

To: Article 2A Drafting Committee and Interested Persons

From: Marion Benfield

Date: January 29, 1997

Subject: January 28 Draft of Article 2A.

Here is a redraft of 2A. This memo points out briefly the matters we should consider at the meeting. The latest Article 2 meeting may have made some additional changes in Article 2. We may be able to deal with them at the meeting based on a report by Bob Tennessen or Fred Miller.

You will need to consult the January 24 draft of Article 2, and Dick Spiedel's covering memo.

The reorganization of the sections in the latest draft was done by the Style Committee. The sequence of sections more or less follows the Article 2 organization, but not completely. Article 2 Part 3, General Obligation and Construction of Contract, has no counterpart in 2A. Therefore, Article 2 has eight parts, Article 2A only 7.

Perhaps we should follow present Article 2A organization as much as possible. But we can't follow exactly because of added sections on electronic contracting and because of the shift of additional sections into Subpart A of Part 7 (Remedies).

The revisions to follow Article 2 are based on the Article 2 draft dated January 24, 1997. The comparable Article 2 section and the page number in the January 24 draft are given in parentheses following each section. No reference is given to Article 9 sections.

Notes have been added following sections noting decisions taken at the October 2A Committee meeting. These notes are based on my meeting notes. If I have failed to note a decision made, raise the issue at the meeting.

Article 2 is still in some flux. Some major sections, particularly 2-206 and standard forms and Section 2-403 on express warranty have been substantially rewritten. Article 2 has also reinstated a statute of frauds section.

Following are comments on those sections which I think the 2A Committee needs to consider. They are listed in the order they appear in the draft, not in order of importance.

1. 2A-102(6). Should 2A define "consumer" as well as "consumer lease" to follow Article 2?

Does the comment following the definition of "consumer lease" sufficiently cover the cap issue. (That comment is intended to be a part of final comments. At the October meeting the Committee decided that the issue should be addressed in a comment.

2. 2A-102(10). Shall the definition of "finance lease" be changed? The specific issue is whether a finance lessor that receives back the property at the end of a first lease can be a

finance lessor as to a second lease of the property?

3. 2A-103. The Article 2 Committee has returned to the present Article 2 language. Therefore, 2A-103 (a) now reads as in present 2A. Is there any objection to the substance or language of paragraph (b)? It is not new in this draft.

4. 2A-104. Present 2A-104 (3) reads "Failure to comply with an applicable law has only the effect specified therein." Does revised (c) better capture the idea?

5. 2A-201. Article 2 has the longer language in subsection (a). Should we resist that language?

2A-201(d)(3) applies part performance rules only to receipt of the goods, not to paying the rent. Article 2 applies the part performance rule "to extent that performance has been tendered by one party and accepted by the other." The divergence continues a divergence in present Article 2 and 2A.

Subparagraph (d)(4) and subsection (e) are alternative ways of stating that the parties by an agreement which satisfies the statute of frauds can waive the requirements of the statute as to future transactions. (d)(4) comes from Article 2 and (e) comes from 2B. If the Committee agrees with the concept, which formulation is better?

Should subsection (f) be added?

6. 2A-202. Note the deletion in (b)(1). Is there any reason to reject that decision?

7. 2A-207. The 2A Committee deferred a decision on whether this section should be in 2A. The decision probably should be made now. Note the long letter from Hertz arguing against the inclusion of a rule like that in subsection (a)?

8. 2A-303. The last sentence of subsection (a) was added to deal primarily with attempts by a finance lessee to revoke acceptance without the consent of the finance lessor. It also, however, would cover damage claims for breach of warranty. The lessee is not entitled to recover any damages relating to lessor's residual interest in the goods. Is the sentence satisfactory? Should it be added?

9. 2A-306. The new language in subsection (b) is added at the instruction of the Drafting Committee. It is not related to any Article 2 changes. Is it necessary?

10. 2A-308 and 309. Should these sections be added to Article 2A? See the comment following 2A-308.

11. 2A-502. Remember that this draft of 2A-502 expands the warranties given under present 2A-211. Under that section non-finance lessors warrant only against their own acts, and finance lessors make no warranty at all. Does the Committee agree with the expansion?

Revised Article 2 warrants against false but colorable claims. Should Article 2A do so by the addition of the reference to "apparent claim or interest" which "unreasonably exposes the lessee to litigation"?

12. 2A-403. The Article 2 express warranty section has been completely rewritten. Are there any problems with the rewrite in the 2A context?

13. 2A-508. By striking the provisions shown in stricken 2A-509 and on 2A-508(b), and adding new subsection (b) to what is 2A-508 here, the Article 2 committee has retreating from attempting a fuller statement of the relationship between warranty rules and tort rules. Are the changes appropriate for Article 2A. Present 2A picked up the three alternative of present 2-318. Subsection (a) states the rule of Alternative C of present 2-318.

14. 2A-604. See the issue raised by the drafting comment following that section.

15. 2A-605. The Article 2 Committee has largely returned to the present Code rules. Should Article 2A adopt the language now adopted in Article 2. Compare 2A-605 with present 2A-405.

16. 2A-704. See the drafting comment after the section.

17. 2A-705 The comparable Article 2 section begins with "To the extent that a breach is not material or the remedies" . . . I don't understand the reason for the reference to breaches that are not material. If that is the only place in Article 2 which purports to state a remedy for non-material breach, 2A states those rules in 2A-716(c) and 2A-724(c)..

18. 2A-707. See the drafting comment after the section.

19. 2A-710. Revised 2-809, following present Article 2, limits the ability of a seller to retain deposits, without a showing of actual damages or a valid liquidated damages clause, to the lesser of \$500 or 20% of the price of the goods. Article 2A rejected the \$500 limitation and allows a lessor to retain 20% of a deposit without showing damages or a valid liquidated damages clause. My notes don't indicate whether the Committee decided to adhere to the original 2A position.

20. 2A-708. See the drafting comment following the section.

21. 2A-711. The Committee voted to strike (a)(2) but to revisit the issue if the Article 2 Committee did not delete the subsection. They have not deleted it: the 2A Committee must decide whether the provision should appear in 2A.

The last sentence of subsection (c) in Article 2 refers to "consumer goods". Remember that at present 2A does not have a separate definite of consumer goods. Can we use "a consumer lease" here rather than "consumer goods"? Or should we define consumer goods and use the term here.?

22. 2A-719. See the drafting comment following the section.

23. 2A-721. See the drafting comment following the section.

24. 2A-725. Article 2 at present offers the alternatives bracketed in subsection (b). Do we wish to state a preference. I prefer "tender or delivery" because the time the "nonconformity was or should have been discovered" is the same test as for revocation of acceptance. I prefer a time measured from tender of delivery for rejection.

25. 2A-729. The Article 2 Committee is presenting alternatives for subsection (b).and (c). Does the 2A Committee have a preference. See also the Drafting Comment to the section.

26. 2A-730. Subsections (a) and (b) are new in the comparable Article 2 section. Should those provisions be adopted in Article 2A?

27. 2A-732. Subsection (d)(1) has been revised to expressly allow multiple tiers of parties to be vouched in. Do you see any problem with that?

28. 2A-733. See the drafting comment following the section.

29. 2A-734. See the drafting comment following the section.

30. 2A-737. See the drafting comment following the section.