

24 ~~_____ **Alternative A**~~

~~Subject to [liquidation of damages section?], if a breach of warranty results in injury to a person or damage to property other than the goods leased, this article applies without regard to the nature of the resulting loss.~~

~~**Alternative B**~~

~~If a breach of warranty results in injury to person or damage to property other than the goods leased, this article applies subject to the following rules:~~

~~(1) A claim is not barred for failing to give notice as required by Section~~

~~(2) Any agreement, however expressed, that disclaims or limits liability for consequential damages for injury to the person is unenforceable.~~

~~(3) A seller's warranty extends to any lessee of, or other person that may reasonably be expected to use or be affected by, the goods under Section 2-507(a).~~

PART 6

**PERFORMANCE OF LEASE CONTRACT: REPUDIATED,
SUBSTITUTED, AND EXCUSED**

SECTION 2A-601. INSECURITY: ADEQUATE ASSURANCE OF PERFORMANCE.

(a) A lease contract imposes an obligation on each party not to impair the other's expectation of receiving due performance. If reasonable grounds for insecurity arise with respect to the performance of either party, the other party may demand in a record adequate assurance of due performance and until that assurance is received, if commercially reasonable, may suspend any performance for which the agreed return has not already been received .

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

(c) Acceptance of improper delivery or payment does not prejudice an aggrieved party's right to demand adequate assurance of future performance.

(d) After receipt of a demand under subsection (a), failure to provide within a reasonable time, not exceeding 30 days, assurance of due performance which is adequate under the circumstances of the particular case is a repudiation of the contract.

(2-711, page 114)

SECTION 2A-602. ANTICIPATORY REPUDIATION.

(a) If either party to a lease contract repudiates a performance not yet due ~~whose~~ and the loss of performance will substantially impair the value of the lease contract to the other, the aggrieved party may:

(1) await performance by the repudiating party for a commercially reasonable time, or ~~(2)~~ resort to any ~~right or~~ remedy for default under the lease contract or this article, even if it has urged the repudiating party to retract the repudiation or has notified the repudiating party that it would await the repudiating party's performance; and

(2) in either case, suspend its own performance or proceed in accordance with Section 2A-627.

(b) Repudiation includes but is not limited to language that one party will not or cannot make a performance still due under the contract or voluntary affirmative conduct that reasonably appears to the other party to make a future performance impossible.

(2-712, page 115)

Drafting Comment - January, 1997

The final text will contain a comment noting that a failure to give assurances under 2A-402 is a repudiation giving the other party the rights given by this section.

SECTION 2A-603. RETRACTION OF ANTICIPATORY REPUDIATION.

1 (a) A repudiating party may retract a repudiation until its next performance is due
2 unless the aggrieved party, after the repudiation, has canceled the lease contract, materially
3 changed its position, or otherwise indicated that the repudiation is considered to be final.

4 (b) Retraction may be by any method that clearly indicates to the aggrieved party that
5 the repudiating party intends to perform the contract. However, a retraction must include any
6 assurance demanded under Section 2A-601.

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

9 (2-713, page 116)

10 **SECTION 2A-604. SUBSTITUTED PERFORMANCE.**

11 (a) If, without the fault of the lessee, lessor or supplier, agreed berthing, loading, or
12 unloading facilities fail, or an agreed type of carrier becomes unavailable, or ~~the~~ an agreed
13 manner of delivery otherwise becomes commercially impracticable, an aggrieved party may
14 claim excuse under Section 2-605 but unless a commercially reasonable substitute is available.-
15 ~~the substitute performance must be tendered and accepted.~~

16 (b) If an agreed means or manner of payment fails because of domestic or foreign
17 governmental regulation, the lessor may withhold or stop delivery or cause the supplier to
18 withhold or stop delivery until the lessee provides a means or manner of payment that is
19 commercially a substantial equivalent. If delivery has already been made, payment by the
20 means or in the manner provided by the regulation discharges the lessee's obligation unless the
21 regulation is discriminatory, oppressive, or predatory.

22 (2-715, page 118)

23 Drafting Comment - January, 1997

24 My notes indicate that at the October meeting the Committee voted to delete the
25 underlined language in subsection (a) and make no reference to ability to claim excuse. On

1 reflection, however, doesn't the underlined language merely state the obvious. If so, is there
2 any reason to depart from the Article 2 language. The comments to the Article 2 section state
3 that it makes no change of substance from the previous present Article 2 section (which does
4 not contain the underlined language.).

5 **SECTION 2A-605. EXCUSE BY FAILURE OF PRESUPPOSED CONDITIONS.**

6 (a) Subject to Section 2A-604 and subsections (b), and (c) delay in ~~delivery or~~
7 ~~nondelivery in whole or in part~~ performance or nonperformance by a the lessor or a the supplier
8 ~~that complies with subsections (b) and (c)~~ is not a default under the lease contract if
9 performance as agreed has been made impracticable by:

10 (1) the occurrence of a contingency whose nonoccurrence was a basic
11 assumption on which the lease contract was made or

12 (2) compliance in good faith with any applicable foreign or domestic
13 governmental regulation, statute, or order, whether or not it later proves to be invalid.

14 (b) If the claimed excuse affects only a part of the lessor's or supplier's capacity ~~of the~~
15 ~~lessor or supplier~~ to perform, the lessor or supplier shall also allocate production and deliveries
16 among its customers in a manner that is fair and reasonable. ~~but at its option~~ However, the
17 lessor or seller may include regular customers not then under contract for sale or lease as well
18 as its own requirements for further manufacture. ~~The lessor or supplier may so allocate in any~~
19 ~~manner that is fair and reasonable.~~

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

24 (2-716, page 119)

25 Drafting Comment - January, 1997

1 At the October, 1996, meeting the Committee rejected various changes in this section
2 which had been proposed by the Article 2 Drafting Committee. The Article 2 Committee
3 receded from those proposals. The section set out above follows the most recent Article 2
4 version which is substantially the same as the original Article 2-2A provision.

5 **SECTION 2A-606. PROCEDURE ON NOTICE CLAIMING EXCUSE.**

6 (a) If the lessee receives notification of a material or indefinite delay in performance or
7 an allocation permitted under Section 2A-605, the lessee, by notification in a record to the
8 lessor as to any goods concerned, and with respect to all of the goods if under an installment
9 lease contract the value of the whole lease contract is substantially impaired, may:

10 (1) terminate and thereby discharge any unexecuted portion of the lease
11 contract ;or

12 (2) except in a finance lease that is not a consumer lease, modify the contract
13 by accepting the available allocation in substitution [with due allowance from the rent
14 payable for the balance of the lease term for the deficiency but without further right
15 against the lessor.]

16 (b) If, after receipt of a notification from the lessor under Section 2A-605, the lessee
17 fails to terminate or modify the lease contract within a reasonable time not exceeding 30 days,
18 the contract lapses with respect to any performance affected.

19 (2-717, page 120)

20 **SECTION 2A-607. IRREVOCABLE PROMISES: FINANCE LEASES.**

21 (a) In the case of a finance lease that is not a consumer lease, the lessee's promises
22 under the lease contract become irrevocable and independent upon the lessee's acceptance of
23 the goods.

24 (b) A promise that has become irrevocable and independent under subsection (a):

25 (1) is effective and enforceable between the parties and by or against third
26 parties including assignees of the parties; and

(2) is not subject to cancellation, termination, modification, repudiation, excuse, or substitution without the consent of the party to which the promise runs.

(c) This section does not affect the validity under any other law of a covenant in any lease agreement making the lessee's promises irrevocable and independent upon the lessee's acceptance of the goods.

PART 7.

DEFAULT

[A. IN GENERAL]

SECTION 2A-701. SUBJECT TO GENERAL LIMITATIONS.

The remedies of the lessee, lessor, and other protected persons under this article are subject to the general limitations and principles stated in subpart 8A. (2-801, page 121)

SECTION 2A-702. DEFAULT: PROCEDURE.

(a) Whether the lessor or the lessee is in default under a lease contract is determined by the lease agreement and this article.

(b) If the lessor or the lessee is in default under the lease contract, the party seeking enforcement:

(1) has the rights and remedies ~~as~~ provided in this article and, except as limited by this [article][part], as provided in the lease agreement.

~~———— (c) If the lessor or the lessee is in default under the lease contract, the party seeking enforcement~~

(2) may reduce ~~the party's~~ its claim to judgment, or otherwise enforce the lease contract by self-help or any available administrative or judicial procedure or nonjudicial procedure, or the like, including ~~administrative proceeding, arbitration, or the like, in accordance with this article.~~ if agreed to by the parties.

1 (2-802, page 122)

2 Drafting Comment

3 CUMULATION of remedies is addressed in § 2A-704(c).

4 (c) If the lease agreement covers both real property and goods, the party seeking
5 enforcement may proceed under this part as to the goods, or under other applicable law as to
6 both the real property and the goods in accordance with that party's rights and remedies in
7 respect of the real property, in which case this Part does not apply. (2-802, page 122)

8 **SECTION 2A-703. NOTICE AFTER DEFAULT.**

9 Except as otherwise provided in this article or the lease agreement, a lessor or lessee
10 in default under a lease contract is not entitled to notice of default or notice of enforcement from
11 the other party.

12 **SECTION 2A-704. REMEDIES IN GENERAL.**

13 (a) Subject to Section 1-106, The remedies provided in this article must be liberally
14 administered with the purpose of ~~putting~~ placing the aggrieved party in as good a position as if
15 the other party had fully performed.

16 (b) Except as otherwise provided in ~~this part~~ §, an aggrieved party may not recover
17 that part of a loss resulting from a default that could have been avoided by reasonable
18 measures under the circumstances. The burden of establishing a failure to take reasonable
19 measures under the circumstances is on the defaulting party.

20 (c) The rights and remedies provided in this article are cumulative, but a party may not
21 recover more than once for the same injury. ~~Except for damages~~ Unless the contract provides
22 for liquidated damages or a limited remedy enforceable under Sections 2A-710 or 2A-711, a
23 court may deny or limit a remedy if, under the circumstances, it would put the aggrieved party in
24 a substantially better position than if the other party had fully performed.

(d) This article does not ~~preclude~~ impair a remedy for breach of any obligation or promise collateral or ancillary to a lease contract.

Drafting Comment- January, 1997

At the October, 1996, meeting the Committee indicated that it should be made clear that the burden of proof language did not apply to statutory remedies. I do not now understand the thrust of that instruction. The Committee needs to revisit that point.

SECTION 2A-705. MEASUREMENT OF DAMAGES IN GENERAL.

To the extent that [a default is not material or] the remedies in this part fail to put the aggrieved party in as good a position as if the other party had fully performed, the aggrieved party may:

[(1)] recover compensation for the loss resulting in the ordinary course from the default as determined in any reasonable manner, together with incidental damages and consequential damages, less expenses and costs avoided as a result of the default; and

[(2) exercise any rights or remedies provided in the agreement.]

Drafting Comment

The above section is revised Article 2, 2-804, page 126. The bracketed language in the first sentence was added in September, 1996. I don't understand its purpose or effect.

Drafting Comment - January, 1997

Now the first sentence in what is now 2-804 reads "To the extent that a breach of contract is not material . . . "I still don't understand the purpose. Perhaps it is intended to be the only place in Article 2 which deals with damages for non-material breach. If so, I don't think we need it in Article 2A because there are other provisions in 2A dealing with non-material breach.

The reference to the right to "exercise any rights or remedies provided in the agreement" is bracketed because that is already said in 2A-702 (and in 2-802). Is it necessary to say it again here?

The final version of 2A will contain a comment discussing some cases to which the rules of this section would be applicable and perhaps a reference to DeKoven's Article on Puritan Leasing.

SECTION 2A-706. INCIDENTAL DAMAGES.

1 Incidental damages resulting from a default under a lease contract include
2 compensation for any commercially reasonable charges, expenses, or commissions [incurred
3 after the default] with respect to:

4 (1) inspection, receipt, transportation, care, and custody of property after the other
5 party's default;

6 (2) stopping delivery or shipment;

7 (3) effecting cover, return, or resale of ~~property~~ the goods; and

8 (4) reasonable efforts otherwise to minimize or avoid the consequences of default; and

9 (5) otherwise dealing with the goods or effectuating other remedies. (2-805, page 127)

10 Drafting Comment - January, 1997

11 This and the following section are moved forward. They were 2A-722 and 723 in the
12 previous version of 2A. The Article 2 draft deletes "incurred after the breach" in the opening
13 sentence. Should Article 2A follow?

14 **SECTION 2A-707. CONSEQUENTIAL DAMAGES.**

15 Consequential damages to a lessee, lessor, or other protected person for default
16 ~~include~~ (1) compensation for are all losses resulting from a default which:

17 (1) the defaulting party at the time of contracting had reason to know would probably
18 result from the aggrieved party's general or particular requirements and needs; ~~but which are~~
19 ~~not unreasonably disproportionate to the risk assumed by the defaulting party under the lease~~
20 ~~contract, and which~~

21 (2) could not have been avoided ~~by the aggrieved party~~ by reasonable measures
22 under the circumstances; and

23 (3) except for injury to the person, the party in breach establishes are not
24 unreasonably disproportionate to the risk assumed by the party in breach under the contract.

1 ~~(2) subject to 2A-509, injury to person or property proximately resulting from any~~
2 ~~breach of warranty.~~ (2-806, page 128)

3 Drafting Comment - January, 1997

4 Present Article 2 applies a "proximate cause" test, rather than a foreseeability test, for
5 recovery of personal injuries as consequential damages. The January draft of Article 2 does not
6 contain that provision so that the general foreseeability test also applies to personal injury.
7 There is probably no justification for Article 2A to refuse to follow that change.

8 Note that subdivision (3) is inaccurately drafted. The party in breach does not want to
9 prove that particular damages are "not unreasonably disproportionate to the risk assumed". It
10 wants to prove that the damages are unreasonably disproportionate. Subdivision (3) should read
11 something like: "(3) but, except for injury to the person, do not include damages the party in
12 breach establishes are unreasonably disproportionate to the risk assumed by it under the
13 contract."

14 The latest Article 2 draft deletes the reference to unreasonably disproportionate damages.

15 **SECTION 2A-708. SPECIFIC PERFORMANCE**

16 (a) A court may enter a decree for specific performance if the parties have expressly
17 agreed to that remedy, ~~or the~~ goods or the agreed performance of the defaulting party is
18 unique, or in other proper circumstances. However, if specific performance is expressly agreed
19 to, a decree for the rent may not be entered unless the conditions of Section 2A-722 are
20 satisfied.

21 (b) A decree for specific performance may include terms and conditions as to
22 payment of the rent, damages, or other relief the court considers just.

23 (c) A lessee has a right of replevin, detinue, sequestration, claim and delivery, or the
24 like to recover goods identified to the lease contract if, after reasonable efforts, the lessee is
25 unable to effect cover for the goods or the circumstances indicate that an effort to obtain cover
26 would be unavailing. (2-807, page 132)

Drafting Comment

The ELA memorandum, page 49, asks that the present. more specific language, in subsection (c) be retained.

The last sentence of subsection (a) was added to Article 2 in September, 1996. Do we agree that if the rent could be obtained under 2A-732, it can be obtained in an equity action (power of contempt)?

**SECTION 2A-709. CANCELLATION ~~AND TERMINATION~~; EFFECT OF
CANCELLATION, ~~TERMINATION~~, RESCISSION, OR FRAUD ON RIGHTS
AND REMEDIES.**

(a) [Except as provided in section (section on waiver)] If a party defaults under a lease contract, the aggrieved party may cancel the contract if the conditions of Section 2A-716 or 2A-724 are satisfied or the agreement so provides.

(b) Cancellation is not effective until the canceling party sends notice of cancellation to the other party.

(c) Upon cancellation, the lessee is subject to the same obligations and duties with respect to goods in its possession or control as the lessee would be if it had rejected a nonconforming tender and remained in control of the goods of the lessor or if the lease contract had terminated according to its own terms.

(d) Except as otherwise provided in subsection (e), upon cancellation ~~of the lease contract~~, all obligations that are still executory on both sides are discharged.

(e) The following survive cancellation:

(1) any right based on previous default;

(2) ~~any~~ limitation on the scope, manner, method, or location of the exercise of rights in goods;

(3) ~~any~~ limitation on disclosure of information;

1 (4) any obligation to return goods, if one exists, which obligation must be
2 promptly performed;

3 (5) ~~any~~ remedy for default on the whole contract or any unperformed
4 balance[; and

5 (6) other rights, remedies, or limitations if in the circumstances such survival
6 is necessary to achieve the purposes of the parties.]

7 (f) Unless a contrary intention clearly appears, ~~expressions~~ language of "cancellation,"
8 "rescission," or "avoidance" of the lease contract, or words of similar import ~~must not be~~
9 ~~construed as~~ [are][is] not a renunciation or discharge of any claim in damages for an
10 antecedent default. (2-808, page 133)

11 Drafting Comment - January, 1997

12 New subsection (e)(6) is an attempt to follow the direction of the 2A Drafting Committee
13 that it be made clear that the specific listing is not exclusive. There is probably a better way to
14 make the point. Possibly a comment would be sufficient.

15 **SECTION 2A-710. LIQUIDATION OF DAMAGES; DEPOSITS.**

16 (a) Damages for default, or any other act or omission, including indemnity for loss or
17 diminution of anticipated tax benefits or loss or damage to lessor's residual interest, may be
18 liquidated, but only at an amount or by a formula that is reasonable in light of either the actual
19 loss or the then anticipated loss caused by the default or other act or omission. If a term
20 liquidating damages ~~term~~ is unenforceable under this subsection, the aggrieved party has the
21 remedies provided in this article.

22 (b) If a lessor justifiably withholds or stops performance because of the lessee's
23 default or insolvency, the lessee is entitled to restitution of the amount by which the sum of
24 payments exceeds:

(1) the amount to which the lessor is entitled under a term liquidating damages in accordance with subsection (a);or

(2) in the absence of ~~those~~ such 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 that amount or \$500.

(c) A lessee's right to restitution under subsection (b) is subject to offset to the extent that the lessor establishes a right to recover damages under the provisions of this article other than subsection (a) and the amount or value of any benefits received by the lessee directly or indirectly by reason of the lease contract. (2-809, page 136)

Drafting Comment

The ELA memorandum, page 42, asks that this section specifically state that a deposit must be returned unless the lessor proves a right to retain under a liquidated damages clause or actual damages. Is the rule made clearer by changing "payments" to "deposit" or to "deposits and other payments?" A comment will make the point.

Revised 2-809, following the original code provisions, requires restitution of amounts of deposits over \$500 unless the seller can show actual damages in that amount. Article 2A, except in consumer leases, allows retention of 20% of the deposit, unlimited by the \$500 maximum. My notes don't indicate whether the Committee discussed that issue. Did we or do we adhere to the original 2A position?

SECTION 2A-711. CONTRACTUAL MODIFICATION OF REMEDIES.

(a) Subject to Section 2A-710 and except as otherwise provided in this Article, the following rules apply to contractual modification of a remedy:

(1) A lease agreement may add to, limit, or ~~provide a~~ substitute for the remedies provided in this article, ~~and may~~ or limit or alter the measure of damages recoverable under this article.

~~(2) An agreed remedy under paragraph (1) may not operate to deprive the aggrieved party of a minimum adequate remedy under the circumstances[, such as restitution for any benefits conferred on the party in breach].~~

(2) Resort to an agreed remedy under paragraph (1) is optional. However, if the parties expressly agree that the agreed remedy is exclusive, it is the sole remedy.

(b) If, because of a default or other circumstances, an exclusive, agreed remedy fails substantially to achieve the intended purposes of the parties, the following rules apply:

~~Alternative A~~

~~(1) In a lease other than a consumer lease, the aggrieved party, to the extent of the failure, may resort to remedies provided in this article but is bound by any other agreed remedy that is not dependent on the failed remedy.~~

~~Alternative B~~

(1) In a lease other than a consumer lease, ~~an~~ the aggrieved party may resort to all remedies provided in this article. ~~However, but~~ an agreement expressly providing that incidental or consequential damages, including those resulting from the failure to provide the limited remedy, are excluded is enforceable to the extent permitted under subsection (c).

end of alternatives

(2) In a consumer lease, an aggrieved party may reject the goods or revoke acceptance and, to the extent of the failure, ~~have other remedies permitted in Section 2A-710.~~ may resort to all remedies provided in this article notwithstanding the terms of the agreement.

(c) Subject to subsection (b), consequential damages ~~including injury to property, but excluding injury to a person,~~ and incidental damages may be limited or excluded by agreement, unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods [consumer lease] is prima facie unconscionable. (2-810, page 138)

Drafting Comment - January, 1997

At the October, 1996 meeting, the Committee voted to delete (a)(2) which is shown above stricken. If the Article 2 Committee declined to strike, we were to consider the matter again.

Bracketed Alternative B (now adopted by the Article 2 Committee rather than stricken alternative A) is new and has not been considered by the 2A Drafting Committee. The change in subsection (c) returns to the present code rule which also appears in 2A.

The comments to the final text should note that this section and the preceding section are mutually exclusive. That point is perhaps sufficiently made by the fact that subsection (a) states that the section is subject to 2A-709.

SECTION 2A-712. REMEDIES FOR MISREPRESENTATION OR FRAUD.

Remedies for material misrepresentation or fraud include all remedies available under this article for non-fraudulent default. Rescission or a claim for rescission of a lease contract and rejection or return of the goods do not bar ~~and are not inconsistent with~~ a claim for damages or other remedy. (2-811, page 142)

Drafting Comment - January, 1997

In Present 2A this section is a subsection of the section on cancellation (see 2A-707(g) in the Nov. 24, 1996 draft).

SECTION 2A-713. PROOF OF MARKET RENT: TIME AND PLACE.

(a) Damages based on market rent 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-722 and 2A-735.

(b) 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 following rules apply:

(1) The rent prevailing within any reasonable time before or after the time described may be used.

1 (2) The rent prevailing at any other place or for a different lease term which in
2 commercial judgment or under usage of trade is a reasonable substitute for ~~the one~~
3 ~~described~~ may be used, making ~~any~~ proper allowance for the difference, including the
4 cost of transporting the goods to or from the other place.

5 (c) Evidence of a relevant rent prevailing at another time or place or for a lease term
6 other than the one described in this section offered by one party is not admissible unless the
7 party has given the other party notice that the court finds sufficient to prevent unfair surprise.

8 (d) If the prevailing rent or value of any goods regularly leased in any established
9 market is in dispute, reports in official publications or trade journals or in newspapers,
10 periodicals, or other means of communication in general circulation and published as the
11 reports of that market are admissible in evidence. The circumstances of the preparation of the
12 report may be shown to affect the weight of the evidence but not its admissibility. (2-812, page
13 143)

14 **SECTION 2A-714. STANDING TO MAINTAIN ACTION AGAINST THIRD**
15 **PARTY FOR INJURY TO GOODS.**

16 (a) If a third party deals with goods ~~that have been~~ identified to a lease contract and
17 causes actionable injury to the goods, the lessor has a right of action against the third party,
18 and the lessee has a right of action against the third party, if the lessee:

- 19 (1) has a security interest in the goods;
20 (2) has an insurable interest in the goods; or
21 (3) bears the risk of loss under the lease contract or has since the injury
22 assumed that risk as against the lessor and the goods have been converted or
23 destroyed.

1 (b) If at the time of the injury the plaintiff did not bear the risk of loss as against the
2 other party to the lease contract and there is no arrangement between them for disposition of
3 the recovery, any recovery or settlement is, subject to ~~its own~~ the plaintiff's interest, as fiduciary
4 for the other party to the lease contract.

5 (c) Either party, with the consent of the other, may maintain an action for the benefit of
6 an interested party. (2-813, page 144)

7 Drafting Comment - January, 1997

8 The final text will contain a comment that "injury to the goods" includes a breach which
9 does not physically harm the goods, but which causes loss to one or more of the parties who
10 have an interest in the goods.

11 **SECTION 2A-715. STATUTE OF LIMITATIONS.**

12 (a) An action for default under a lease contract, including breach of warranty or
13 indemnity, must be commenced within four years after the right of action has accrued. The
14 parties to the original agreement may not extend the four year limitation period. Except in a
15 consumer lease for an action for indemnity, the parties ~~in~~ to the original lease agreement may
16 reduce the period of limitations to not less than one year ~~but may not extend it.~~

17 (b) Except as otherwise provided in subsection (c), a right of action accrues when the
18 act or omission on which the default or breach of warranty is based is or should have been
19 discovered by the aggrieved party, or when the default occurs, whichever is later. A right of
20 action for indemnity accrues when the act or omission on which the claim for indemnity is based
21 is or should have been discovered by the indemnified party, whichever is later.

22 (c) If a breach of warranty occurs, and the lessor or supplier, after delivery, attempts to
23 conform goods to the contract and fails, the period of limitation is tolled during the time of the
24 attempt.

1 (d) If an action commenced within the applicable period of limitation is terminated but a
2 remedy by another action for the same default or breach of warranty or indemnity is available,
3 the other action may be commenced after the expiration of the ~~period~~ time limitation and within
4 six months after the termination of the first action unless the termination resulted from voluntary
5 discontinuance or from dismissal for failure to prosecute.

6 (e) This section does not alter ~~other~~ the law on tolling of the statute of limitations and
7 does not apply to a right of action that accrued before this article took effect. (2-814, page 145)

8 Drafting Comment - January, 1997

9 The second sentence of subsection (b) appears in exactly this form in present 2A.
10 However, the "whichever is later" doesn't make sense, does it? Can a plaintiff who has
11 discovered the breach claim that the statute of limitations doesn't start running because he
12 shouldn't have discovered it until later? Should we delete the "whichever is later" language?

13 **[B. LESSOR'S REMEDIES]**

14 **SECTION 2A-716. LESSOR'S REMEDIES IN GENERAL.**

15 (a) If a lessee wrongfully rejects or revokes acceptance of goods or fails to make a
16 payment when due or repudiates with respect to a part or the whole, the lessee is in default
17 under the lease contract with respect to any goods involved, and with respect to all of the goods
18 if under an installment lease contract the value of the whole lease contract is substantially
19 impaired, and the lessor may:

20 (1) withhold delivery of the goods and take possession of goods previously
21 delivered;

22 (2) stop delivery of the goods by any bailee;

23 (3) proceed respecting goods not identified to the lease contract;

24 (4) dispose of the goods and recover damages or retain the goods and
25 recover damages, or in a proper case recover rent;

26 (5) cancel the lease contract;

1 (6) exercise any other rights or pursue any other remedies provided in the
2 lease agreement.

3 (b) If a lessor does not fully exercise a right or obtain a remedy to which the lessor is
4 entitled under subsection (a), the lessor may recover the loss resulting in the ordinary course of
5 events from the lessee's default as determined in any reasonable manner, together with
6 incidental damages, less expenses avoided as a result of the lessee's default.

7 (c) If a lessee is otherwise in default under a lease contract, the lessor may exercise
8 the rights and pursue the remedies provided in the lease agreement, which may include a right
9 to cancel the lease. In addition, except as otherwise provided in the lease agreement:

10 (1) if the default substantially impairs the value of the lease contract to the
11 lessor, the lessor may exercise the rights and pursue the remedies provided in
12 subsection (a) or (b); or

13 (2) if the default does not substantially impair the value of the lease contract
14 to the lessor, the lessor may recover as provided in subsection (b). (2-815, page 148)

15 **SECTION 2A-717. LESSOR'S RIGHT TO POSSESSION OF GOODS.**

16 ~~(a) A lessor that discovers that the lessee is insolvent may refuse to deliver the goods.~~

17 (a) After a default by the lessee under the lease contract of the type described in
18 Section 2A-716(a) or (c)(1) or, if agreed, after other default by the lessee, the lessor has the
19 right to take possession of the goods. If the lease agreement so provides, the lessor may
20 require the lessee to assemble the goods and make them available to the lessor at a place to
21 be designated by the lessor which is reasonably convenient to both parties. Without removal,
22 the lessor may render unusable any goods employed in trade or business and may dispose of
23 goods on the lessee's premises.

1 (b) A lessor may proceed under subsection (b) without judicial process if it can be
2 done without breach of the peace or the lessor may proceed by action. (2-816, page 150)

3 Drafting Comment

4 In revised Article 2, subsection (a) is moved to the stoppage in transit section, should
5 that be done here? I have done so.

6 **SECTION 2A-718. LESSOR'S RIGHT TO IDENTIFY GOODS TO LEASE CONTRACT**
7 **NOTWITHSTANDING DEFAULT OR TO SALVAGE UNFINISHED GOODS.**

8 (a) After default by the lessee under the lease contract of the type described in Section
9 2A-716(a) or (c)(1) or, if agreed, after other default by the lessee, the lessor may:

10 (1) identify to the lease contract conforming goods not already identified if
11 they are in the lessor's or supplier's possession or control at the time the lessor learned
12 of the default; and

13 (2) dispose of goods that are shown to have been intended for the particular
14 lease contract, even if they are unfinished.

15 (b) If the goods are unfinished at the time of default, an aggrieved lessor or the
16 supplier, in the exercise of reasonable commercial judgment to minimize loss and for the
17 purpose of effective realization, may complete manufacture and wholly identify the goods to the
18 lease contract, cease manufacture and lease, sell, or otherwise dispose of the goods for scrap
19 or salvage value, or proceed in any other reasonable manner. (2-817, page 153)

20 **SECTION 2A-719. LESSOR'S REFUSAL TO DELIVER BECAUSE OF LESSEE'S**
21 **INSOLVENCY; STOPPAGE OF DELIVERY IN TRANSIT OR OTHERWISE.**

22 (a) A lessor that discovers that the lessee is insolvent may refuse to deliver the goods.

23 (b) Subject to subsection (d), a lessor may stop delivery of goods in the possession of
24 a carrier or other bailee if the lessee is insolvent or repudiates or fails to make a payment due

1 before delivery, whether for rent, security, or otherwise under the lease contract or if, for any
2 other reason, the lessor has a right to withhold or reclaim the goods.

3 (c) As against a lessee under subsection (b), the lessor may stop delivery until:

4 (1) receipt of the goods by the lessee; or

5 (2) acknowledgment to the lessee by any bailee of the goods, other than a
6 carrier, or a carrier by reshipment or as a warehouseman, that the bailee holds the
7 goods for the lessee.

8 (d) If notice to stop delivery has been given, the following rules apply:

9 (1) The notice must afford the carrier or ~~a~~ bailee a reasonable opportunity to
10 prevent delivery of the goods.

11 (2) After notification, the carrier or bailee shall hold and deliver the goods
12 according to the directions of the lessor. ~~However,~~ The lessor is liable to the bailee or
13 carrier for any ~~ensuing~~ resulting charges or damages. A carrier or bailee is not
14 obligated to stop delivery if the lessor does not provide indemnity for charges or
15 damages upon the carrier's or bailee's demand.

16 (3) A carrier or bailee that has issued a nonnegotiable document need not
17 obey a notification to stop received from a person other than the person named in the
18 document as the person from which the goods have been received for shipment or
19 storage. (2-818, page 154)

20 Drafting Comment - January, 1997

21 2A omitted any reference to negotiable documents of title in this section because of an
22 assumption that they would not be used in leasing transactions. I assume we will continue to
23 do so.

24 **SECTION 2A-720. LESSOR'S RIGHTS TO DISPOSE OF GOODS.**

1 (a) After a default by a lessee under the lease contract of the type described in Section
2 2A-716(a) or (c)(1), or after the lessor refuses to deliver or takes possession of goods under
3 2A-717 or 2A-719, or, if agreed, after other default by a lessee, the lessor may dispose of the
4 goods concerned or the undelivered balance thereof by lease, sale, or otherwise.

5 (b) Except as otherwise provided with respect to damages liquidated in the lease
6 agreement or otherwise determined pursuant to agreement of the parties, if the disposition is by
7 lease agreement substantially similar to the original lease agreement and the new lease
8 agreement is made in good faith and in a commercially reasonable manner, the lessor may
9 recover from the lessee as damages compensation for:

10 (1) accrued and unpaid rent as of the date of the commencement of the term
11 of the new lease agreement;

12 (2) the present value, as of the same date, of the total rent for the then
13 remaining lease term of the original lease agreement, minus the present value, as of
14 the same date, of the rent under the new lease agreement applicable to that period of
15 the new lease term which is comparable to the then remaining term of the original lease
16 agreement; and

17 (3) any incidental damages allowed under Section 2A-706, less expenses
18 avoided as a result of the lessee's default.

19 (c) If the lessor's disposition is by a lease agreement that for any reason does not
20 qualify for treatment under subsection (b), or is by sale or otherwise, the lessor may recover
21 from the lessee as if the lessor had elected not to dispose of the goods, and Section 2A-721
22 governs.

23 (d) A person that subsequently buys or leases from the lessor in good faith for value
24 as a result of a disposition under this section takes the goods free of the original lease contract

1 and any rights of the original lessee, even if the lessor fails to comply with one or more of the
2 requirements of this article.

3 (e) A lessor is not accountable to the lessee for any profit made on any disposition.
4 A lessee that has rightfully rejected or justifiably revoked acceptance shall account to the
5 lessor for any excess over the amount of the lessee's security interest. (2-819, page 157)

6 **SECTION 2A-721. LESSOR'S DAMAGES FOR NONACCEPTANCE,**
7 **FAILURE TO PAY, REPUDIATION, OR OTHER DEFAULT.**

8 (a) Except as otherwise provided with respect to damages liquidated in the lease
9 agreement or otherwise determined pursuant to agreement of the parties, if a lessor elects to
10 retain the goods or a lessor elects to dispose of the goods and the disposition is by lease
11 agreement that for any reason does not qualify for treatment under Section 2A-720(b), or is by
12 sale or otherwise, the lessor may recover from the lessee as damages for a default of the type
13 described in Section 2A-716(a) or (c)(1), or, if agreed, for other default of the lessee,
14 compensation for:

15 (1) accrued and unpaid rent as of the date specified in subsection (b) if the lessee has
16 never taken possession of the goods, or, if the lessee has taken possession of the goods, as of
17 the date the lessor repossesses the goods or an earlier date on which the lessee makes a
18 tender of the goods to the lessor;

19 (2) the present value as of the date determined under paragraph (1) of the total rent for
20 the then remaining lease term of the original lease agreement minus the present value as of the
21 same date of the market rent at the place where the goods are located computed for the same
22 lease term; and

23 (3) any incidental or consequential damages allowed under Sections 2A-706 and Section
24 2A-707, less expenses avoided as a result of the lessee's default.

1 (b) Market rent under subsection (a)(1) is to be determined as of the times specified
2 according to the following rules:

3 (1) If the case comes to trial after the agreed time for ~~performance~~ acceptance of the
4 goods by the lessee, the following rules apply:

5 (A) If the default is other than by repudiation the market rent is determined as of the
6 time the lessor learned of the default.

7 (B) If the default is by repudiation, market rent is determined as of the time for
8 acceptance of the goods by the lessee.

9 (2) If the case comes to trial before the agreed time for ~~performance~~ for acceptance of
10 the goods by the lessee, the time for determining market rent is the time when a commercially
11 reasonable period of time after the lessor learned of the repudiation has expired.

12 ~~(c) A lessor may recover damages measured by other than the market rent including~~
13 ~~the present value of the profit, including reasonable overhead, the lessor would have made~~
14 ~~from full performance by the lessee, together with any incidental damages allowed under~~
15 ~~Section 2A-722, due allowance for costs reasonably incurred and due credit for payments or~~
16 ~~proceeds of disposition.~~

17 (c) A lessor may recover damages measured by other than the market rent including:

18 (1) the present value of the profit, including reasonable overhead, the lessor
19 would have made from full performance by the lessee, determined in any reasonable
20 manner, together with any incidental and consequential damages, and allowed under
21 Section 2A-722, due allowance for costs reasonably incurred and due credit for
22 payments or proceeds of disposition.

1 (2) reasonable expenditures made in preparing for or performing the contract
2 if, after the breach the lessor is unable to obtain reimbursement by salvage, real, or
3 other reasonable measures. (2-821, page 160)

4 Drafting Comment - January, 1997

5 Late last year, the Article 2 Committee adopted the rule that in the case of a
6 repudiation, if the action comes to trial after the time for performance, damages were to be
7 measured as of the time for performance, rather than at the time the seller learned of the
8 breach plus a reasonable time. That rule has been adopted here for Article 2A. .

9
10 The language here, however, is substantially different than the language in Article 2.
11 Does the language here state the rule in an understandable way?

12 **SECTION 2A-722. LESSOR'S ACTION FOR THE RENT.**

13 (a) Upon a default by the lessee under the lease contract of the type described in
14 Section 2A-716(a) or (c)(1) or, if agreed, upon another default by the lessee, if the lessor
15 complies with subsection (b), the lessor may recover from the lessee as damages:

16 (1) goods accepted by the lessee and not repossessed by or tendered to the
17 lessor, and for conforming goods lost or damaged ~~within a commercially reasonable~~
18 ~~time~~ after risk of loss passes to the lessee but if the lessor has retained or regained
19 control of the goods, the loss or damage must occur within a commercially reasonable
20 time after the risk of loss has passed to the lessee:

21 (A) accrued and unpaid rent as of the date of entry of judgment in
22 favor of the lessor;

23 (B) the present value as of the same date of the rent for the then
24 remaining lease term of the lease agreement; and

25 (C) any incidental damages allowed under Section 2A-706, less
26 expenses avoided as a result of the lessee's default; and

1 (2) for goods identified to the lease contract if the lessor is unable after
2 reasonable effort to dispose of them at a reasonable price or the circumstances
3 reasonably indicate that effort will be unavailing:

4 (A) accrued and unpaid rent as of the date of entry of judgment in
5 favor of the lessor;

6 (B) the present value as of the same date of the rent for the then
7 remaining lease term of the lease agreement; and

8 (C) any incidental damages allowed under Section 2A-706, less
9 expenses avoided as a result of the lessee's default.

10 (b) Except as otherwise provided in subsection (c), a lessor shall hold for the lessee for
11 the remaining lease term of the lease agreement any goods that have been identified to the
12 lease contract and are in the lessor's control.

13 (c) A lessor may dispose of the goods at any time before collection of the judgment for
14 damages obtained pursuant to subsection (a). If the disposition is before the end of the
15 remaining lease term of the lease agreement, the lessor's recovery against the lessee for
16 damages is governed by Section 2A-720 or Section 2A-721, and the lessor shall cause an
17 appropriate credit to be provided against a judgment for damages to the extent that the amount
18 of the judgment exceeds the recovery available under Section 2A-720 or 2A-721.

19 (d) Payment of the judgment for damages obtained pursuant to subsection (a) entitles
20 the lessee to the use and possession of the goods not then disposed of for the remaining lease
21 term of, and in accordance with, the lease agreement.

22 (e) After default by the lessee under the lease contract of the type described in Section
23 2A-716(a) or (c)(1) or, if agreed, after other default by the lessee, a lessor that is held not

entitled to rent under this section must nevertheless be awarded damages for nonacceptance under Section 2A-720 or 2A-721. (2-822, page 164)

SECTION 2A-723. LESSOR'S RIGHTS TO RESIDUAL INTEREST.

In addition to any other recovery permitted by this article or other law, a lessor may recover from a 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 lessee's default.

[C. ~~DEFAULT BY LESSOR~~] LESSEE'S REMEDIES

SECTION 2A-724. LESSEE'S REMEDIES IN GENERAL; LESSEE'S SECURITY INTEREST IN REJECTED GOODS.

(a) If a lessor fails to deliver the goods in conformity to the lease contract or repudiates the contract, or a lessee rightfully rejects the goods, or justifiably revokes acceptance of the goods, 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, the lessor is in default under the lease contract, and the lessee may:

- (1) cancel the lease contract;
- (2) recover so much of the rent and security as has been paid and is just under the circumstances;
- (3) cover and obtain damages as to all goods affected, whether or not they have been identified to the lease contract as provided in Sections 2A-734, 2A-706 and 2A-707;
- (4) recover damages for nondelivery as provided in Sections 2A-735, 2A-706 and 2A-707;
- (5) if an acceptance of goods has not been justifiably revoked, recover damages for default with regard to accepted goods under 2A-736.

1 (6) exercise any other rights or pursue any other remedy provided in the
2 lease contract.

3 (b) If a lessor fails to deliver or repudiates the lease contract, the lessee may also:

4 (1) recover identified goods under Section 2A-737; or

5 (2) in a proper case, obtain specific performance or replevy the goods under
6 Section 2A-708.

7 (c) If a lessor is otherwise in default under a lease contract, the lessee may exercise
8 the rights and pursue the remedies provided in the lease agreement, which may include a right
9 to cancel the lease, and those in Section 2A-736(a).

10 (d) If a lessor has breached a warranty, whether express or implied, the lessee may
11 recover damages under Section 2A-736(b).

12 (e) On rightful rejection or justifiable revocation of acceptance, a lessee has a security
13 interest in goods in the lessee's possession or control for any rent and security that has been
14 paid and any expenses reasonably incurred in their inspection, receipt, transportation, care, and
15 custody. In that case, the lessee may hold the goods and dispose of them in good faith and in a
16 commercially reasonable manner, subject to Section 2A-720(e).

17 (f) Subject to Section 2A-607, a lessee, on so notifying the lessor, may deduct all or
18 any part of the damages resulting from any default under the lease contract from any part of the
19 rent still due under the same contract. (2-823, page 166)

20 **SECTION 2A-725. LESSEE'S RIGHTS ON IMPROPER DELIVERY;**

21 **RIGHTFUL REJECTION.**

22 (a) Subject to Section 2A-726, if goods or the tender or delivery fail in any respect to
23 conform to the lease contract, a lessee may:

24 (1) reject the whole;

1 (2) accept the whole; or

2 (3) accept any commercial unit or units and reject the rest.

3 (b) A Rejection under subsection (a) is not effective unless the lessee notifies the
4 ~~lessor is notified~~ within a reasonable time after [tender or delivery] the nonconformity was or
5 should have been discovered.] (2-703, page 98)

6 **SECTION 2A-726. INSTALLMENT LEASE CONTRACTS: REJECTION**

7 **AND DEFAULT.**

8 (a) In this section, "installment lease contract" means a lease contract in which the
9 terms require or the circumstances permit the delivery of goods in separate lots to be
10 separately accepted, even if the lease agreement requires payment other than in installments
11 or contains a term "Each delivery is a separate lease" or ~~its equivalent~~ or words of similar
12 import.

13 (b) A lessee may reject any nonconforming installment of delivery of goods in Under
14 ~~an installment lease contract a lessee may reject any delivery that is nonconforming if the~~
15 ~~nonconformity substantially impairs the value of that installment to the buyer and cannot be~~
16 ~~cured or the nonconformity is a defect in the required document. However, if the a~~
17 ~~nonconforming tender by the lessor is not a breach of the whole contract does not fall within~~
18 ~~subsection (c), and the lessor or the supplier gives adequate assurance of its cure, the lessee~~
19 shall accept that installment.

20 (c) If a nonconformity or default with respect to one or more installments in an
21 installment contract is a breach of the whole contract, the aggrieved party may cancel the
22 contract. ~~substantially impairs the value of the whole lease contract, there is a default of the~~
23 ~~whole.~~ However, the power to cancel the contract for default is waived, or a canceled contract
24 is reinstated, if the aggrieved party accepts a nonconforming installment without seasonably

1 ~~giving notice of notifying~~ of cancellation, ~~or~~ brings an action with respect only to past
2 installments, or demands performance as to future installments. (2-710, page 112)

3 **SECTION 2A-727. MERCHANT LESSEE'S DUTIES; LESSEE'S OPTIONS**

4 **AS TO SALVAGE.**

5 (a) Subject to a lessee's security interest under Section 2A-724(e), if the lessor or
6 supplier does not have an agent or place of business at the market where the goods were
7 rejected or acceptance was revoked, a merchant lessee, after rejection or revocation of
8 acceptance, shall follow any reasonable instructions received from the lessor or supplier with
9 respect to goods in the lessee's possession or control and in the absence of ~~these~~ such
10 instructions, ~~a merchant lessee~~ shall make a reasonable effort to sell, lease, or otherwise
11 dispose of the goods for the lessor's account if they threaten to decline speedily in value.
12 Instructions are not reasonable if on demand indemnity for expenses is not forthcoming ~~on~~
13 ~~demand~~.

14 (b) ~~If a lessee, whether merchant or not, disposes of goods, the lessee~~ A merchant
15 lessee that sells goods under subsection (a) is entitled to reimbursement from the lessor, or
16 supplier, or out of the proceeds, for the reasonable expenses of caring for and disposing of
17 them. If the expenses do not include a disposition commission, the lessee is entitled to a
18 commission usual in the trade, or if there is none, to a reasonable sum not exceeding 10
19 percent of the gross proceeds.

20 (c) Subject to subsection (a), if a lessor or supplier does not give instructions within a
21 reasonable time after notification of rejection or revocation of acceptance, ~~the~~ a merchant
22 lessee, whether a merchant or not, or a non-merchant in any case, may store the rejected
23 goods for the account of the lessor or supplier, reship them to the lessor or supplier, or resell

1 them for the account of the lessor or supplier, with reimbursement as provided in subsection
2 (b).

3 (d) In complying with this section or Section 2A-728, the lessee shall act in good faith.
4 Conduct in good faith under this section does not constitute acceptance or conversion and may
5 not be the basis of a claim for damages.

6 (e) A purchaser that purchases in good faith from a lessee pursuant to this section or
7 Section 2A-728 takes the goods free of any rights of the lessor and the supplier, even if the
8 lessee fails to comply with the requirements of this article. (2-705, page 102)

9 **SECTION 2A-728. LESSEE'S DUTIES AS TO RIGHTFULLY REJECTED GOODS.**

10 (a) Subject to Section 2A-727, a lessee that, before rejection or revocation of
11 acceptance, takes physical possession or control of goods other than those in which there is a
12 security interest under Section 2A-724(e)), after a rightful rejection or justifiable revocation of
13 acceptance, shall hold the goods with reasonable care at the disposal of the lessor or supplier
14 for a sufficient time to permit the lessor or supplier to remove them. However, the lessee has no
15 further obligation with regard to the goods.

16 (b) If a lessee uses the goods after a rightful rejection or a justifiable revocation of
17 acceptance, the following rules apply:

18 (1) Any use by the lessee which is inconsistent with the interest of the lessor
19 or supplier in the goods or with the lessee's claim of rejection or revocation of
20 acceptance and is unreasonable under the circumstances is an acceptance if ratified
21 by the lessor or supplier.

22 (2) If use of the goods is not an acceptance, the lessee, upon returning or
23 disposing of the goods, in appropriate circumstances, shall pay the lessor or supplier

1 the reasonable value of the use to the lessee. That value must be deducted from any
2 damages to which the buyer is otherwise entitled under this article.

3 (c) A lessee in possession that wrongfully rejects but does not accept goods is subject
4 to subsection (b)(1) and the duty of care in subsection (a). (2-704, page 100)

5 Drafting Comment

6 The ELA memorandum, page 45, objects to including (b)(1) in the statute. That group
7 doesn't want the statutory language to suggest that actual use by the lessee might not be a use
8 "under the lease", but rather a use to mitigate damages.

9 **SECTION 2A-729. CURE.**

10 (a) ~~If a~~ the lessee rightfully rejects a tender of delivery under Section 2A-725 [or 2A-
11 726] or justifiably revokes an acceptance under Section 2A-733 and the agreed time for
12 performance has not expired, the lessor or supplier, upon reasonable notice to the buyer and at
13 its own expense, may cure any breach by making a conforming tender of delivery within the
14 agreed time. ~~as follows:~~

15 ~~(1) If the agreed time for performance has not expired, the lessor or supplier~~
16 ~~may tender a conforming delivery within the agreed time.~~

17 ~~————— (2) If the agreed time for performance has expired, the lessor or supplier may~~
18 ~~provide a cure that is appropriate and timely under the circumstances.~~

19 (b) If the lessee rightfully rejects goods or a tender of delivery under Section 2A-725
20 and if the agreed time for performance has expired, the lessor or supplier, upon reasonable
21 notice to the lessee and at its own expense, may cure a default by making a tender of
22 conforming goods within a reasonable time if

23 Alternative A

24 such tender does not substantially impair the value of the contract to the buyer.

25 Alternative B

1 the lessor or supplier had reasonable grounds to believe that a nonconforming tender would be
2 acceptable to or be accepted by the lessee.

3 (c) If the lessee has justifiably revoked acceptance under 2A-733(a)(2) and if the time
4 for performance has expired, the lessor or supplier, upon seasonable notice to the lessee and
5 at its own expense, may cure any default by making a tender of conforming goods within a
6 reasonable time if

7 Alternative A

8 such retender does not substantially impair the value of the contract to the buyer.

9 Alternative B

10 the seller establishes that the lessee will not be harmed if it accepted the tender. (See 2-709)

11 Drafting Comment

12 **SECTION 2A-730. WAIVER OF LESSEE'S OBJECTIONS.**

13 (a) Except as otherwise provided in this section, a party that knows that the other
14 party's performance constitutes a default but accept that performance and fails within a
15 reasonable time to object is precluded from relying on the default to cancel the contract.
16 However, acceptance of that performance and failure to object do not preclude a claim for
17 damages unless the party in breach has changed its position reasonably and in good faith in
18 reliance of the aggrieved party's inaction.

19 (b) A failure to object to a nonconforming performance under subsection (a) does not
20 foreclosure objection to the same or a similar default in future performances of like kind unless
21 the party foreclosed expressly so states.

22 (c) A lessee's failure to state, in connection with a rejection under Section 2A-725 or
23 2A-726 or a revocation of acceptance under 2A-727, a particular nonconformity that is

ascertainable by reasonable inspection precludes reliance on the unstated nonconformity to justify rejection or revocation of acceptance or to establish default if:

(1) the lessor, upon a seasonable particularization, had a right to cure under Section 2A-729 and would have cured the nonconformity; or

(2) between merchants, the lessor or the supplier after rejection or revocation of acceptance has made a request in a record for a full and final ~~recorded~~ statement in a record of all nonconformities on which the lessee proposes to rely. (2-702, page 75)

SECTION 2A-731. ACCEPTANCE OF GOODS.

(a) Goods are accepted if a lessee:

(1) states to the lessor or supplier at any time that the goods are accepted;

(2) after a reasonable opportunity to inspect the goods signifies to the lessor or the supplier that the goods conform or will be taken or retained in spite of their nonconformity;

(3) after a reasonable opportunity to inspect the goods, fails to make an effective rejection; or

(4) either before or after rejection or revocation of acceptance, does any unreasonable act inconsistent with the interest of the lessor or supplier in the goods or the lessor's claim of rejection or revocation of acceptance and that act is ratified by the lessor or supplier as an acceptance.

(b) Acceptance of a part of ~~any~~ a commercial unit is acceptance of the entire unit.

(See 2-706, page 103)

SECTION 2A-732. 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) A lessee shall pay rent in accordance with the lease contract for any goods
2 ~~accepted in accordance with the lease contract~~

3 (b) Acceptance of goods by a lessee precludes rejection of the goods accepted but
4 does not by itself preclude any other remedy for nonconformity provided by this article or the
5 lease agreement.

6 (c) If a tender has been accepted, the following rules apply:

7 (1) The lessee, within a reasonable time after the lessee discovers or should
8 have discovered a default, shall notify the lessor and the supplier, if any, of the claimed
9 default. However, a failure to give notice bars the lessee from a remedy only to the
10 extent that the party entitled to notice establishes that it was prejudiced by the failure.

11 (2) Except in the case of a consumer lease, if ~~the a claim is one for~~
12 infringement or the like is made against a lessee for which a lessor or supplier is
13 answerable over, the lessee shall notify the lessor or supplier within a reasonable time
14 after receiving notice of the litigation or be barred from any remedy over for liability
15 established by the litigation. ~~and as a result of the default the lessee is sued, the lessee~~
16 ~~shall so notify the lessor or the supplier, if any, within a reasonable time after receiving~~
17 ~~notice of the litigation or be barred from any remedy over for liability established by the~~
18 ~~litigation.~~

19 (3) A lessee has the burden of establishing a default with respect to goods
20 accepted.

21 (d) In a claim ~~if a lessee is sued~~ for breach of a warranty, indemnity, or other obligation
22 against the lessee ~~for which its lessor or supplier~~ another party is answerable over, the
23 following rules apply:

1 (1) The lessee may give ~~its lessor or supplier, or both,~~ notice ~~in a record~~ of
2 the litigation to the other party in a record, and the person notified may then give similar
3 notice of the litigation to any other person who is answerable over. If the notice invites
4 the person notified to intervene in the litigation and states that ~~if the person notified~~
5 ~~does not do so that person~~ failure to do so will bind the person notified in any action
6 later brought by the lessor as to ~~the bound in any action against that person by the~~
7 ~~lessee by~~ any determination of fact common to the two actions, the person notified is
8 so bound, unless ~~that person~~, after seasonable receipt of the notice, the person
9 notified intervenes in the litigation and defends.

10 (2) If the claim is one for infringement or the like, the original lessor or
11 supplier may demand in a record that its lessee turn over control of the litigation,
12 including settlement, or otherwise be barred from any remedy over. If the lessor or the
13 supplier also agrees to bear all expense and to satisfy any adverse judgment, the
14 lessee is so barred unless, after seasonable receipt of the demand, control is turned
15 over to the lessor or supplier.

16 (f) Subsections (c) through (e) apply to an obligation of a lessee to hold the lessor or
17 the supplier harmless against infringement or the like. (2-707, page 105)

18 **SECTION 2A-733. REVOCATION OF ACCEPTANCE OF GOODS.**

19 (a) A lessee may revoke acceptance of a lot or commercial unit whose nonconformity
20 substantially impairs its value to the lessee if accepted:

21 (1) except in the case of a finance lease, on the reasonable assumption that
22 its nonconformity would be cured and it has not been seasonably cured; or

(2) without discovery of the nonconformity if acceptance was reasonably induced by the lessor's assurances or, except in the case of a finance lease, by the difficulty of discovery before acceptance.

(b) 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.

(c) If the lease agreement so provides, the lessee may revoke acceptance of a lot or commercial unit because of other defaults by the lessor.

(d) To be effective, a lessee's acceptance must be revoked 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 there~~ own defects. The revocation is not effective until the lessee notifies the lessor of it.

[(e) A lessee that justifiably revokes acceptance has the same rights and duties with regard to the goods involved under Sections 2A- 727—~~through~~ and 2A-728 as if they had been rejected.] (2-708, page 108)

Drafting Comment - January, 1997

Subsection (e) is bracketed. It is probably not needed since 2A-727 and 728 both state that they apply after revocation of acceptance. The subsection is probably also not necessary in the Article 2 section.

The final text will contain a comment on revocation of acceptance in finance leases. It will point out that that a lessee cannot revoke against a finance lessor unless the lessee has been induced to accept by the finance lessor's assurances. However, the lessee may be able to get the agreement of the finance lessor to take the goods back and revoke the finance lessor's acceptance as against the supplier.

SECTION 2A-734. COVER; SUBSTITUTE GOODS.

(a) After a default by a lessor under the lease contract of the type described in Section 2A-724(a), or, if agreed, after other default by the lessor, the lessee may cover by making in

1 good faith and without unreasonable delay any purchase or lease of or contract to purchase or
2 lease comparable goods to substitute in substitution for those due from the lessor.

3 (b) Except as otherwise provided with respect to damages liquidated in the lease
4 agreement or determined pursuant to agreement of the parties, if a ~~lessee's cover is by a lease~~
5 ~~contract substantially similar to the original lease contract and the new lease contract is made in~~
6 ~~good faith and in a commercially reasonable manner,~~ lessee that covers in the manner required
7 by subsection (a);

8 (1) the lessee may recover from the lessor as damages measured by ~~(1) the~~
9 present value, as of the date of the commencement of the term of the new lease
10 contract, of the rent under the new lease contract applicable to that period of the new
11 lease term which is comparable to the then remaining term of the original lease
12 contract minus the present value as of the same date of the total rent for the then
13 remaining lease term of the original lease contract ~~and together with~~ (2) any incidental
14 or consequential damages, less expenses avoided as a result ~~saved in consequence of~~
15 the lessor's default;and

16 (2) may not recover damages under 2A-735.

17 (c) ~~If a lessee's cover is by a lease agreement that for any reason does not qualify for~~
18 ~~treatment under subsection (b), or is by purchase or otherwise, the lessee may recover from~~
19 ~~the lessor as if the lessee had elected not to cover, and Section 2A-721 governs.~~

20 A lessee that does not cover or that covers in good faith but fails to cover in a manner
21 required under subsection (a) is not barred from any other available remedy.

22 (2-825, page 169)

23 Drafting Comment - January, 1997

1 Revised subsection (c) implies that after a "bad faith" cover, the lessee loses other
2 remedies. Is that reasonable? The present rule is that the new lease agreement, for any
3 reason, fails to qualify as cover, remedy under the other provisions is available.
4

5 **SECTION 2A-735. LESSEE'S DAMAGES FOR NONDELIVERY, REPUDIATION,**
6 **DEFAULT, AND BREACH OF WARRANTY IN REGARD TO ACCEPTED GOODS.**

7 (a) Except as otherwise provided with respect to damages liquidated in the lease
8 agreement or otherwise determined pursuant to agreement of the parties, if a lessee elects not
9 to cover or a lessee elects to cover and the cover is by lease agreement that for any reason
10 does not qualify for treatment under Section 2A-734(b), or is by purchase or otherwise, the
11 measure of damages for nondelivery or repudiation by the lessor or for rejection or revocation
12 of acceptance by the lessee is the present value, as of the date specified in subsection (b) and
13 at the place specified in subsection (c), of the then market rent, minus the present value as of
14 the same date of the original rent, computed for the remaining lease term of the original lease
15 agreement, together with incidental and consequential damages, less expenses saved in
16 consequence of the lessor's default.

17 (b) Market rent is to be determined as of the times specified by the following rules:

18 (1) If the case comes to trial after the agreed time for performance, market
19 rent is determined at the time of the breach or when the lessee learned of the breach,
20 whichever is later. ~~the following rules apply:~~

21 ~~————— (A) If the default is other than by repudiation market rent is~~
22 ~~determined as of the time the lessee learned of the default.~~

23 ~~————— (B) If the default is by repudiation, market rent is determined as of~~
24 ~~the time for performance.~~

1 (2) If the case comes to trial before the agreed time for performance, the time
2 for determining market rent is the time [when a commercially reasonable period of time
3 after] the lessee learned of the ~~repudiation~~ default [has expired].

4 (c) Market rent is determined as of the place for tender, ~~or However~~, in cases of
5 rejection after arrival or revocation of acceptance, ~~as of it is determined at~~ the place of arrival.

6 (2-826, page 171)

7 **SECTION 2A-736. LESSEE'S DAMAGES FOR DEFAULT REGARDING**
8 **ACCEPTED GOODS.**

9 (a) Except as otherwise agreed, a lessee that has accepted goods and given notice
10 pursuant to Section 2A-732(c), may recover as damages for any nonconforming tender or other
11 default by a lessor the loss resulting in the ordinary course of events from the lessor's default
12 as determined in any reasonable manner, ~~together with incidental and consequential damages,~~
13 ~~less expenses avoided as a result of the lessor's default.~~

14 (b) Except as otherwise agreed, the measure of damages for breach of warranty is the
15 present value at the time and place of acceptance of the difference between the value of the
16 use of the goods accepted and the value if they had been as warranted for the lease term,
17 unless special circumstances show proximate damages of a different amount, ~~together with~~
18 ~~incidental and consequential damages, less expenses avoided as a result of the lessor's default~~
19 ~~or breach of warranty.~~

20 (c) A lessee may also recover incidental and consequential damages.

21 (2-827, page 173)

22 **SECTION 2A-737. LESSEE'S RIGHT TO GOODS IF PART OF RENT**
23 **HAS BEEN PAID.**

