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PART 1. GENERAL PROVISIONS

§ 2A-101. SHORT TITLE.

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

SECTION § 2A-102. SCOPE.

(a) Unless the context otherwise requires, this [Article] applies to any:

(1) transaction, regardless of form, that creates a lease of goods, including a contract in which a lease of goods predominates; and

(2) claim that the goods supplied under a contract in which a lease of goods does not predominate fail to conform to the terms of the contract.

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

Drafting Comment

The 2A Committee decided that 2A should follow the revised Article 2 Scope Section (2-103) but omit 2-103(a) (3) and (c).

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

(a) In this ~~[Article]~~ unless the context otherwise requires:

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

(b) ~~"Cancellation" occurs when~~ means an act by either party ~~puts an~~ which ends to the a lease contract ~~for~~ because of a default by the other party.

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

any other unit treated in use or in the relevant market as a single whole.

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

(e) "Consumer lease" means a lease that a lessor regularly engaged in the business of leasing or selling makes to a lessee who is an individual and who takes under the lease primarily for a personal, family, or household purpose, if the total payments to be made under the lease contract, excluding payments for options to renew or buy, do not exceed \$_____.

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

(xx) "Electronic agent" means a computer program designed, selected, or programmed by a party to initiate or respond to electronic messages or performances without review by an individual. An electronic agent acts within the scope of its agency if its performance is consistent with the functions intended by the party who utilizes the electronic agent."

(xx) "Electronic message" means a record generated or communicated by electronic, optical, or other analogous means for transmission from one

information system to another. The term includes electronic data interchange and electronic mail.

(xx) "Electronic transaction" means a transaction in which the parties, or their intermediaries, contemplate that an agreement may be formed through the use of electronic messages or responses, whether or not either party anticipates that the information or records exchanged will be reviewed by an individual.

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

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

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

(iii) one of the following occurs:

(A) the lessee receives a copy of the contract by which the lessor acquired, or proposes to acquire, the goods or the right to possession and use of the goods before signing the lease contract ;

(B) the lessee's approval of the contract or of the general contract terms under by which the lessor acquired or proposes to acquire the

goods or the right to possession and use of the goods is a condition to effectiveness of the lease contract;

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

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

lessor and receive an accurate and complete statement of those promises and warranties, including any disclaimers and limitations of them or of remedies.

Drafting Comment

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

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

(xx) "Good faith" means

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

~~(i) "Installment lease contract" means is a lease contract that authorizes or requires in which the terms require or the circumstances permit the delivery of goods in separate lots to be separately accepted,~~

~~even though if the lease contract requires payment other than in installments or contains a clause "each delivery is a separate lease" or its equivalent.~~

Drafting Comment

Definition (i) moved to 2A-510, following Article 2.

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

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

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

Drafting Comment

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

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

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

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

Drafting Comment

Definition (o) is to be left to Article 1.

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

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

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

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

(xx) A party "manifests assent" to a record if, after having an opportunity to review the terms of the record, the party engages in conduct that under the circumstances constitutes acceptance of the terms of the record and the party had an opportunity to decline to engage in the conduct.

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

(xx) A party has an "opportunity to review" a record if the record is made available in a manner designed to call the terms to the attention of the party before assent to the record or is provided in such a manner that the terms will be conspicuous in the normal course of initial use or preparation to use the goods.

Drafting Comment

2A probably should have the "opportunity to review" concept, but the last phrase is troublesome in the goods lease context. Should a lessee be bound by terms which he first discovers "in the normal course of initial use or preparation to use the goods." Of course, the same issue exists in Article 2.

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

~~(v) "Purchase" includes taking by sale, lease, mortgage, security interest, pledge, gift, or any~~

~~other voluntary transaction creating an interest in goods.~~

Drafting Comment

The above definition is left to Article 1.

(xx) "Record" when used as a noun, means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(xx) "Sign," when used as a verb, means to identify a record by means of any symbol executed or adopted by a party with present intention to authenticate the record. "Signed" has an analogous meaning. An electronic record is a signed record if a method of authentication identifying the originator of the record and indicating the originators approval of the information contained therein is used and that method has been agreed on between the parties or was as reliable as appropriate for the purpose for which the record was generated or communicated in light of all the circumstances.

(xx) "Standard form" means a record prepared by one party in advance for general and repeated use that substantially contains standard terms and was used in the transaction without negotiation of, or changes in, the substantial majority of the standard terms.

Negotiation of price, quantity, time of delivery or method of payment does not preclude a record from being a standard form.

(xx) "Standard terms" means terms prepared in advance for general and repeated use by one party and use without negotiation with the other party.

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

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

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

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

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

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

"Construction mortgage". Section 2A-309(a)(4).

"Encumbrance". Section 2A-309(a)(5).

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

"Fixture filing". Section 2A-309(a)(2).

"Purchase money lease". Section 2A-309(a)(3).

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

- "Account". Section 9-106.
- "Between merchants". Section 2-104(3).
- "Buyer". Section 2-103(1)(a).
- "Chattel paper". Section 9-105(1)(b).
- "Consumer goods". Section 9-109(1).
- "Document". Section 9-105(1)(f).
- "Entrusting". Section 2-403(3).
- "General intangibles". Section 9-106.
- "Good faith". Section 2-103(1)(b).
- "Instrument". Section 9-105(1)(i).
- "Merchant". Section 2-104(1).
- "Mortgage". Section 9-105(1)(j).
- "Pursuant to commitment". Section 9-105(1)(k).
- "Receipt". Section 2-103(1)(c).
- "Sale". Section 2-106(1).
- "Sale on approval". Section 2-326.
- "Sale or return". Section 2-326.
- "Seller". Section 2-103(1)(d).

Drafting Comment

The citations to other articles have not been corrected to the revised versions.

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

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

(a) ~~A lease.~~ although transaction subject to this ~~[Article]~~, is also subject to any applicable:

(1) federal law to the extent that it governs the rights of parties to, and third parties affected by, the transaction;

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

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

(4) consumer protection ~~statute~~ law of this State, ~~or final consumer protection decision of a court of this State existing on the effective date of this Article.~~

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

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

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

Subject to the provisions of Sections 2A-304(c)
and 2A-305(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 (a) ~~surrender of the
certificate,~~ the time the certificate becomes
ineffective under the law of that jurisdiction or (b)
~~four months after the goods are removed from that
jurisdiction and thereafter until a new certificate of
title is issued by another jurisdiction~~ the time the
goods become covered subsequently by another certificate
of title from another jurisdiction.

Drafting Comment

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

§ 2A-106. LIMITATION ON POWER OF PARTIES TO CONSUMER
LEASE TO CHOOSE APPLICABLE LAW AND 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 enforceable or within 30 days thereafter or in which the goods are to be used, the choice is not enforceable.

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

Drafting Comment

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

~~2A-107. WAIVER OR RENUNCIATION OF CLAIM OR RIGHT AFTER DEFAULT. Any claim or right arising out of an alleged default or breach of warranty may be discharged in whole or in part without consideration by a written waiver or renunciation signed and delivered by the aggrieved party.~~

2A-108. UNCONSCIONABILITY.

(a) If the court as a matter of law finds a lease contract or any clause of a lease contract to have been unconscionable at the time it was made or was induced by unconscionable conduct, the court may refuse to enforce the lease contract, ~~or it may~~ enforce the remainder of the lease contract without the unconscionable clause, or

~~it may~~ so limit the application of any unconscionable clause as to avoid any unconscionable result.

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

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

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

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

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

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

2A-109. OPTION TO ACCELERATE AT WILL.

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

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

PART 2. FORMATION AND CONSTRUCTION OF LEASE CONTRACT

~~§ 2A-201. STATUTE OF FRAUDS NO FORMAL REQUIREMENTS.~~

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

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

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

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

~~———— (3) A writing is not insufficient because it omits or incorrectly states a term agreed upon, but the lease contract is not enforceable under subsection (1) (b) beyond the lease term and the quantity of goods shown in the writing.~~

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

~~———— (a) if the goods are to be specially manufactured or obtained for the lessee and are not suitable for lease or sale to others in the ordinary course of the lessor's business, and the lessor, before notice of repudiation is received and under circumstances that reasonably indicate that the goods~~

~~are for the lessee, has made either a substantial beginning of their manufacture or commitments for their procurement;~~

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

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

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

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

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

~~———— (c) a reasonable lease term.~~

(a) A lease contract or modification thereof is enforceable, whether or not there is a record signed by a party against whom enforcement is sought, even if the contract or modification is not capable of performance within one year after its making.

(b) The affixing of a seal to a record evidencing a lease contract or an offer does not make the record a sealed instrument. The law with respect to sealed instruments does not apply to the contract or offer.

Drafting Comment

The ELA memorandum, page 12, makes a strong argument in favor of retention of the statute of frauds for leases.

An argument they make is that, similar to the situation in Article 9, a writing requirement protects third parties who deal with the goods from a false claim that the possessor was merely a lessee. How do you assess that argument? Can a convincing case be made that there are sufficient differences between leasing transactions and sales transactions that the statute of frauds should be retained for leases even if abolished for sales?

§ 2A-202. FINAL WRITTEN EXPRESSION: PAROL OR EXTRINSIC EVIDENCE. Terms ~~with respect to~~ on which the confirmatory memoranda of the parties agree or which are otherwise set forth in a ~~writing~~ record intended by the parties as a final expression of their agreement with respect to ~~such terms as are~~ the included therein terms may not be contradicted by evidence of ~~any prior~~ a previous agreement or ~~of~~ a contemporaneous oral agreement. ~~but~~ However the terms may be explained or supplemented by evidence of:

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

(2) ~~by evidence of consistent~~ noncontradictory additional terms unless the court finds that the ~~writing~~

~~record to have been~~ was intended also as a complete and exclusive statement of the terms of the agreement.

~~§ 2A-203. SEALS INOPERATIVE.~~

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

§ 2A-204. FORMATION IN GENERAL.

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

(b) If the parties so intend, ~~An~~ agreement sufficient to ~~constitute~~ make a lease contract may be found ~~although~~ even if the ~~moment~~ time of its making is ~~undetermined~~ when the agreement was made cannot be determined, one or more terms are left open or to be agreed upon, or standard terms in the records of the parties do not otherwise establish a contract.

(c) ~~Although one or more terms are left open, a lease contract does not fail for indefiniteness if the parties have intended to make a lease contract and~~ If a

contract is made and one or more terms in the agreement are left open, the contract does not fail for indefiniteness if there is a reasonably certain basis for giving an appropriate remedy.

(d) Language in a standard form or a standard term which conditions the intention of that party to be bound upon further agreement by the other party must be clear and conspicuous.

Drafting Comment

My notes indicate that the Drafting Committee agreed at the April meeting that the references to "standard forms or standard terms" in the Article 2 section should not be included. But, since the Committee did decide to include 2-206 on standard forms and standard terms should not these references be included? I have included them in this draft.

§ 2A-205. FIRM OFFERS.

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

A term of assurance in a record supplied by the offeree is ineffective unless the offeree manifests assent to the term.

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

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

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

§ 2A-206A STANDARD FORM RECORDS

(a) If all of the terms of a contract are contained in a record which is a standard form or contains standard terms and the party who did not prepare the record manifests assent to it by a signature or other conduct, that party adopts all the terms contained in a record as part of the contract except those terms that are unconscionable.

(b) A term in a record which is a standard form or which contains standard terms to which a consumer has

manifested assent by a signature or other conduct is not part of the contract if the consumer could not reasonably have expected it unless the consumer expressly agrees to the term. In determining whether a term is part of the contract, the court shall consider the content, language, and presentation of the standard form or standard term.

(c) a term adopted under subsection (a) becomes part of the contract without regard to the knowledge or understanding of individual terms by the party assenting to the standard form record, whether or not the party read the form.

§ 2A-206B ELECTRONIC TRANSACTIONS: FORMATION.

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

(b) A contract is created under subsection (a) even if no individual representing either party was aware of or reviewed the initial message or response or the action manifesting acceptance of the contract. Electronic records exchanged in an electronic transaction are effective when received in a form and at

a location capable of processing the record even if no individual is aware of their receipt.

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

(1) If the recipient of the message, whether or not recorded, has designated an information system for the purpose of receiving such messages, receipt occurs when the message enters the designated information system.

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

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

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

(b) ~~The e~~Express terms of a lease agreement, ~~and any~~ course of performance, ~~as well as any~~ and course of

dealing and usage of trade, must be construed whenever reasonable as consistent with each other, ~~but~~ However, if that construction is unreasonable, the following rules apply:

(1) express terms control over course of performance, course of dealing, and usage of trade;

(2) course of performance controls over ~~both~~ course of dealing and usage of trade; and

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

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

Drafting Comment

This section will probably be moved to Article 1.

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

(a) An good-faith agreement modifying a lease contract ~~needs no~~ is binding without consideration ~~to be binding.~~

~~(2) A signed lease agreement that excludes modification or rescission except by a signed writing may not be otherwise modified or rescinded, but, except as between merchants, such a requirement on a form~~

~~supplied by a merchant must be separately signed by the other party.~~

(b) Except in a consumer lease contract or as otherwise provided in subsection (c), a contract that contains a term prohibiting modification or rescission except by a signed record may not be otherwise modified or rescinded.

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

(c) A party whose language or conduct in modifying or rescinding a lease contract is inconsistent with a term requiring a signed record to modify or rescind the contract may not assert the term if the other party is induced to change its position reasonably and in good faith.

~~(d) A party who has made a waiver affecting an executory portion of a lease contract may retract the waiver. Subject to subsection (c), a lease contract term may be modified or rescinded by waiver. Language or a course of performance between the parties is relevant to show a waiver of any term inconsistent with that language of course of performance. The waiver of an executory portion of a contract may be retracted by reasonable notification received by the other party that strict performance will be is required of any term~~

~~waived unless the retraction would be unjust in view of a material change of position in reliance on the waiver.~~
waiver induced the other party to change its position reasonably and in good faith.

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

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

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

(c) Any modification or rescission of the supply contract by the supplier and the lessor is effective between the supplier and the lessee unless, before the

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

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

§ 2A-210. EXPRESS WARRANTIES.

(a) In Sections 2A-210 through 2A-216A:

(1) "Damage" means all loss resulting from a breach of warranty other than injury to a person or to property other than the goods leased.

(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 whom a warranty claim is asserted.

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

(b) Any affirmation of fact or promise made by the lessor to the immediate lessee ~~which that~~ relates to the goods and becomes part of the ~~basis of the bargain 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, ~~or~~ 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 to ~~the creation of an express warranty that the lessor use formal words, such as "warrant" or "guarantee," or that the lessor have a specific intention to make a warranty.~~

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

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

~~(2)~~

(c) Any affirmation of fact, promise, description, sample or model made or provided under subsection (b) becomes part of the agreement unless the lessor establishes that a reasonable person in the position of the immediate lessee would either believe otherwise or believe that any affirmation, promise or statement made was but an affirmation merely of the value of the goods or a statement purporting to be merely the lessor's opinion or commendation of the goods. does not create a warranty.

(d) If the seller or lessor makes an affirmation of fact or promise relating to or a description of goods to a remote lessee through an authorized dealer or other intermediary of the seller or lessor or through any medium of communication to the public, including advertising, the following rules apply:

(1) An obligation is created if the remote lessee establishes that it knew of and was reasonable in believing that the goods leased from another lessor in the distributive chain would conform to the affirmation of fact, promise or description made by the seller or lessor.

(2) The obligation may be enforced by the remote lessee as an express warranty directly against the seller or lessor under this [article] subsection to subsection (d) of Section [(2-318)]

Drafting Comment

The ELA memorandum, pages 17-18, argues that 2A-210 should remain as is and not follow revised 2-313.

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

(a) Except in a finance lease and except as provided in subsection(c), ~~There is in a lease contract a warranty by a lessor that for the lease term no person holds a claim to or interest in the goods that arose from an act or omission of the lessor, other than a claim by way of infringement or the like, which will interfere with the lessee's enjoyment of its leasehold interest. In a finance lease contract, except as provided in subsection (c), there is a warranty by the lessor that for the lease term no person holds a claim or interest in the goods that arose from an act or omission of the lessor which will interfere with the lessee's enjoyment of its leasehold interest.~~

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

(c) A warranty under subsections (a) or (b) may be excluded or modified only by specific language or by

circumstances giving the lessee reason to know that the lessor purports to transfer only such right as the lessor or a third party may have. Language in a record is sufficient to exclude warranties under this section if it is conspicuous and states "There is no warranty against third party claims which may interfere with lessee's enjoyment of his leasehold interest or against infringement in this lease" or words of similar import.

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

(e) A lessor's warranty under this Section, made to an immediate lessee, extends to any remote lessee who may be reasonably expected to lease the goods and who suffers damage from breach of the warranty. The rights and remedies of a remote lessee against the lessor for breach of the warranty are determined by the enforceable terms of the contract between the lessor and the immediate lessee and this [article]]

Drafting Comment

The warranties under present 2A-211 are too narrow. A non-finance lessor presently warrants only against its own conduct which affects lessee's quite enjoyment of the lease, and finance lessors seem to make no warranty even against their own acts, though a court could probably deal with that. I suggest that we ask the executive committee to approve the change suggested

by the above redraft. Present 2A-214(4) states the rules for disclaimer of warranties under this section.

The ELA memorandum, page 19, argues that disclaims of the warranty under this section should be effective only if in writing. It also suggests adding from 2-312(a)(2) "and will not unreasonably expose the lessee to a lawsuit." I did not adopt that language in the revision because I thought it was sufficiently covered by the warranty that there is no outstanding interest "which will interfere with the lessee's enjoyment of its leasehold interest."

New subsection (e) is bracketed because of doubt whether it should be included.

§ 2A-212. IMPLIED WARRANTY OF MERCHANTABILITY.

(a) Except in a finance lease and subject to 2A-214, a warranty that ~~the goods will be~~ are merchantable is implied in a lease contract if the lessor is a merchant with respect to goods of that kind.

(b) ~~Goods to~~ To be merchantable, goods, at a minimum, must: ~~be at least such as~~

(1) pass without objection in the trade under the agreed ~~description in the lease agreement;~~

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

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

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

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

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

(c) Subject to 2A-214, ~~Other~~ implied warranties may arise from course of dealing or usage of trade.

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

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

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

(a) Words or conduct relevant to the creation of or tending to exclude or modify an express warranty ~~and words or conduct tending to negate or limit a warranty~~ must be construed ~~wherever~~ if reasonable as consistent with each other, ~~but,~~ Subject to the provisions of Section 2A-202 ~~on~~ with regard to parol or extrinsic

evidence, if such construction is unreasonable, words excluding or modifying an express warranty are negation or limitation is inoperative to that the extent. that the construction is unreasonable.

~~(2) Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention "merchantability", be by a writing, and be conspicuous. Subject to subsection (3), to exclude or modify any implied warranty of fitness the exclusion must be by a writing and be conspicuous. Language to exclude all implied warranties of fitness is sufficient if it is in writing, is conspicuous and states, for example, "There is no warranty that the goods will be fit for a particular purpose".~~

(b) Except in a consumer lease, if language in an agreement is construed to exclude or modify an implied warranty, the following rules apply:

(1) ~~Notwithstanding subsection (2), but subject to subsection (4), (a)~~ unless the circumstances indicate otherwise, all implied warranties are excluded or modified by expressions like "as is," or "with all faults," or by other language that ~~in common~~ understanding under the circumstances calls the lessee's attention to the exclusion or modification of the warranties and ~~makes plain that there is no~~ the implied

warranties, if in writing and conspicuous, have been excluded or modified.

(2) Subject to [2-206], language contained in a record that excludes or modifies implied warranties is sufficient to satisfy paragraph (1) in the following cases:

(i) An exclusion or modification of the implied warranty of merchantability is sufficient if the language is conspicuous and mentions merchantability. Conspicuous language that states "These goods may not be merchantable or language of similar import is sufficient,

(ii) An exclusion or modification of the implied warranty of fitness is sufficient if the language is conspicuous. Conspicuous language that states "There are no warranties that these goods will conform to the purposes for which they are leased made known to the lessor" or words of similar import is sufficient.

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

(4) ~~An implied warranty may also be excluded or modified by course of performance, course of dealing, course of performance, or usage of trade.~~

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

(e) Terms in a consumer lease excluding or modifying the implied warranty of merchantability or the implied warranty of fitness for particular purpose must be contained in a record and be conspicuous.

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

Drafting Comment

The ELA memorandum, page 25, asks that the conspicuous writing requirement for warranty disclaimer contained in present 2A-214(2) be retained.

§ 2A-215. CUMULATION AND CONFLICT OF WARRANTIES ~~EXPRESS OR IMPLIED.~~ Warranties, whether express or implied, must be construed as consistent with each other and as cumulative., ~~but~~ However, if that construction is

unreasonable, the intention of the parties determines which warranty ~~is dominant~~ prevails. In ascertaining that intention ~~the following rules apply:~~

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

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

(c) Except in a consumer lease under 2A-214(e), ~~an Express warranty~~ displace prevails over inconsistent implied warranties other than an implied warranty of fitness for a particular purpose.

§ 2A-216. EXTENSION OF EXPRESS OR IMPLIED WARRANTIES
~~THIRD-PARTY BENEFICIARIES OF EXPRESS AND IMPLIED~~
~~WARRANTIES.~~

ALTERNATIVE A

~~A warranty to or for the benefit of a lessee under this Article, whether express or implied, extends to any natural person who is in the family or household of the lessee or who is a guest in the lessee's home if it is reasonable to expect that such person may use, consume, or be affected by the goods and who is injured in person by breach of the warranty. This section does not displace principles of law and equity that extend a~~

~~warranty to or for the benefit of a lessee to other persons. The operation of this section may not be excluded, modified, or limited, but an exclusion, modification, or limitation of the warranty, including any with respect to rights and remedies, effective against the lessee is also effective against any beneficiary designated under this section.~~

~~—————ALTERNATIVE B—————~~

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

~~—————ALTERNATIVE C—————~~

~~A warranty to or for the benefit of a lessee under this Article, whether express or implied, extends to any person who may reasonably be expected to use, consume, or be affected by the goods and who is injured by breach~~

~~of the warranty. The operation of this section may not be excluded, modified, or limited with respect to injury to the person of an individual to whom the warranty extends, but an exclusion, modification, or limitation of the warranty, including any with respect to rights and remedies, effective against the lessee is also effective against the beneficiary designated under this section.~~

(a) A lessor's express or implied warranty made to an immediate lessee extends to any remote lessee of or person who may reasonably be expected to purchase, use, or be affected by the goods and whom 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]. The lessor's obligation to a remote purchaser of or person affected by the goods, however, shall not exceed that owed to the immediate buyer.

(b) If a lessor makes an express warranty to a remote lessee under Section 2A-211(d) or for reasons other than the assignment of a right or claim of warranty under Section 2A-303 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; and

(2) The remote lessee's rights and remedies against the lessor are determined under this [article], subject to subsection (c).

(c) A remote lessee under subsection (b) has the rights and remedies against the lessor provided by this [article], except as follows:

(1) The time for giving a required notice begins to run when the remote lessee receives the goods.

(2) A remote lessee other than a consumer lessee may not recover consequential damages unless the conditions of paragraph (3) are satisfied.

(3) Within a reasonable time after receipt of a timely notice of rejection or revocation of acceptance from the remote lessee of the lease to it, the lessor may tender a refund of the allocable rent paid by the remote lessee or tender goods that conform to the warranty. If a complying tender is made, the lessor's liability is limited to incidental damages under Section 2A-XXX, whether or not the tender is accepted by the remote lessee. If the tender fails to comply with this subsection, the remote lessee may recover damages for

breach of warranty including incidental and consequential damages under Sections 2A-XXX and 2A-XXX

(4) A [cause of action/claim] for relief for breach of warranty accrues no earlier than the time when the remote lessee receives the goods.

(d) A seller may not exclude or limit the operation of this section.

§ 2A-216A. INJURY TO PERSON OR PROPERTY RESULTING FROM BREACH OF WARRANTY.

(a) In this section:

(1) "Property" means any real or personal property, other than the goods leased;

(2) If personal injuries are involved, "person" means an individual not an organization.

[(b) This [article] applies to a claim for injury to person or property resulting from any breach of warranty to the extent that the goods are not defective under other applicable law.]

(c) Claims under subsection (b) to which this [article] applies are also subject to the following rules:

(1) A claim is not barred for failing to give notice as required by Section 2A-XXX.

(2) Any agreement, however express, that excludes or limits consequential damages for injury to the person is unenforceable.

(3) A [cause of action/claim for relief] accrues when the lessee discovers or should have discovered the breach. An action must be commenced within four years after the cause of action has accrued.

(4) A lessor's warranty extends to an "immediate" lessee and any "remote" lessee, user or person protected under Section 2A-216.

§ 2A-217. IDENTIFICATION. Identification of goods as goods to which a lease contract refers may be made at any time and in any manner explicitly agreed to by the parties. In the absence of explicit agreement, identification occurs when:

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

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

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

§ 2A-218. INSURANCE AND PROCEEDS.

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

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

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

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

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

§ 2A-219. RISK OF LOSS.

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

~~(b) Subject to the provisions of this Article on the effect of default on risk of loss (Section 2A-220),~~
~~i~~If risk of loss is to pass to the lessee, and the time of passage is not stated, the following rules apply:
except as provided in subsections (c), (d) and (e), the risk of loss passes to the lessee upon receipt of the goods. If the lessee does not intend to take possession, risk of loss passes to the lessee when it receives control of the goods.

(c) If ~~the~~ a lease contract requires or authorizes ~~the goods~~ a lessor to ~~be shipped~~ goods by carrier, the following rules apply:

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

(2) ~~i~~If it does the contract requires delivery at a particular destination and the goods arrive there in the possession of the carrier, are there ~~duly tendered while in the possession of the carrier,~~ the risk of loss passes to the lessee when the goods are

~~there duly so tendered as to enable the lessee to take delivery.~~

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

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

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

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

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

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

~~(b) If the lessee rightfully revokes acceptance, he [or she], to the extent of any deficiency~~

~~in his [or her] effective insurance coverage, may treat the risk of loss as having remained with the lessor from the beginning.~~

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

§ 2A-221. CASUALTY TO IDENTIFIED GOODS.

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

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

(2) ~~if~~ if the loss is total, the lease contract is avoided, ~~and~~.

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

Drafting Comment

Addition of the words "or retain" in subdivision (3) is not required for conformity to Article 2. The addition is a "correction" to present Article 2A. Should it be made?

PART 3. EFFECT OF LEASE CONTRACT

§ 2A-301. ENFORCEABILITY OF LEASE CONTRACT. Except as otherwise provided in this Article, a lease contract is effective and enforceable according to its terms

between the parties, against purchasers of the goods and against creditors ~~of the parties~~.

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

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

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

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

(b) Except as provided in subsections (c) and (d), a provision in a lease agreement which (i) prohibits the voluntary or involuntary transfer, including a transfer by sale, sublease, creation or enforcement of a security interest, or attachment, levy, or other judicial process, of an interest of a party under the lease contract or of the lessor's residual

interest in the goods, or (ii) makes such a transfer an event of default, gives rise to the rights and remedies provided in subsection (e), but a transfer that is prohibited or is an event of default under the lease agreement is otherwise effective.

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

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

(e) Subject to subsections (c) and (d):

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

(2) if paragraph (1) is not applicable and if a transfer is made that (i) is prohibited under a lease agreement or (ii) materially impairs the prospect of obtaining return performance by, materially changes the duty of, or materially increases the burden or risk imposed on, the other party to the lease contract, unless the party not making the transfer agrees at any time to the transfer in the lease contract or otherwise,

then, except as limited by contract, (i) the transferor is liable to the party not making the transfer for damages caused by the transfer to the extent that the damages could not reasonably be prevented by the party not making the transfer and (ii) a court having jurisdiction may grant other appropriate relief, including cancellation of the lease contract or an injunction against the transfer.

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

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

(h) In a consumer lease, to prohibit the transfer of an interest of a party under the lease contract or to make a transfer an event of default, the

language must be specific, by a writing, and conspicuous.

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

(a) Subject to Section 2A-303, a subsequent lessee from a lessor of goods under an existing lease contract obtains, to the extent of the leasehold interest transferred, the leasehold interest in the goods that the lessor had or had power to transfer, and except as provided in subsections (b) and (c) and Section 2A-527(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 who has relinquished possession or control has power to transfer a good leasehold interest to a good faith subsequent lessee for value, but only to the extent set forth in the preceding sentence in subsection (a). ~~If goods have been delivered under a~~ transaction of purchase, ~~the lessor has that power even though~~ includes a transaction in which:

(1) ~~the lessor's~~ transferor was deceived as to the identity of the lessor;

(2) the delivery was in exchange for a check ~~which is~~ later dishonored;

(3) it was agreed that the transaction was to be a "cash sale"; or

(4) the delivery was procured through fraud punishable ~~as larcenous~~ under the criminal law.

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

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

Drafting Comment

Notice that the revision of the last part of subsection (b) is less clear in meaning than the present language of Article 2A (and Article 2). Of course such transactions of purchase, the question is are they the kinds of purchase which give "voidable", as distinguished (under the old law) from "void" title. This is probably Style Committee work.

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

(a) Subject to the provisions of Section 2A-303, a buyer or sublessee from the lessee of goods under an existing lease contract obtains, to the extent of the interest transferred, the leasehold interest in the goods that the lessee had or had power to transfer, and except as provided in subsection (2) and Section 2A-511(d), takes subject to the existing lease contract.

(b) A lessee with a voidable leasehold interest acquired in a lease transaction from a lessor who has relinquished possession or control has power to transfer a good leasehold interest to a good faith buyer for value or a good faith sublessee for value, but only to the extent set forth in ~~the preceding sentence~~ subsection (a). ~~When goods have been delivered under a~~ A transaction of lease the lessee has that power even ~~though:~~ includes a lease in which:

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

(2) the delivery was in exchange for a check ~~which is later~~ dishonored; or

(c) the delivery was procured through fraud punishable ~~as larcenous~~ under the criminal law.

(b) A buyer in the ordinary course of business or a sublessee in the ordinary course of business from a lessee who is a merchant dealing in goods of that kind to whom the goods were entrusted by the lessor obtains,

to the extent of the interest transferred, all of the lessor's and lessee's rights to the goods, and takes free of the existing lease contract.

(c) 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.

§ 2A-306. PRIORITY OF CERTAIN LIENS ARISING BY OPERATION OF LAW. If a person in the ordinary course of his [or her] business furnishes services or materials with respect to goods subject to a lease contract, a lien upon those goods in the possession of that person given by statute or rule of law for those materials or services takes priority over any interest of the lessor or lessee under the lease contract or this Article unless the lien is created by statute and the statute provides otherwise or unless the lien is created by rule of law and the rule of law provides otherwise.

§ 2A-307. 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-306, a creditor of a lessee takes subject to the lease contract.

(b) Except as otherwise provided in ~~subsections (c) and (d) [Article 9 Sections]~~ and in Sections 2A-306 and 2A-308, 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.~~

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

~~————— (3) the creditor holds a security interest in the goods which was perfected (Section 9-303) before the lease contract became enforceable.~~

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

~~————— (d) A lessee other than a lessee in the ordinary course of business takes the leasehold interest free of a security interest to the extent that it secures future advances made after the secured party acquires knowledge of the lease or more than 45 days after the lease contract becomes enforceable, whichever first occurs,~~

~~unless the future advances are made pursuant to a
commitment entered into without knowledge of the lease
and before the expiration of the 45-day period.~~

Comment: Stricken material goes to Article 9

§ 2A-308. SPECIAL RIGHTS OF CREDITORS.

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

(b) Nothing in this Article impairs the rights of a creditors:

(1) under [Article 9]; or

(2) of a lessor if the lease contract ~~(a)~~ becomes enforceable, is made not in current course of trade but in satisfaction of or as security for a pre-existing claim for money, security, or the like, and ~~(b)~~ is made under circumstances which that under any statute or rule of law apart from this [Article] would

constitute the transaction a fraudulent transfer or voidable preference.

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

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

(a) In this section:

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

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

(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 ~~conflicting~~ interest of the encumbrancer or owner arises before the goods become fixtures, the interest of the lessor is perfected by a fixture filing before the goods

become fixtures or within ten days thereafter, and the lessee has an interest of record in the real estate or is in possession of the real estate; or

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

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

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

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

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

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

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

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

by the priority rules governing conflicting interests in real estate.

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

(i) Even though the lease agreement does not create a security interest, the interest of a lessor of fixtures, including the lessor's residual interest, is perfected by filing a financing statement as a fixture

filing for leased goods that are or are to become fixtures in accordance with the relevant provisions of the Article on Secured Transactions (Article 9).

2A-310. LESSOR'S AND LESSEE'S RIGHTS WHEN GOODS BECOME ACCESSIONS.

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

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

(c) The interest of a lessor or a lessee under a lease contract entered into at the time or after the goods became accessions is ~~superior to~~ valid against all persons subsequently acquiring ~~ed~~ interests in the whole except as stated in subsection (4) but is ~~subordinate to~~ invalid against any person with an interests in the whole ~~existing at the time the lease contract was made unless the holders of such interests in the whole have~~ that has not in writing consented to the lease or disclaimed an interest in the goods as part of the whole.

(d) The interest of a lessor or a lessee under a lease contract described in subsection (2) or (3) ~~is~~

~~subordinate to the interest of~~ does not take priority over

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

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

Drafting Comment

The new language in subsection (d), coming from a change in revised Article 9, is not as precise as the existing language. "Does not take priority over" leaves open the question whether there might be equal priority.

(e) When under subsections (b) or (c) and (d) a lessor or a lessee ~~of accessions~~ holds an interest in accessions that is ~~superior to all~~ has priority over the claims of all persons that have interests in the whole, the lessor or the lessee may (a) on default, expiration, termination, or cancellation of the lease contract by the other party but subject to the provisions of the lease contract and this Article, or (b) if necessary to enforce his [or her] other rights and remedies under this Article, remove the goods from the whole, ~~free and clear of all interests in the whole,~~ but he [or she]

must reimburse any holder of an interest in the whole ~~who~~ is not the lessee and ~~who~~ that has not otherwise agreed for the cost of repair of any physical injury but not for any diminution in value of the whole caused by the absence of the goods removed or by any necessity for replacing them. A person entitled to reimbursement may refuse permission to remove until the party seeking removal gives adequate security for the performance of this obligation.

§ 2A-311. PRIORITY SUBJECT TO SUBORDINATION.
Nothing in this Article prevents subordination by agreement by any person entitled to priority.

PART 4 PERFORMANCE OF LEASE CONTRACT: REPUDIATED,
SUBSTITUTED AND EXCUSED

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

(a) A lease contract imposes an obligation on each party ~~that~~ not to impair the other's expectation of receiving due performance ~~will not be impaired.~~ (2) If reasonable grounds for insecurity arise with respect to the performance of either party, the ~~insecure party~~ other may demand in ~~writing~~ a record adequate assurance of due performance. ~~And until the insecure party receives~~ that assurance is received, if commercially

reasonable ~~the insecure party~~ may suspend any performance for which he ~~[or she]~~ the agreed return has not already been received ~~the agreed return~~.

(b) Between merchants, the reasonableness of grounds for insecurity and the adequacy of any assurance offered ~~must~~ is be 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. ~~(3) A repudiation of the lease contract occurs if assurance of due performance adequate under the circumstances of the particular case is not provided to the insecure party within a reasonable time, not to exceed 30 days after receipt of a demand by the other party.~~

(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.

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

§ 2A-402. ANTICIPATORY REPUDIATION.

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

~~(1) await performance by the repudiating party for a commercially reasonable time, or ~~await retraction of repudiation and performance by the repudiating party;~~~~

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

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

(3) in either case suspend its own performance or proceed in accordance with Section 2A-524.

(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 or apparently impossible.

Drafting Comment

The ELA memorandum, page 34, suggests that the definition of repudiation here include failure to give adequate assurance. However, the previous section specifically states that failure to give assurance is a repudiation. It is probably not necessary to repeat the idea in two successive sections. That part of 2A-401 could be moved here if that is better positioning.

§ 2A-403. RETRACTION OF ANTICIPATORY REPUDIATION.

(a) ~~Until the repudiating party's next performance is due, the A repudiating party can~~ may ~~retract the a repudiation until its next performance is due unless, since the repudiation, the aggrieved party,~~ after the repudiation, ~~has cancelled the lease contract,~~ or materially changed the aggrieved party's its ~~position,~~ or otherwise indicated that the aggrieved party considers the repudiation is considered to be final.

(b) Retraction may be by any method that clearly indicates to the aggrieved party that the repudiating party intends to perform, ~~under the lease contract and~~ However, a retraction must include any assurance demanded under Section 2A-401.

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

§ 2A-404. SUBSTITUTED PERFORMANCE.

(a) If l, without fault of the lessee, the lessor and the supplier, ~~the~~ agreed berthing, loading, or unloading facilities fail, ~~or the~~ an agreed type of carrier becomes unavailable, l or the agreed manner of delivery otherwise becomes commercially impracticable, an aggrieved party may claim excuse under Section 2A-405 but unless a commercially reasonable substitute is available, l In that case, the substitute performance must be tendered and accepted.

(b) If ~~the~~ an agreed means or manner of payment fails because of domestic or foreign governmental regulation: ~~(a)~~ the lessor may withhold or stop delivery or cause the supplier to withhold or stop delivery ~~unless~~ until the lessee provides a means or manner of payment that is commercially a substantial equivalent.

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

§ 2A-405. ~~EXCUSED PERFORMANCE BY FAILURE OF~~
PRESUPPOSED CONDITIONS.

(a) Subject to Section 2A-404 ~~on substituted performance, the following rules apply: and subsection (b), (a)~~ Delay in delivery or nondelivery in whole or in part performance or nonperformance by a lessee, lessor, or a supplier who complies with paragraphs (b) and (c) is not a default under the lease contract if performance as agreed has been made impracticable or a party's principal purpose is substantially frustrated by:

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

(2) by compliance in good faith with any applicable foreign or domestic governmental regulation, statute, or order, whether or not the regulation or order it later proves to be invalid, which both parties assumed would not occur.

(b) If the ~~causes mentioned in paragraph (a)~~ claimed excuse affects only a part of the lessor's or the supplier's capacity to perform, ~~he [or she]~~ the lessor or supplier ~~shall~~ must also allocate production and deliveries among his ~~[or her]~~ its customers ~~but at his [or her] option may include regular customers not then under contract for sale or lease as well as his [or her] own requirements for further manufacture. He [or she] may so allocate in any manner that is fair and reasonable.~~

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

Drafting Comment

The ELA memorandum, page 35, urges that this section not be expanded to cover lessee's frustration of purpose. They note that in essentially all cases the lessee should take the risk that its purpose in leasing the goods is frustrated, particular as against a finance lessor. It would be possible to state a separate rule for finance lessors, I suppose.

§ 2A-406. PROCEDURE ON ~~EXCUSED PERFORMANCE~~ NOTICE CLAIMING EXCUSE.

(a) ~~If the lessee~~ A party who receives notification of a material or indefinite delay in performance or an allocation ~~justified~~ permitted under

Section 2A-405, ~~the lessee may,~~ by written notification in a record ~~to the lessor as to any goods~~ delivery involved concerned, and ~~with respect to all of the goods~~ if under an installment lease contract the value of the whole lease contract is where the prospective deficiency substantially impaired the value of the whole contract (~~Section 2A-510~~):

(1) terminate and thereby discharge any unexecuted portion of the lease contract (~~Section 2A-505(2)~~), or

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

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

(c) This section may be varied by agreement to the extent that the parties have assumed a different obligation under Section 2A-405.

Drafting Comment

The material in brackets in subsection (b) does not appear in revised Article 2. Should we continue it nevertheless?

The ELA memorandum, page 38, objects to the inclusion of the last sentence. Present 2-616 reads "The provisions of this section may not be negated by agreement except in so far as the seller has assumed a greater obligation under the preceding section." The revised language, changing "greater" to "different" seemed to me to make the provision innocuous, and, perhaps, meaningless. But maybe there is more here than I saw.

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

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

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

(1) is effective and enforceable between the parties, and by or against third 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 whom the promise runs.

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

PART 5. DEFAULT

A. IN GENERAL

§ 2A-501. 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 has rights and remedies as provided in this Article and, except as limited by this Article, as provided in the lease agreement.

(c) If the lessor or the lessee is in default under the lease contract, the party seeking enforcement may reduce the party's claim to judgment, or otherwise enforce the lease contract by self-help or any available judicial procedure or nonjudicial procedure, including administrative proceeding, arbitration, or the like, in accordance with this Article.

~~(d) Except as otherwise provided in Section 1-106(1) or this Article or the lease agreement, the rights and remedies referred to in subsections (b) and (c) are cumulative.~~

Drafting Comment

Cumulation of remedies is now addressed in § 2A-502A(c).

(e) If the lease agreement covers both real property and goods, the party seeking enforcement may proceed under this Part as to the goods, or under other applicable law as to both the real property and the goods in accordance with that party's rights and remedies in respect of the real property, in which case this Part does not apply.

§ 2A-502. NOTICE AFTER DEFAULT.

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

§ 2A-502A REMEDIES IN GENERAL

(a) The remedies provided in this [article] must be liberally administered with the purpose of putting the aggrieved party in as good a position as if the other party had fully performed.

(b) Except as otherwise provided in this [part], an aggrieved party may not recover that part of a loss resulting from a default that could have been avoided by reasonable measures under the circumstances. The burden

of establishing a failure to take reasonable measures under the circumstances is on the defaulting party.

(c) The rights and remedies provided in this [article are cumulative, but a party may not recover more than once for the same injury. A court may deny or limit a remedy if, under the circumstances, it would put the aggrieved party in a better position than if the other party had fully performed.]

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

Drafting Comment

The above Section is revised Article 2, 2-703.

§ 2A-502B. DAMAGES IN GENERAL

To the extent that 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 recover 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 breach.

Drafting Comment

The above section is revised Article 2, 2-704

§ 2A-503. CONTRACTUAL MODIFICATION OR IMPAIRMENT OF RIGHTS AND REMEDIES.

(a) [Except as otherwise provided in this Article] [Subject to Section 2A-504], the following rules apply:

(1) ~~the A~~ lease agreement may include rights and remedies for default in addition to or in substitution for those add to, limit, or substitute for the remedies provided in this [~~A~~ article] ~~, and may 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.

(3) ~~Resort to an agreed remedy provided under this Article or in the lease agreement paragraph (a) (1) is optional unless the , but if the parties expressly agree that the remedy is expressly agreed to be exclusive, it is the sole remedy. If circumstances cause an exclusive or limited remedy to fail of its essential purpose, or provision for an exclusive remedy is unconscionable, remedy may be had as provided in this Article.~~

~~(3) Consequential damages may be liquidated under Section 2A-504, or may otherwise be limited, altered, or excluded unless the limitation, alteration, or exclusion~~

~~is unconscionable. Limitation, alteration, or exclusion of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation, alteration, or exclusion of damages where the loss is commercial is not prima facie unconscionable.~~

~~(4) Rights and remedies on default by the lessor or the lessee with respect to any obligation or promise collateral or ancillary to the lease contract are not impaired by this Article.~~

(b) Subject to subsection (a) (2) 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:

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

(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-508.

(c) Subject to subsection (b) and except for injury to the person, consequential and incidental damages and injury to property may be limited or

excluded by agreement, unless the exclusion is unconscionable.

Drafting Comment

In subsection (a), revised Article 2 reads "Subject to Section 2-710 (the liquidated damages section). I feel safer with the broader reference. What do you think?"

§ 2A-504. LIQUIDATION OF DAMAGES; DEPOSITS.

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

~~(2) If the lease agreement provides for liquidation of damages, and such provision does not comply with subsection (1), or such provision is an exclusive or limited remedy that circumstances cause to fail of its essential purpose, remedy may be had as provided in this Article.~~

(b) If ~~the~~ a lessor justifiably withholds or stops ~~delivery of goods~~ performance because of the

lessee's default or insolvency (~~Section 2A-525 or 2A-526~~), the lessee is entitled to restitution of any the amount by which the sum of his ~~[or her]~~ payments exceeds ~~(a)~~ the amount to which the lessor is entitled by virtue of under terms liquidating the ~~lessor's~~ damages in accordance with subsection (a); ~~or~~

~~(b) in the absence of those terms, 20 percent of the then present value of the total rent the lessee was obligated to pay for the balance of the lease term, or, in the case of a consumer lease, the lesser of such amount or \$500.~~

(c) A lessee's right to restitution under subsection (b) is subject to offset to the extent that the lessor establishes: ~~(a)~~ a right to recover damages under the provisions of this [Article] other than subsection (a); ~~and (b)~~ the amount or value of any benefits received by the lessee directly or indirectly by reason of the lease contract.

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?"

§ 2A-505. CANCELLATION AND TERMINATION AND EFFECT OF CANCELLATION, TERMINATION, RESCISSION, OR FRAUD ON RIGHTS AND REMEDIES.

(a) If a party defaults under a lease contract, the aggrieved party may cancel the contract if the conditions of 2A-508 or 2A-523 are satisfied or if the agreement so provides.

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

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

(d) Subject to subsection (e), on upon cancellation of the lease contract, all obligations that are still executory on both sides are discharged, but

(e) The following survive cancellation:

(1) any right based on ~~prior previous~~ default; or performance survives, and the cancelling party also retains any remedy for default of the whole lease contract or any unperformed balance.

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

(3) any limitation on disclosure of information;

(4) any obligation to return goods which obligation must be promptly performed; and

(5) any remedy for default on the whole contract or any unperformed balance.

~~(f) On termination of the lease contract, all obligations that are still executory on both sides are discharged but any right based on prior default or performance survives.~~

~~(g)~~ Unless ~~the~~ a contrary intention clearly appears, expressions of "cancellation," "rescission," or "avoidance" ~~the like~~ of the lease contract or similar terms may not be construed as a renunciation or discharge of any claim in damages for an antecedent default.

~~(h)~~ ~~Rights and Remedies for material misrepresentation or fraud include all rights and remedies available under this [Article] for nonfraudulent default.~~ ~~(5) Neither Rescission nor or a claim for rescission of the a lease contract nor and rejection or return of the goods may do not bar or be deemed and are not inconsistent with, a claim for damages or other ~~right or~~ remedy.~~

§ 2A-506. STATUTE OF LIMITATIONS.

(a) An action for default under a lease contract, including breach of warranty or indemnity, must be

commenced within 4 years after the ~~cause~~ right of action has accrued. ~~By~~ Except in a consumer lease contract, the parties in the original lease ~~contract~~ agreement the ~~parties~~ may reduce the period of limitations to not less than one year but may not extend it.

(b) Except as otherwise provided in subsection (c), ~~A~~ a ~~cause~~ right of action for default accrues when the ~~act or omission on which the default or breach of warranty is based is or should have been discovered by the aggrieved party, or when the default occurs, even though the aggrieved party had no knowledge of the default whichever is later.~~ A cause of action for indemnity accrues when the act or omission on which the claim for indemnity is based occurs.~~is or should have been discovered by the indemnified party, whichever is later.~~

(c) If a breach of warranty occurs, the following rules apply:

(1) Subject to paragraph (2), a right of action accrues when the lessor or supplier has tendered delivery of, or has completed any agreement to assemble or install nonconforming goods, whichever is later.

(2) If a warranty expressly extends to performance of the goods after delivery, a right of action accrues when the lessee discovers or should have discovered the breach.

(3) If the lessor or supplier, after delivery, attempts to conform goods to the contract and fails, the period of limitation is tolled for the time of the attempt.

(d) If an action commenced within the applicable time limitation~~ed~~ by subsection (1) is ~~so~~ terminated ~~as to leave available~~ but a remedy by another action for the same default or breach of warranty or indemnity is available, the other action may be commenced after the expiration of the time limitation~~ed~~ and within 6 months after the termination of the first action unless the termination resulted from voluntary discontinuance or from dismissal for failure ~~or neglect~~ to prosecute.

(e) This section does not alter the law on tolling of the statute of limitations ~~nor~~ and does it not apply to causes of action that ~~have~~ accrued before this [~~Aa~~Article] ~~becomes~~ took effective.

Drafting Comment

The ELA memorandum, pages 42-44, makes a strong argument for retention of the present 2A "discovers or should have discovered" rule. It can be argued that nothing has changed between the time of drafting present Article 2A and now which makes it more appropriate to follow Article 2 on this point than it did then. However, I still have a hard time think of any principled reason for having a different rule in Article 2A than in Article 2, though I think the better rule in both Articles would be the 2A rule. However, the 2A rule, in the Article 2 context, would require some additional absolute cut off, it would not be appropriate to have a seller sued 15 years after it delivered the goods, even though the buyer reasonably did not discover the defect for eleven years.

§ 2A-507. PROOF OF MARKET RENT: TIME AND PLACE.

(a) Damages based on market rent (Section 2A-519 or 2A-528) are determined according to the rent for the use of the goods concerned for a lease term identical to the remaining lease term of the original lease agreement and prevailing at the times specified in Sections 2A-519 and 2A-528.

(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.

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

(c) Evidence of a relevant rent prevailing at ~~a~~ another time or place or for a lease term other than the one described in this ~~[A]~~ Article offered by one party is

not admissible unless ~~and until he [or she]~~ the party has given the other party notice the court finds sufficient to prevent unfair surprise.

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

B. DEFAULT BY LESSOR

§ 2A-508. 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 (Section 2A-509) or repudiates the lease contract (Section 2A-402), or a lessee rightfully rejects the goods (Section 2A-509) or justifiably revokes acceptance of the goods (Section 2A-517),~~ defaults then with respect to any goods involved, and if the breach is of the whole contract, Section 2A-510, [with respect to all of the goods] [with respect to the undelivered balance] ~~if under an~~

~~installment lease contract the value of the whole lease contract is substantially impaired (Section 2A-510), the lessor is in default under the lease contract and the lessee may:~~

(1) cancel the lease contract ~~(Section 2A-505(1))~~;

(2) recover so much of the rent and security as has been paid and is just under the circumstances;

(3) cover and ~~recover~~ obtain damages as to all goods affected, whether or not they have been identified to the lease contract as provided in Sections 2A-518 and 2A-520,

(4) or recover damages for nondelivery as provided in Sections 2A-519 and 2A-520;

(5) if an acceptance of goods has not been justifiably revoked, recover damages for default with regard to accepted goods under 2A-519.

(6) exercise any other rights or pursue any other remedies provided in the lease contract.

(b) If a lessor fails to deliver ~~the goods in conformity to the lease contract~~ or repudiates the lease contract, the lessee may also:

(1) ~~if the goods have been~~ recover identified, ~~recover them~~ goods under ~~(Section 2A-522)~~; or

(2) in a proper case, obtain specific performance or replevy the goods under ~~(Section 2A-521)~~.

(c) If a lessor is otherwise in default under a lease contract, the lessee may exercise the rights and pursue the remedies provided in the lease contract, which may include a right to cancel the lease, and in Section 2A-519(c).

(d) If a lessor has breached a warranty, whether express or implied, the lessee may recover damages under ~~(Section 2A-519(d))~~.

(e) On rightful rejection or justifiable revocation of acceptance, a lessee has a security interest in goods in the lessee's possession or control for any rent and security that has been paid and any expenses reasonably incurred in their inspection, receipt, transportation, and care and custody. ~~and~~ [Subject to Sections 2A-511 and 2A-512], the lessee may hold ~~those~~ the goods and dispose of them in good faith and in a commercially reasonable manner, subject to Section 2A-527(e).

(f) Subject to the provisions of Section 2A-407, a lessee, on so notifying the lessor ~~of the lessee's intention to do so~~, may deduct all or any part of the damages resulting from any default under the lease contract from any part of the rent still due under the same lease contract.

Drafting Comment

In subsection (a), following present Article 2, 2A referred to "all of the goods" if an installment contract is materially breached by the lessor. Revised Article 2 refers to "the undelivered balance". I'm not sure that "undelivered balance" is correct in 2A, (or in 2). What do you think?

In revised Article 2, the rights of a buyer with a security interest in goods in its possession is said to be subject to the equivalent of 2A-511 and 5-12. Those sections refer to holding at the direction of the lessor (seller) and so on. I'm not sure that the rights should be so subject either in 2A or in 2. What do you think?

§ 2A-509. LESSEE'S RIGHTS ON IMPROPER DELIVERY;
RIGHTFUL REJECTION.

(a) ~~Subject to the provisions of Section 2A-510 on default in installment lease contracts,~~ if the goods or the tender or delivery fail in any respect to conform to the lease contract, ~~the~~ a lessee may:

(1) reject the whole;

(2) or accept the whole;~~goods~~ or

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

(b) A ~~Rejection of goods under subsection (a) is not ineffective unless it the lessor is notified within a reasonable time after the nonconformity was or should have been discovered.~~~~tender or delivery of the goods and the lessee seasonably notifies the lessor.~~

§ 2A-510. INSTALLMENT LEASE CONTRACTS: REJECTION AND DEFAULT.

(a) "Installment lease contract" means is a lease contract that authorizes or requires in which the terms require or the circumstances permit the delivery of goods in separate lots to be separately accepted, even though if the lease contract requires payment other than in installments or contains a clause "each delivery is a separate lease" or its equivalent.

Drafting Comment

Subsection (a) is moved here from the definitions section, following Article 2. The underlined strikeouts indicate language changes in the definition.

(b) ~~Under an installment lease contract a~~ The lessee may reject any nonconforming installment of delivery of goods that ~~is nonconforming~~ if the nonconformity substantially impairs the value of that installment delivery to the aggrieved party. ~~and cannot be cured or the nonconformity is a defect in the required documents; but if the nonconformity does not fall within subsection (2)~~ However, if a non-conforming tender by the lessor, supplier, or lessee is not a breach of the whole contract, and the lessor, ~~or~~ the supplier, or the lessee gives adequate assurance of its cure, the ~~lessee~~ aggrieved party must accept that installment delivery.

(c) ~~If a~~ ~~Whenever~~ nonconformity or default with respect to one or more installments ~~deliveries~~ substantially impairs the value of the whole ~~installment~~ lease contract ~~as a whole~~ there is a default with respect to of the whole. ~~But, the aggrieved party reinstates the installment lease contract as a whole if~~ However, the power to cancel the contract for default is waived or a canceled contract is reinstated if the aggrieved party accepts a nonconforming ~~delivery~~ installment without seasonably notifying of cancellation or brings an action with respect only to past ~~deliveries~~ installments or demands performance as to future ~~deliveries~~ installments.

Drafting Comment

Revised 2-611 applies the substantial breach rule to payments. Therefore, presumably, a seller would have to accept a short payment unless the shortage substantially impaired the value of that payment to the seller. That rule has not been included here. Lessors and lessees probably expect that a lessor has the right to decline to accept short rent payments and, instead terminate the lease. The ELA memorandum, page 45, strongly opposes applying the substantial breach rule to payments.

§ 2A-511. ~~MERCHANT LESSEE'S DUTIES AS TO RIGHTFULLY REJECTED GOODS.~~ ; LESSEE'S OPTIONS AS TO SALVAGE.

(a) Subject to ~~any~~ a lessee's security interest ~~of a lessee~~ under (Section 2A-508(e)), if ~~a~~ the lessor or ~~a~~ the supplier ~~has no~~ does not have an agent or place of business at the market where the goods were ~~of~~

~~rejected~~ or acceptance was revoked, a merchant lessee, after rejection or revocation of acceptance of goods in his [or her] possession or control, shall follow any reasonable instructions received from the lessor or the supplier with respect to ~~the goods~~ in the lessee's possession or control and ~~in~~ the absence of those instructions, a merchant lessee shall make a reasonable efforts to sell, lease, or otherwise dispose of ~~the goods~~ them for the lessor's account if they threaten to decline speedily in value ~~speedily~~. Instructions are not reasonable if on demand indemnity for expenses is not forthcoming.

(b) If a merchant lessee (subsection (a)) or any other lessee (Section 2A-512) disposes of goods, ~~he~~ [or ~~she~~] the lessee is entitled to reimbursement ~~either~~ from the lessor, ~~or~~ the supplier, or out of the proceeds for the reasonable expenses of caring for and disposing of ~~the goods and, them~~. If the expenses do not include ~~no~~ a disposition commission, the lessee is entitled to such a commission ~~as is~~ usual in the trade, or if there is none, to a reasonable sum not exceeding 10 percent of the gross proceeds.

(c) Subject to subsection (a), if a lessor or supplier does not give instructions within a reasonable time after notification of rejection or revocation of acceptance, the lessee, whether a merchant or not, may

store the rejected goods for the lessor's or supplier's account, reship them to the lessor or supplier, or resell them for the lessor's or supplier's account, with reimbursement as provided in subsection (b).

(d) In complying with this section or Section 2A-512, the lessee is ~~held only to~~ shall act in good faith. Conduct in ~~Good faith conduct hereunder~~ under this section does not constitute ~~is neither~~ acceptance or conversion ~~nor~~ and may not be the basis of an action for damages.

(e) A purchaser who purchases in good faith from a lessee pursuant to this section or Section 2A-512 takes the goods free of any rights of the lessor and the supplier even though the lessee fails to comply with one or more of the requirements of this Article.

§ 2A-512. LESSEE'S DUTIES AS TO RIGHTFULLY REJECTED GOODS.

(a) ~~Except as otherwise provided with respect to goods that threaten to decline in value speedily~~ Subject to ~~(Section 2A-511)~~ a lessee who, before rejection or revocation of acceptance, takes physical possession or control of goods other than those in which there is a ~~and subject to any security interest of a lessee under~~ (Section 2A-508(e)) (a) the lessee, shall, after a rightful rejection or justifiable revocation of

~~acceptance of hold the goods in the lessee's possession,~~
~~shall hold them~~ with reasonable care at the lessor's or
the supplier's disposition for a ~~reasonable~~ sufficient
time to permit the lessor or supplier to remove them.
~~after the lessee's seasonable notification of rejection;~~
However, the lessee has no further obligation with
regard to the goods.

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

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

(2) If use of the goods is not an acceptance,
the lessee, upon returning or disposing of the goods,
shall in appropriate circumstances pay the lessor or
supplier the reasonable value of the use to the lessee.
This value must be deducted from any damages to which
the buyer is otherwise entitled under this [article].

~~(b) if the lessor or the supplier gives no~~
~~instructions within a reasonable time after notification~~
~~of rejection, the lessee may store the rejected goods~~
~~for the lessor's or the supplier's account or ship them~~

~~to the lessor or the supplier or dispose of them for the lessor's or the supplier's account with reimbursement in the manner provided in Section 2A-511; but~~

~~———— (c) the lessee has no further obligations with regard to goods rightfully rejected.~~

~~———— (2) Action by the lessee pursuant to subsection (1) is not acceptance or conversion.~~

(c) A lessee in possession who wrongfully rejects but does not accept goods is subject to subsection (b) (1) and the duty of care in subsection (a).

Drafting Comment

The ELA memorandum, page 45, objects to including (b) (1) in the statute. That group doesn't want the statutory language to suggest that actual use by the lessee might not be a use "under the lease", but rather a use to mitigate damages. See also 2A-515(a) (3) to which ELA also objects.

Stricken (b) is moved to 2A-511.

~~§ 2A-513. CURE BY LESSOR OF IMPROPER TENDER OR DELIVERY; REPLACEMENT.~~

~~(1) If any tender or delivery by the lessor or the supplier is rejected because nonconforming and the time for performance has not yet expired, the lessor or the supplier may seasonably notify the lessee of the lessor's or the supplier's intention to cure and may then make a conforming delivery within the time provided in the lease contract.~~

~~(2) If the lessee rejects a nonconforming tender that the lessor or the supplier had reasonable grounds to believe would be acceptable with or without money allowance, the lessor or the supplier may have a further reasonable time to substitute a conforming tender if he [or she] seasonably notifies the lessee.~~

If the lessee rightfully rejects a tender of delivery under Section 2A-509 [or ,2A-510] or justifiably revokes an acceptance under Section 2A-517, the lessor or supplier, upon seasonable notice to the buyer and at its own expense, may cure any breach as follows:

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

(2) If the agreed time for performance has expired, the lessor or supplier may provide a cure that is appropriate in the circumstances if the buyer has no legitimate interest in refusing the cure and cure is effected within a reasonable time.

Drafting comment

Revised Article 2 refers only to rejection under the single delivery perfect tender rules section. Should it not also refer to rejection under the installment rejection rules; or do the cure rules stated in the installment section itself sufficiently cover the question. I have included a reference to 2A-510, the installment delivery section, in brackets.
/

§ 2A-514. WAIVER OF LESSEE'S OBJECTIONS.

(a) ~~In rejecting goods, a~~ A lessee's failure to state, in connection with a rejection under Section 2A-503[,2A-510] or a revocation of acceptance under 2A-527, a particular ~~defect~~ nonconformity that is ascertainable by reasonable inspection precludes ~~the lessee from~~ relying reliance on the unstated ~~defect~~ [nonconformity] to justify rejection or revocation of acceptance or to establish default if:

(1) ~~if, stated seasonably,~~ the lessor or the supplier ~~could~~ would have cured it ~~(Section 2A-513)~~ the nonconformity if stated seasonably; or

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

~~(2) A lessee's failure to reserve rights when paying rent or other consideration against documents precludes recovery of the payment for defects apparent on the face of the documents.~~

(b) Payment against a document made without a lessee's reservation of rights precludes recovery of the payment for defects apparent on the face of the document.

§ 2A-515. ACCEPTANCE OF GOODS.

(a) ~~Acceptance of g~~Goods are accepted if a ~~occurs~~
~~after the lessee:~~

(1) has had after a reasonable opportunity to inspect the goods and ~~(a) the lessee signifies or acts with respect to the goods in a manner that signifies to the lessor or the supplier that the goods are conforming or that the lessee will be taken or retained them in spite of their nonconformity; or~~

(2) after a reasonable opportunity to inspect the goods, ~~the lessee fails to make an effective rejection of the goods (Section 2A-509(2)). or;~~

(3) either before or after rejection or revocation of acceptance, does any unreasonable act inconsistent with the lessor's or supplier's interest 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 commercial unit is acceptance of ~~that~~ the entire unit.

§ 2A-516. EFFECT OF ACCEPTANCE OF GOODS; NOTICE OF DEFAULT; BURDEN OF ESTABLISHING DEFAULT AFTER ACCEPTANCE; NOTICE OF CLAIM OR LITIGATION TO PERSON ANSWERABLE OVER.

(a) A lessee ~~must~~ shall pay rent for any goods accepted in accordance with the lease contract, [with due allowance for goods rightfully rejected or not delivered.]

Drafting Comment

The bracketed language is in present 2A. It is not in present Article 2 and is not in revised Article 2. It is probably redundant in Article 2A. Should it be deleted?

(b) ~~A lessee's~~ Acceptance of goods precludes rejection of the goods accepted but ~~In the case of a finance lease, if made with knowledge of a nonconformity, acceptance cannot be revoked because of it. In any other case, if made with knowledge of a nonconformity, acceptance cannot be revoked because of it unless the acceptance was on the reasonable assumption that the nonconformity would be seasonably cured. Acceptance does not~~ of by itself impair any other remedy provided by this [Article] or the lease agreement for nonconformity.

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

(1) The lessee, within a reasonable time after the lessee discovers or should have discovered a ~~ny~~ default, ~~the lessee~~ shall notify the lessor and the supplier, if any, of the claimed default. However a

failure to give notice bars the buyer from a remedy only to the extent that the seller establishes that it was prejudiced by the failure. ~~or be barred from any remedy against the party not notified;~~

(2) Except in the case of a consumer lease, if the claim is one for infringement or the like and as a result of the default the lessee is sued, the lessee shall so notify the lessor or the supplier,, if any, within a reasonable time after ~~the lessee receives~~ notice of the litigation for ~~infringement or the like~~ (Section 2A-211) ~~the lessee shall notify the lessor or be barred from any remedy over for liability established by the litigation., and~~

(3) ~~the~~ A lessee has the burden is on the lessee to of establishing a any default with respect to goods accepted.

(d If a lessee is sued for breach of a warranty or other obligation for which ~~a~~ its lessor or ~~a~~ supplier is answerable over the following apply:

(1) The lessee may give ~~the~~ its lessor or ~~the~~ supplier, or both, ~~written~~ notice in a record of the litigation. If the notice ~~states that~~ invites the person notified ~~may come in and defend~~ to intervene in the litigation and states that if the person notified does not do so that person will be bound in any action against that person by the lessee by any determination

of fact common to the two ~~litigations~~ actions, the person notified is so bound, ~~then unless the~~ that person notified ~~,~~ after seasonable receipt of the notice, ~~does come in~~ it intervenes in the litigation and defends ~~that person is so bound.~~

(2) If the claim is one for infringement or the like, ~~the~~ original lessor or ~~the~~ supplier may demand in ~~writing~~ a record that ~~the~~ its lessee turn over control of the litigation including settlement ~~if the claim is one for infringement or the like (Section 2A-211) or else~~ or otherwise be barred from any remedy over. If ~~the demand states that~~ the lessor or the supplier also agrees to bear all expense and to satisfy any adverse judgment, ~~then unless~~ the lessee ~~after seasonable receipt of the demand does turn over control~~ ~~the lessee~~ is so barred unless, after seasonable receipt of the demand, control is turned over to the lessor or supplier.

(f) Subsections (c), ~~and~~ (d), and (e) apply to ~~any~~ an obligation of a lessee to hold the lessor or the supplier harmless against infringement or the like (Section 2A-211).

§ 2A-517. REVOCATION OF ACCEPTANCE OF GOODS.

(a) A lessee may revoke acceptance of a lot or commercial unit whose nonconformity substantially

impairs its value to the lessee if ~~the lessee has~~ accepted it:

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

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

(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) The be effective, a lessee's acceptance must be revoked ~~Revocation of acceptance must occur~~ within a reasonable time after the lessee discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by the nonconformity. The Revocation is not effective until the lessee notifies the lessor.

(e) A lessee who ~~so~~ justifiably revokes acceptance has the same rights and duties with regard to the goods involved under Sections 2A-511, 2A-512, and 2A-513 as if they ~~lessee~~ had been rejected ~~them~~.

§ 2A-518. COVER; SUBSTITUTE GOODS.

(a) After a default by a lessor under the lease contract of the type described in Section 2A-508(a), or, if agreed, after other default by the lessor, the lessee may cover by making any purchase or lease of or contract to purchase or lease goods in substitution for those due from the lessor.

(b) Except as otherwise provided with respect to damages liquidated in the lease agreement (Section 2A-504) or otherwise determined pursuant to agreement of the parties (Sections 1-102(3) and 2A-503), if a lessee's cover is by a lease agreement substantially similar to the original lease agreement and the new lease agreement is made in good faith and in a commercially reasonable manner, the lessee may recover from the lessor as damages (1) the present value, as of the date of the commencement of the term of the new lease agreement, of the rent under the new lease agreement applicable to that period of the new lease term which is comparable to the then remaining term of the original lease agreement minus the present value as

of the same date of the total rent for the then remaining lease term of the original lease agreement, and (2) any incidental or consequential damages, less expenses saved in consequence of the lessor's default.

(c) If a lessee's cover is by lease agreement that for any reason does not qualify for treatment under subsection (2), or is by purchase or otherwise, the lessee may recover from the lessor as if the lessee had elected not to cover and Section 2A-519 governs.

§ 2A-519. LESSEE'S DAMAGES FOR NON-DELIVERY, REPUDIATION, DEFAULT, AND BREACH OF WARRANTY IN REGARD TO ACCEPTED GOODS.

(a) Except as otherwise provided with respect to damages liquidated in the lease agreement (Section 2A-504) or otherwise determined pursuant to agreement of the parties (Sections 1-102(3) and 2A-503), if a lessee elects not to cover or a lessee elects to cover and the cover is by lease agreement that for any reason does not qualify for treatment under Section 2A-518(b), or is by purchase or otherwise, the measure of damages for non-delivery or repudiation by the lessor or for rejection or revocation of acceptance by the lessee is the present value, as of the date of the default specified in subsection (b) and at the place specified in subsection (c), of the then market rent

minus the present value as of the same date of the original rent, computed for the remaining lease term of the original lease agreement, together with incidental and consequential damages, less expenses saved in consequence of the lessor's default.

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

(1) If the case comes to trial after the agreed time for performance, the following rules apply:

(i) If the default is other than by repudiation the market rent is determined as of the time the lessee learned of the default.

(ii) If the default is by repudiation, market rent is determined as of the time for performance.

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

(c) Market rent is ~~to be~~ determined as of the place for tender or, in cases of rejection after arrival or revocation of acceptance, as of the place of arrival.

(d) Except as otherwise agreed, ~~if the~~ a lessee who has accepted goods and given notification pursuant to ~~(Section 2A-516(c))~~, ~~the measure of~~ may recover as

damages for any nonconforming tender ~~or delivery~~ or other default by a lessor ~~is~~ the loss resulting in the ordinary course of events from the lessor's default as determined in any reasonable manner ~~that is reasonable~~ together with incidental and consequential damages, less expenses saved in consequence of the lessor's default.

(e) Except as otherwise agreed, the measure of damages for breach of warranty is the present value at the time and place of acceptance of the difference between the value of the use of the goods accepted and the value if they had been as warranted for the lease term, unless special circumstances show proximate damages of a different amount, together with incidental and consequential damages, less expenses saved in consequence of the lessor's default or breach of warranty.

§ 2A-520. ~~LESSEE'S INCIDENTAL AND CONSEQUENTIAL~~
DAMAGES.

~~(1)~~ Incidental damages resulting from a ~~lessor's~~ default under a lease contract include any commercially reasonable charges, expenses, or commissions ~~reasonably~~ incurred after the default with respect to:

(1) in inspection, receipt, transportation, and care and custody of goods property after the other

~~party's default; rightfully rejected or goods the acceptance of~~

(2) stopping delivery or shipment;

~~which is justifiably revoked,~~

(3) any commercially reasonable charges, expenses or commissions in connection with effecting cover, return, or resale of property, and:

(4) and any other reasonable efforts otherwise to minimize or avoid the consequences of expense incident to the default.

SECTION 2A-520A. CONSEQUENTIAL DAMAGES.

~~(2) Consequential damages to a lessee, lessor, or other protected person resulting from a lessor's for default include:~~

(1) any losses resulting from a default which the defaulting party at the time of contracting had reason to know would probably result from the aggrieved party's general or particular requirements and needs, of which the lessor at the time of contracting had reason to know and which are not unreasonably disproportionate to the risk assumed by the defaulting party, and the aggrieved [or the breaching] party could not avoid by reasonable measures under the circumstances; reasonably be prevented by cover or otherwise; and

(2) subject to 2A-216A, injury to person or property proximately resulting from any breach of warranty.

Drafting Comment

Revised 2-706 on consequential damages limits them to damages which the aggrieved or the breaching party could not avoid. I can't understand why the fact that the breaching party might have avoided the loss can be relevant, if it didn't avoid the loss. I have bracketed the language here.

§ 2A-521. ~~LESSEE'S RIGHT TO SPECIFIC PERFORMANCE OR REPLEVIN.~~

(a) A court may, at its discretion, decree ~~specific performance may be decreed~~ if the parties have expressly agreed to that remedy or the agreed performance of the defaulting party is ~~goods are~~ unique or in other proper circumstances.

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

(c) A lessee has a right ~~of replevin, detinue, sequestration, claim and delivery, or the like~~ for to recover goods identified to the lease contract if, after reasonable efforts, the lessee is unable to effect cover for ~~those~~ the goods or the circumstances ~~reasonably~~ indicate that ~~the~~ an effort to obtain cover would ~~will~~ be unavailing.

Drafting Comment

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

§ 2A-522. LESSEE'S RIGHT TO GOODS ON LESSOR'S
INSOLVENCY.

[(a) Subject to subsection (b) ~~lessee and even~~
~~though the goods have not been shipped,~~ a lessee who
[has paid] pays all or a part ~~or all~~ of the rent and
security for goods identified to ~~a~~ the lease contract
~~(Section 2A-217)~~ , on making and keeping good a tender of
any unpaid portion of the rent and security due under
the lease contract, may has a right to recover them
~~goods identified~~ from the lessor if the lessor
repudiates or fails to deliver as required by the
contract. ~~becomes insolvent within 10 days after receipt~~
~~of the first installment of rent and security.~~

[(b) A lessee acquires the right to recover goods
identified to a lease contract only if they conform to
the lease contract.]

Drafting Comment

Should subsection (b) be retained? Present 2-502
says that if identification has been by the buyer, the
buyer can get the goods only if they conform to the
contract. Revised 2-724 has no similar provision.
The present 2A comments say that subsection (b) is
intended to prevent the unjust enrichment would occur if
goods better than the lease required had been identified
to the contract. However, even if that is a desirable
purpose, the language of the statute may not achieve the
purpose: goods better than those required probably do
conform to the contract.

C. DEFAULT BY LESSEE

§ 2A-523. LESSOR'S REMEDIES.

(a) If a lessee wrongfully rejects or revokes acceptance of goods or fails to make a payment when due or repudiates with respect to a part or the whole, then, with respect to any goods involved, and with respect to all of the goods if under an installment lease contract the value of the whole lease contract is substantially impaired (Section 2A-510), the lessee is in default under the lease contract and the lessor may:

(1) cancel the lease contract (Section 2A-505(a));

(2) proceed respecting goods not identified to the lease contract (Section 2A-524);

(3) withhold delivery of the goods and take possession of goods previously delivered (Section 2A-525);

(4) stop delivery of the goods by any bailee (Section 2A-526);

(5) dispose of the goods and recover damages (Section 2A-527), or retain the goods and recover damages (Section 2A-528), or in a proper case recover rent (Section 2A-529) ;

(6) exercise any other rights or pursue any other remedies provided in the lease contract.

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

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

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

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

§ 2A-524. LESSOR'S RIGHT TO IDENTIFY GOODS TO LEASE CONTRACT NOTWITHSTANDING DEFAULT OR TO SALVAGE UNFINISHED GOODS.

(a) After default by the lessee under the lease contract of the type described in Section 2A-523(a) or Section 2A-523(c)(1) or, if agreed, after other default by the lessee, the lessor may:

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

(2) dispose of goods (Section 2A-527(a)) that demonstrably are shown to have been intended for the particular lease contract even ~~though those goods~~ if they are unfinished.

(b) If the goods are unfinished at the time of breach, an aggrieved lessor or the supplier, in the exercise of reasonable commercial judgment ~~for the purposes of avoiding to minimize loss and for the purpose~~ of effective realization, ~~an aggrieved lessor or the supplier~~ may ~~either~~ complete manufacture and wholly identify the goods to the lease contract, ~~or~~ cease manufacture and lease, sell, or otherwise dispose of the goods for scrap or salvage value, or proceed in any other reasonable manner.

§ 2A-525. LESSOR'S RIGHT TO POSSESSION OF GOODS.

(a) ~~If a~~ A lessor who discovers that the lessee ~~to be~~ is insolvent, ~~the lessor~~ may refuse to deliver the goods.

(b) After a default by the lessee under the lease contract of the type described in Section 2A-523(a) or 2A-523(c)(1) or, if agreed, after other default by the lessee, the lessor has the right to take possession of the goods. If the lease contract so provides, the lessor may require the lessee to assemble the goods and make them available to the lessor at a place to be designated by the lessor which is reasonably convenient to both parties. Without removal, the lessor may render unusable any goods employed in trade or business, and may dispose of goods on the lessee's premises (Section 2A-527).

(c) The lessor may proceed under subsection (b) without judicial process if it can be done without breach of the peace or the lessor may proceed by action.

Drafting Comment

In revised Article 2, subsection (a) is moved to the stoppage in transit section, should that be done here?

§ 2A-526. LESSOR'S STOPPAGE OF DELIVERY IN TRANSIT OR OTHERWISE.

(a) Subject to subsection (c), a lessor may stop delivery of goods in the possession of a carrier or

other bailee if the ~~lessor discovers the lessee to be~~ is insolvent ~~and may stop delivery of carload, truckload, planeload, or larger shipments of express or freight if the lessee~~ or repudiates or fails to make a payment due before delivery, whether for rent, security or otherwise under the lease contract, ~~or~~ if, for any other reason, ~~the lessor has a right to withhold or take possession of~~ reclaim the goods.

(b) As against a lessee ~~In pursuing its remedies~~ under subsection (a), the lessor may stop delivery until

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

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

~~————— (c) such an acknowledgment to the lessee by a carrier via reshipment or as warehouseman.~~

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

(1) The notice must afford the carrier or a bailee reasonable opportunity ~~(a) To stop delivery, a lessor shall so notify as to enable the bailee by reasonable diligence to prevent delivery of the goods.~~

(2) After notification, the carrier or bailee shall must hold and deliver the goods according to the

directions of the lessor, ~~but~~ However, the lessor is liable to the bailee for any ensuing charges or damages.

(3) A carrier or bailee ~~who~~ that has issued a nonnegotiable ~~bill of lading~~ document is not obliged to need not obey a notification to stop received from a person other than the ~~consignor~~ person named in the document as the person from whom the goods have been received for shipment or storage.

§ 2A-527. LESSOR'S RIGHTS TO DISPOSE OF GOODS.

(a) After a default by a lessee under the lease contract of the type described in Section 2A-523(a) or 2A-523(c)(1) or after the lessor refuses to deliver or takes possession of goods (Section 2A-525 or 2A-526), or, if agreed, after other default by a lessee, the lessor may dispose of the goods concerned or the undelivered balance thereof by lease, sale, or otherwise.

(b) Except as otherwise provided with respect to damages liquidated in the lease agreement (Section 2A-504) or otherwise determined pursuant to agreement of the parties (Sections 1-102(3) and 2A-503), if the disposition is by lease agreement substantially similar to the original lease agreement and the new lease agreement is made in good faith and in a commercially reasonable manner, the lessor may recover

from the lessee as damages (i) accrued and unpaid rent as of the date of the commencement of the term of the new lease agreement, (ii) the present value, as of the same date, of the total rent for the then remaining lease term of the original lease agreement minus the present value, as of the same date, of the rent under the new lease agreement applicable to that period of the new lease term which is comparable to the then remaining term of the original lease agreement, and (iii) any incidental damages allowed under Section 2A-530, less expenses saved in consequence of the lessee's default.

(c) If the lessor's disposition is by lease agreement that for any reason does not qualify for treatment under subsection (b), or is by sale or otherwise, the lessor may recover from the lessee as if the lessor had elected not to dispose of the goods and Section 2A-528 governs.

(d) A subsequent buyer or lessee who buys or leases from the lessor in good faith for value as a result of a disposition under this section takes the goods free of the original lease contract and any rights of the original lessee even though the lessor fails to comply with one or more of the requirements of this Article.

(e) The lessor is not accountable to the lessee for any profit made on any disposition. A lessee who

has rightfully rejected or justifiably revoked acceptance shall account to the lessor for any excess over the amount of the lessee's security interest (Section 2A-508(e)).

§ 2A-528. LESSOR'S DAMAGES FOR NON-ACCEPTANCE, FAILURE TO PAY, REPUDIATION, OR OTHER DEFAULT.

(1) Except as otherwise provided with respect to damages liquidated in the lease agreement (Section 2A-504) or otherwise determined pursuant to agreement of the parties (Sections 1-102(3) and 2A-503), if a lessor elects to retain the goods or a lessor elects to dispose of the goods and the disposition is by lease agreement that for any reason does not qualify for treatment under Section 2A-527(b), or is by sale or otherwise, the lessor may recover from the lessee as damages for a default of the type described in Section 2A-523(a) or 2A-523(c)(1), or, if agreed, for other default of the lessee, (i) accrued and unpaid rent as of the date specified in subsection (b) if the lessee has never taken possession of the goods, or, if the lessee has taken possession of the goods, as of the date the lessor repossesses the goods or an earlier date on which the lessee makes a tender of the goods to the lessor, (ii) the present value as of

the date determined under clause (i) of the total rent for the then remaining lease term of the original lease agreement minus the present value as of the same date of the market rent at the place where the goods are located computed for the same lease term, and (iii) any incidental or consequential damages allowed under Section 2A-530 and Section 2A-531, less expenses saved in consequence of the lessee's default.

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

(1) If the case comes to trial after the agreed time for performance, the following rules apply:

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

(ii) If the breach is by repudiation, market rent is determined as of the time for acceptance of the goods by the lessee.

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

~~(c) If the measure of damages provided in subsection (1) is inadequate to put a lessor in as good~~

~~a position as performance would have, the measure of~~ A
lessor may recover damages measured by other than the
market rent including the present value of the profit,
including reasonable overhead, the lessor would have
made from full performance by the lessee, together with
any incidental damages allowed under Section 2A-520, due
allowance for costs reasonably incurred and due credit
for payments or proceeds of disposition.

§ 2A-529. LESSOR'S ACTION FOR THE RENT.

(a) After default by the lessee under the lease
contract of the type described in Section 2A-523(a) or
2A-523(c)(1) or, if agreed, after other default by the
lessee, if the lessor complies with subsection (b), the
lessor may recover from the lessee as damages:

(1) for goods accepted by the lessee and not
repossessed by or tendered to the lessor, and for
conforming goods lost or damaged within a commercially
reasonable time after risk of loss passes to the lessee
(Section 2A-219), (i) accrued and unpaid rent as of the
date of entry of judgment in favor of the lessor, (ii)
the present value as of the same date of the rent for
the then remaining lease term of the lease agreement,
and (iii) any incidental damages allowed under
Section 2A-530, less expenses saved in consequence of
the lessee's default; and

(2) for goods identified to the lease contract if the lessor is unable after reasonable effort to dispose of them at a reasonable price or the circumstances reasonably indicate that effort will be unavailing, (i) accrued and unpaid rent as of the date of entry of judgment in favor of the lessor, (ii) the present value as of the same date of the rent for the then remaining lease term of the lease agreement, and (iii) any incidental damages allowed under Section 2A-530, less expenses saved in consequence of the lessee's default.

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

(c) The lessor may dispose of the goods at any time before collection of the judgment for damages obtained pursuant to subsection (a). If the disposition is before the end of the remaining lease term of the lease agreement, the lessor's recovery against the lessee for damages is governed by Section 2A-527 or Section 2A-528, and the lessor will cause an appropriate credit to be provided against a judgment for damages to the extent that the amount of the judgment exceeds the recovery available pursuant to Section 2A-527 or 2A-528.

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

(e) After default by the lessee under the lease contract of the type described in Section 2A-523(a) or Section 2A-523(c)(1) or, if agreed, after other default by the lessee, a lessor who is held not entitled to rent under this section must nevertheless be awarded damages for non-acceptance under Section 2A-527 or Section 2A-528.

~~§ 2A-530. LESSOR'S INCIDENTAL DAMAGES.~~

~~Incidental damages to an aggrieved lessor include any commercially reasonable charges, expenses, or commissions incurred in stopping delivery, in the transportation, care and custody of goods after the lessee's default, in connection with return or disposition of the goods, or otherwise resulting from the default.~~

§ 2A-531. STANDING TO SUE THIRD PARTIES FOR INJURY TO GOODS.

(a) If a third party ~~so~~ deals with goods that have been identified to a lease contract ~~as to~~ and

causes actionable injury [to the goods] [to a party to the lease contract] (a) the lessor has a right of action against the third party, and (b) the lessee also has a right of action against the third party if the lessee:

(i) has a security interest in the goods;

(ii) has an insurable interest in the goods; or

(iii) bears the risk of loss under the lease contract or has since the injury assumed that risk as against the lessor and the goods have been converted or destroyed.

(b) If at the time of the injury the ~~party~~ plaintiff did not bear the risk of loss as against the other party to the lease contract and there is no arrangement between them for disposition of the recovery, ~~his [or her] suit~~ any recovery or settlement is, subject to his [or her] own interest, ~~is~~ as a fiduciary for the other party to the lease contract.

(c) Either party with the consent of the other may sue for the benefit of ~~whom it may~~ a concerned party.

Drafting Comment

The Article 2 revision speaks of injury to the goods. Isn't that incorrect. Is the issue, injury to a party rather than injury to the goods. Conversion would not be injury "to the goods"

§ 2A-532. LESSOR'S RIGHTS TO RESIDUAL INTEREST. In addition to any other recovery permitted by this Article or other law, the lessor may recover from the lessee an amount that will fully compensate the lessor for any loss of or damage to the lessor's residual interest in the goods caused by the default of the lessee.

ARTICLE 1 AND ARTICLE 9: CONFORMING AMENDMENTS

§ 1-105. TERRITORIAL APPLICATION OF THE ACT; PARTIES' POWER TO CHOOSE APPLICABLE LAW.

(1) Except as provided hereafter in this section, when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties. Failing such agreement this Act applies to transactions bearing an appropriate relation to this state.

(2) Where one of the following provisions of this Act specifies the applicable law, that provision governs and a contrary agreement is effective only to the extent permitted by the law (including the conflict of laws rules) so specified:

Rights of creditors against sold goods.

Section 2-402.

Applicability of the Article on Leases.

Sections 2A-105 and 2A-106.

Applicability of the Article on Bank Deposits and Collections. Section 4-102.

Bulk transfers subject to the Article on Bulk
Transfers. Section 6-102.

Applicability of the Article on Investment
Securities. Section 8-106.

Perfection provisions of the Article on Secured
Transactions. Section 9-103.

§ 1-201(37). GENERAL DEFINITIONS: "SECURITY INTEREST".

(37) "Security interest" means an interest in personal property or fixtures which secures payment or performance of an obligation. The retention or reservation of title by a seller of goods notwithstanding shipment or delivery to the buyer (Section 2-401) is limited in effect to a reservation of a "security interest". The term also includes any interest of a buyer of accounts or chattel paper which is subject to Article 9. The special property interest of a buyer of goods on identification of those goods to a contract for sale under Section 2-401 is not a "security interest", but a buyer may also acquire a "security interest" by complying with Article 9. Unless a consignment is intended as security, reservation of title thereunder is not a "security interest", but a consignment in any event is subject to the provisions on consignment sales (Section 2-326).

Whether a transaction creates a lease or security interest is determined by the facts of each case; however, a transaction creates a security interest if the consideration the lessee is to pay the lessor for the right to possession

and use of the goods is an obligation for the term of the lease not subject to termination by the lessee, and

(a) the original term of the lease is equal to or greater than the remaining economic life of the goods,

(b) the lessee is bound to renew the lease for the remaining economic life of the goods or is bound to become the owner of the goods,

(c) the lessee has an option to renew the lease for the remaining economic life of the goods for no additional consideration or nominal additional consideration upon compliance with the lease agreement, or

(d) the lessee has an option to become the owner of the goods for no additional consideration or nominal additional consideration upon compliance with the lease agreement.

A transaction does not create a security interest merely because it provides that

(a) the present value of the consideration the lessee is obligated to pay the lessor for the right to possession and use of the goods is substantially equal to or is greater than the fair market value of the goods at the time the lease is entered into,

(b) the lessee assumes risk of loss of the goods, or agrees to pay taxes, insurance, filing, recording, or registration fees, or service or maintenance costs with respect to the goods,

(c) the lessee has an option to renew the lease or to become the owner of the goods,

(d) the lessee has an option to renew the lease for a fixed rent that is equal to or greater than the reasonably predictable fair market rent for the use of the goods for the term of the renewal at the time the option is to be performed, or

(e) the lessee has an option to become the owner of the goods for a fixed price that is equal to or greater than the reasonably predictable fair market value of the goods at the time the option is to be performed.

For purposes of this subsection (37):

(x) Additional consideration is not nominal if (i) when the option to renew the lease is granted to the lessee the rent is stated to be the fair market rent for the use of the goods for the term of the renewal determined at the time the option is to be performed, or (ii) when the option to become the owner of the goods is granted to the lessee the price is stated to be the fair market value of the goods determined at the time the option is to be performed. Additional consideration is nominal if it is less than the lessee's reasonably predictable cost of performing under the lease agreement if the option is not exercised;

(y) "Reasonably predictable" and "remaining economic life of the goods" are to be determined with reference to the facts and circumstances at the time the transaction is entered into; and

(z) "Present value" means the amount as of a date certain of one or more sums payable in the future, discounted to the date certain. The discount is determined by the

interest rate specified by the parties if the rate is not manifestly unreasonable at the time the transaction is entered into; otherwise, the discount is determined by a commercially reasonable rate that takes into account the facts and circumstances of each case at the time the transaction was entered into.

§ 9-113. SECURITY INTERESTS ARISING UNDER ARTICLE ON SALES OR UNDER ARTICLE ON LEASES. A security interest arising solely under the Article on Sales (Article 2) or the Article on Leases (Article 2A) is subject to the provisions of this Article except that to the extent that and so long as the debtor does not have or does not lawfully obtain possession of the goods

(a) no security agreement is necessary to make the security interest enforceable; and

(b) no filing is required to perfect the security interest; and

(c) the rights of the secured party on default by the debtor are governed (i) by the Article on Sales (Article 2) in the case of a security interest arising solely under such Article or (ii) by the Article on Leases (Article 2A) in the case of a security interest arising solely under such Article.