

DRAFT

FOR DISCUSSION ONLY

**REVISION OF UNIFORM COMMERCIAL CODE
ARTICLE 2A – LEASES**

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

MARCH 1999

**REVISION OF UNIFORM COMMERCIAL CODE
ARTICLE 2A – LEASES**

With Reporter's Notes

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**DRAFTING COMMITTEE TO REVISE
UNIFORM COMMERCIAL CODE ARTICLE 2A – LEASES**

ROBERT J. TENNESSEN, 3400 City Center, 33 South 6th Street, Minneapolis, MN 55402-3796, Chair
JOHN FOX ARNOLD, 714 Locust Street, St. Louis, MO 63101
MARION W. BENFIELD, JR., University of Texas, School of Law, 10 Overlook Circle, New Braunfels,
TX 78132, National Conference Reporter
JEAN BRAUCHER, University of Arizona, College of Law, NW Corner of Speedway and Mountain
Streets, P.O. Box 210176, Tucson, AZ 85721-0176, The American Law Institute Representative
STEPHEN C. CAWOOD, 163 W. Short Street, Suite 300, Lexington, KY 40507-1361
ELLEN F. DYKE, Suite 400, 2010 Corporate Ridge, McLean, VA 22102
HENRY DEEB GABRIEL, JR., Loyola University, School of Law, 526 Pine Street, New Orleans, LA
70118
MORRIS W. MACEY, 600 Marquis II, 285 Peachtree Center Avenue, N.E., Atlanta, GA 30303
THOMAS J. McCracken, JR., Room 600, 134 N. LaSalle Street, Chicago, IL 60602
JAMES J. WHITE, University of Michigan, Law School, Room 300, Hutchins Hall, Room 300, 625
South State Street, Ann Arbor, MI 48109-1215, The American Law Institute Representative

EX OFFICIO

GENE N. LEBRUN, P.O. Box 8250, 9th Floor, 909 St. Joseph Street, Rapid City, SD 57709 President
BARRY H. EVENCHICK, 8th Floor, One Gateway Center, Newark, NJ 07102, Division Chair

AMERICAN BAR ASSOCIATION ADVISOR

MARVIN GARFINKEL, Suite 3800, 1735 Market Street, Philadelphia, PA 19103, Real Property,
Probate & Trust Law Section Advisor
THOMAS B. HUDSON, 2191 Defense Highway, Suite 304, Crofton, MD 21114, Advisor

EXECUTIVE DIRECTOR

FRED H. MILLER, University of Oklahoma, College of Law, 300 Timberdell Road, Norman, OK
73019, Executive Director
WILLIAM J. PIERCE, 1505 Roxbury Road, Ann Arbor, MI 48104, Executive Director Emeritus

Copies of this Act may be obtained from:

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS
211 E. Ontario Street, Suite 1300
Chicago, Illinois 60611
312/915-0195

REVISION OF UNIFORM COMMERCIAL CODE ARTICLE 2A – LEASES

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1 **REVISION OF UNIFORM COMMERCIAL CODE**
2 **ARTICLE 2A – LEASES**

3 **PART 1**
4 **GENERAL PROVISIONS**

5 **SECTION 2A-101. SHORT TITLE.** This article may be cited as Uniform Commercial
6 Code – Leases.

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

8 (a) Unless the context otherwise requires, in this article

9 (1) “Authenticate” means to sign, or otherwise to execute or adopt a
10 symbol or sound, or to use encryption or another process with respect to a record ~~in whole or~~
11 ~~part,~~ with ~~present~~ intent of the authenticating person to

12 (A) identify that ~~party~~ person,

13 (B) adopt or accept ~~a record or~~ term or (iii) establish the
14 authenticity of a record or term that contains the authentication or to which a record containing
15 the authentication refers.[from 0-102(a)(7).]
16 of the information in a record which includes or is logically associated or linked with the
17 authentication or to which a record containing ~~term that contains~~ the authentication or to which a
18 record contain authentication refers.

19 (2) ~~“Buyer in ordinary course of business” means a person that buys~~
20 ~~goods in good faith, without knowledge that the sale to violates the rights of another person in~~
21 ~~the goods, and in the ordinary course from a person, other than a pawnbroker, in the business of~~

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1 ~~selling goods of that kind. A person buys in the ordinary course if the sale to the person~~
2 ~~comports with the usual or customary practices in the kind of business in which the seller is~~
3 ~~engaged or with the seller's own usual or customary practices. A person that sells minerals or~~
4 ~~the like, including oil and gas, at the wellhead or minehead is a person in the business of selling~~
5 ~~goods of that kind. A buyer in the ordinary course of business may buy for cash, by exchange of~~
6 ~~other property, or on secured or unsecured credit, and may acquire goods or documents of title~~
7 ~~under a pre-existing contract for sale. Only a buyer that takes possession of the goods or has a~~
8 ~~right to recover the goods from the seller (Section 2-807, 2-822, or 2-824) may be a buyer in~~
9 ~~ordinary course of business. A person that acquires goods in a transfer in bulk or in total or~~
10 ~~partial or total satisfaction of a money debt is not a buyer in ordinary course of business.~~

11 3/99 comment. There is no reason for Article 2A to retain this definition.

12 (3) "Cancellation means an act by either party which ends a lease
13 contract because of a default by the other party. "Cancel has a corresponding meaning.

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

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

21 (6) "Conspicuous ,with reference to a term, means so written, displayed
22 or presented that a reasonable person against which it is to operate ~~ought to~~ would have noticed

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1 it or, in the case of an electronic message intended to evoke a response without the need for
2 review by an individual, in a form that would enable a reasonably configured electronic agent to
3 take it into account or react to it without the review of the message by an individual. In a written
4 record:

5 (i) a ~~term heading~~ is conspicuous if it is all capitals

6 ~~(A) a heading in capitals~~, (as: NEGOTIABLE BILL OF
7 LADING) equal or greater in size to the surrounding text;

8 (ii) ~~language~~ a term or clause in the body ~~or text~~ of a record or
9 display is conspicuous if it is in larger or other contrasting type or color than other language;

10 (iii) Any term or clause in a telegram or other similar
11 communication is conspicuous. In an electronic record or display, a term is conspicuous if it is so
12 positioned that a party cannot proceed without taking some additional action with respect to the
13 term or any prominent reference thereto.

14 ~~(C) a term prominently referenced in the body or text of an~~
15 ~~electronic record or display that can be readily accessed from the record or display~~

16 ~~(D) language so positioned in a record or display that a party~~
17 ~~cannot proceed without taking some additional action with respect to the term or the reference~~
18 ~~thereto; or~~

19 ~~(E) language readily distinguishable in another manner.~~

20 (7) "Consumer means an individual who leases or contracts to lease
21 goods that, at the time of contracting, or intended by the individual to be used primarily for
22 personal, family, or household purposes. [The term does not include an individual who leases or

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1 contracts to lease goods that, at the time of contracting, are intended by the individual to be used
2 primarily for professional or commercial purposes.]

3 3/99 comment. Revised 2 does not have the bracketed language.

4 [(8) “Consumer lease means a lease between a merchant lessor ~~regularly~~
5 ~~engaged in the business of leasing or selling~~ and a consumer.]

6 Drafting Comment

7 Revised Article 2 defines “consumer contract” and does not include a dollar cap in the
8 definition. Some States have not included a dollar cap in present Article 2A and States which
9 have adopted a dollar cap have stated varying amounts. If a State wishes to include a dollar cap,
10 the cap should be inserted here. Any cap probably should be set high enough to bring within the
11 definition most automobile leasing transactions for personal, family, or household use.

12 (9) “Delivery means the voluntary transfer of physical possession or
13 control of goods.

14 ~~(10) “Electronic agent means a computer program or other automated~~
15 ~~means used, selected, or programmed by a party to initiate or respond to electronic messages or~~
16 ~~performances [in whole or in part][on behalf of that person] without review by an individual.~~

17 ~~(11) “Electronic means of or relating to electrical, digital, magnetic,~~
18 ~~wireless, optical, electromagnetic technology, or any other form of wave propagation, or by or~~
19 ~~any other technology that entails capabilities similar to those technologies.~~

20 ~~(12) “Electronic message means an electronic record or display that is~~
21 ~~stored generated, or transmitted by electronic means for purposes of communication to a person~~
22 ~~or electronic agent. a record that, for purposes of communication to another person, is stored,~~
23 ~~generated, or transmitted by electronic, optical, or similar means. The term includes electronic~~
24 ~~data interchange, electronic or voice mail, facsimile, telex, telecopying, scanning and similar~~

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1 ~~communications.~~

2 (13) “Electronic transaction means a transaction formed by electronic
3 messages in which the messages of one or both parties will not be reviewed by an individual as
4 an expected step in forming the contract.

5 (14) “Finance lease means a lease with respect to which:

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

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

10 (C) one of the following occurs:

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

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

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

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

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

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

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

14 Drafting Comment

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

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

25 Also, the Stephen Whelan letter from the ABA group urges the White amendment.
26 However, at the February meeting, the Committee voted 4-2 to delete the language.

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1 (15) “Good faith means honesty in fact and the observance of reasonable
2 commercial standards of fair dealing.

3 (16) “Goods means all things that are movable at the time of
4 identification to a lease contract, or which are fixtures. The term includes the unborn young of
5 animals. The term does not include money in which the rent is to be paid, the subject of foreign
6 exchange transactions, information and software, documents, letters of credit, letter of credit
7 rights, instruments, investment property, accounts, chattel paper, deposit accounts, or general
8 intangibles, payment intangibles, or minerals, or the like, including oil and gas, before extraction.

9 Drafting Comment

10 The final Comments should state that Article 2A does not apply to oil and gas leases.
11 The first two sentences of the definition follow present 2A which departed from the language of
12 Article 2. Draft revised 2 reads: “Goods means all things, including specially manufactured
13 goods, that are movable at the time of identification to a contract for sale and, unless the context
14 otherwise requires, future goods. The term includes the unborn of animals, growing crops, and
15 other identified things to be served from real property under Section 2-107.

16 Drafting Comment

17 Definition of “installment lease” is moved to Section 2A-726, following Article 2.

18 (17) “Lease means a transfer of the right to possession and use of goods
19 for a period in return for consideration. The term includes a sublease unless the context clearly
20 indicates otherwise. The term does not include a sale, including a sale on approval or a sale or
21 return, or retention or creation of a security interest.

22 (18) “Lease agreement means the bargain, with respect to the lease, of
23 the lessor and the lessee in fact as found in their language or inferred from other circumstances,
24 including course of performance, course of dealing, or usage of trade as provided in this article.
25 The term includes a sublease agreement unless the context clearly indicates otherwise.

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1 (19) "Lease contract means the total legal obligation resulting from the
2 lease agreement as affected by this article and other applicable law. The term includes a sublease
3 contract unless the context clearly indicates otherwise.

4 Drafting Comment

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

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

11 (21) "Lessee means a person that acquires the right to possession and use
12 of goods under a lease. The term includes a sublessee unless the context clearly indicates
13 otherwise.

14 (22) "Lessee in ordinary course of business means a person that, in good
15 faith and without knowledge that its lease is in violation of ownership rights, security interest, or
16 leasehold interest of a third party in the goods, leases in the ordinary course from a person in the
17 business of selling or leasing goods of that kind for cash or by exchange of other property or on
18 secured or unsecured credit, including receiving goods or documents of title under a preexisting
19 lease contract but not including a transfer in bulk or as security for or in total or partial
20 satisfaction of a money debt. The term does not include a pawnbroker.

21 Drafting Comment

22 Definition (22) will be moved to Article 1 when that Article is revised to conform to the
23 Article 9 rules. This definition probably should be conformed to the new buyer in ordinary
24 course definition.

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1 (23) "Lessor" means a person that transfers the right to possession and use
2 of goods under a lease. The term includes a sublessor unless the context clearly indicates
3 otherwise.

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

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

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

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

12 (28) "Present value" means the amount as of a date certain of one or more
13 sums payable in the future, discounted to the date certain. In determining present value, the
14 discount is determined by the interest rate specified by the parties if the rate was not manifestly
15 unreasonable at the time the transaction was entered into. Otherwise, the discount is determined
16 by a commercially reasonable rate that takes into account the facts and circumstances of each
17 case at the time the transaction was entered into.

18 (29) ~~"Receipt"~~ "Receive" means with respect to goods, to take delivery;
19 and in the case of an electronic record, ~~means when it enters~~ to come into existence in an
20 information processing system in a form capable of being processed by or perceived from a
21 system of that type, if the recipient uses, or has otherwise has ~~designed~~ designated or otherwise
22 holds out that system as a place for the receipt of such notices. ~~for the purpose of "receiving such~~

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1 ~~records or information.~~ “Receive” ~~“Receipt”~~ has ~~an analogous~~ a corresponding meaning.

2 (30) “Record” means information inscribed on a tangible medium or that
3 is stored in an electronic or other medium and is retrievable in perceivable form.

4 (30a) “Remedial promise” means a promise by a lessor to take remedial
5 action, including to repair or replace the goods or to refund any lease payments made, if the
6 goods do not conform to the contract, or a representation, or upon the happening of a specified
7 future event.

8 (31) “Sublease” means a lease of goods whose right to possession and use
9 is acquired by the lessor as a lessee under an existing lease.

10 (32) “Supplier” means a person from which a lessor buys or leases goods
11 to be leased under a finance lease.

12 (33) “Supply contract” means a contract under which a lessor buys or
13 leases goods to be leased.

14 (34) “Termination” means the ending of a contract or a part thereof by an
15 act by a party under a power created by agreement or law, or by operation of the terms of the
16 agreement for a reason other than for a default by the other party. Terminate has a corresponding
17 meaning.

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

19 “Account” . Section 9-102(a)(2).

20 “Between merchants” . Section 2-102(2).

21 “Buyer” . Section 2-102(3).

22 “Chattel paper” . Section 9-102(a)(11).

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1 “Consumer goods . Section 9-102(a)(23).

2 “Document . Section 9-102(a)(30).

3 “Entrusting . Section 2-504(e).

4 “General intangibles . Section 9-102(a)(42).

5 “Instrument . Section 9-102(a)(47).

6 “Merchant . Section 2-102(23).

7 “Mortgage . Section 9-102(a)(55).

8 “Pursuant to commitment . Section 9-102(a)(68).

9 “Sale . Section 2-102(27).

10 “Sale on approval . Section 2-506(a)(1)

11 “Sale or return . Section 2-506(a)(2)

12 “Seller . Section 2-102(a)(28).

13 Drafting Comment

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

15 (c) In addition, Article 1 contains general definitions and principles of
16 construction that apply throughout this article.

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

18 (a) This article applies to any transaction regardless of form which creates a lease.

19 (b) If a lease [transaction] involves computer information and goods, this article
20 applies to the goods in the lease while Article 2B applies to the computer information, its
21 packaging and documentation. However, if a copy is contained in and leased as part of other

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1 goods, this article applies to that copy unless:

2 (1) the primary goods in which the copy is contained are a computer or
3 computer peripheral; or

4 (2) giving the lessee of the goods access to or use of the computer
5 information itself is a material purpose of the transaction, such as where the computer
6 information is separately licensed.

7 Drafting Comment

8 The May, 1998 version of Section 2-103 states that except as provided in subsection (b) if
9 another article applies to a transaction governed by Article 2, Article 2 does not apply to the part
10 of the transaction governed by the other Article. I assume that we do not wish to adopt that rule.
11 We state some rules which are different than the Article 9 rules – arguably they don’t overlap
12 with Article 9, but it may be better not to create the argument.

13 Notes

14 Article 2A covers leases of goods. A pure services contract is not covered by Article 2A,
15 but a court, as in Article 2, could apply Article 2A to a mixed transaction of goods and services if
16 the lease of goods predominates. Also, courts have applied Article 2 to disputes over the quality
17 of goods furnished in transactions in which services predominate. Such results under Article 2A
18 are not precluded by this section.

19 Subsection (b) deals with transactions in which both goods and information licensed
20 under Article 2B are involved. See Section 2B-103 on the scope of Article 2B. Presumably,
21 Article 2B governs all disputes over “licenses of information and software contracts and
22 “related support and maintenance agreements. Section 2B-103(a). Article 2A, however, may
23 apply to transactions excluded from Article 2B under Section 2B-103(d). Under Section
24 2B-103(d) “a sale or lease of a copy of a computer program that was not developed specifically
25 for a particular transaction and that is embedded in goods other than a copy of the program or an
26 information processing machine, if the program was not the subject of a separate license with the
27 buyer or lease. Therefore all aspects of such a transaction would be governed by Article 2A if
28 the underlying transaction is a lease of the goods in which the computer program is embedded.

29 There are some apparent inconsistencies between the scope provisions of Article 2 and
30 Article 2B. Since the scope provision of 2B is still under active consideration, this draft of 2A
31 adopts the most recent language of Article 2.

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

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1 (a) A transaction subject to this article is also subject to:

2 (1) [list any certificate of title statutes covering automobiles, trailers,
3 mobile homes, boats, farm tractors, or the like]; except as to the rights of a lessee in the ordinary
4 course of business under Sections 2A-404(d) and 2A-405(d) whose rights arise before a
5 certificate of title covering the goods is effective in the name of any other [purchaser][buyer or
6 lessee].

7 [(2) any applicable certificate-of-title statute of another jurisdiction;]

8 (3) any applicable law which establishes a different rule for consumer
9 leases.

10 (4) any other law of this State to which the subject matter of this article is
11 subject, such as laws dealing with:

12 (A) the sale or lease of agricultural products,

13 (B) the consignment or transfer by artists of works of art or fine
14 prints,

15 (C) distribution agreements, franchises and other relationships
16 through which goods are leased,

17 (D) liability for products which cause injury to person or property,

18 (E) the making and disclaimer of warranties, and

19 (F) dealers in particular products, such as automobiles, motorized
20 wheelchairs, agricultural equipment, and hearing aids.

21 (b) [Except for the rights of a lessee in the ordinary course of business,]in case of
22 conflict between this article, other than Sections 2A-105, 2A-401(c), and 2A-402(c), and a statute

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1 ~~or decision~~ any law referred to in subsection (a), the statute or decision controls.

2 [(c) If a law referred to in subsection (a) existing on the effective date of this
3 article applies to a transaction governed by this article, the following rules apply:

4 (1) A requirement that a contractual obligation, waiver, notice, or
5 disclaimer be in writing is satisfied by a record.

6 (2) A requirement that a record or a contractual term be signed is satisfied
7 by an authentication.

8 (3) A requirement that a contractual term be conspicuous or the like is
9 satisfied by a term that is conspicuous in accordance with that article.]

10 (d) With respect to this article, failure to comply with ~~a statute or decision~~ the
11 laws referred to in subsection (a) has only the effect specified therein. (Section 2-104, 2B-105))

12 Drafting Comment

13 The latest version of Section 2-104 raises a number of issues for Article 2A. First,
14 Section 2-104(a)(1) overrides certificate of title legislation as to rights of buyers in ordinary
15 course under Section 2-504(d) if their rights arose before “a certificate of title covering the goods
16 is effective in the name of any other buyer. Section 2-504(d) is the entrusting provision of
17 Article 2. Perhaps we should include a similar rule in Article 2A, but Article 2A presently is
18 subject to both in state and other state certificate of title laws with no exception for lessee in
19 ordinary course situations. Note that subsection (e) of Section 2A-404 and Section 2A-405
20 seems to state a rule contrary to that now being proposed in Article 2 and set out above. The
21 Article 2A Committee must decide what position Article 2A should take. Apparently, a few
22 western States require that lessees in leases longer than a few month by noted on certificates of
23 title as owners with the lessor appearing as “lienholder . In most States, apparently, the practice
24 is not to note the lessee’s interest on the certificate of title.

25 What do you think of the specific listing which is now in subsection (a)(4)? Look at the
26 listing in Section 2-104. I have omitted items, such as blood products, which I thought could not
27 be leased.

28 The reference to certificate of title laws of other States is probably not necessary both
29 because they are already covered under subsection (a)(1) and because of Section 2A-105.

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1 Bracketed subsection (c) follows 2B. The Article 2 drafting committee has, apparently,
2 decided not to deal with the issue in the statute. They propose only a comment dealing with the
3 issue. Note 3/99. Does 2A still have this provision?

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

6 (a) This section applies to goods covered by a certificate of title, even if there is
7 no other relationship between the jurisdiction under whose certificate of title law the goods are
8 covered and the goods or the lessee or lessor.

9 (b) Goods become covered by a certificate of title when a valid application for the
10 certificate of title and the application fee are delivered to the appropriate authority. Goods cease
11 to be covered by a certificate of title at the earlier of the time the certificate of title ceases to be
12 effective under the law of the issuing jurisdiction or the time the goods become covered
13 subsequently by a certificate of title issues by another jurisdiction.

14 (c) Subject to Sections 2A-401(c) and 2A-402(c), with respect to goods covered
15 by a certificate of title issued under a statute of this State or of another jurisdiction, compliance
16 and the effect of compliance or noncompliance with a the certificate-of-title statute are governed
17 by the local law, including the conflict-of-laws rules, of the jurisdiction issuing the whose
18 certificate covers the goods from the time the goods become covered by the certificate until the
19 goods cease to be covered by the certificate of title. ~~until the earlier of the time the certificate~~
20 ~~ceases to be effective under the law of that jurisdiction or the time the goods subsequently~~
21 ~~become covered another certificate of title from another jurisdiction.~~

22 Drafting Comment

23 Section 2A-105 is conformed to the new rules of Article 9. See Section 9-303.

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1 Should 2A define certificate of title, or refer to the Article 9 definition? In old Article 9, 9-103(2)
2 by its terms applies only to certificate of title laws under which security interests are noted on the
3 certificate of title. New Article 9 reaches the same result by so defining “certificate of title.
4 Present 2A-105 does not contain that limitation on its applicability. Should it? If so, we need to
5 incorporate the Article 9 definition of certificate of title.

6 **SECTION 2A-106. LIMITATION ON POWER OF PARTIES TO CONSUMER**
7 **LEASE TO CHOOSE APPLICABLE LAW [OR JUDICIAL FORUM] [: CHOICE OF**
8 **FORUM].**

9 [(a)] A choice-of-law term in a consumer lease contract is not enforceable if the
10 law chosen is that of a jurisdiction other than one in which the lessee resides at the time the lease
11 agreement becomes enforceable or within 30 days thereafter or in which the goods are to be used.

12 [(b) The parties may choose an exclusive judicial form. However, in a consumer
13 lease the choice is not enforceable if the chosen jurisdiction would not otherwise have
14 jurisdiction over the consumer and the choice unfairly disadvantages the consumer. A choice of
15 forum in a term of an agreement is not exclusive unless the agreement expressly so provides.]

16 **Drafting Comment**

17 The ELA memorandum, page 10, asks that this section specifically state that choice of
18 law/forum selection clauses are valid in commercial leases. Choice of law is dealt with in 1-105,
19 and probably should not be separately addressed in Article 2A. Since Article 2B presently does
20 state specifically that, except in consumer transactions, the parties may choose the forum,
21 perhaps we should also.

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

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

7 (b) With respect to a consumer lease, if the court finds as a matter of law that a
8 lease contract or a term of the contract was induced by unconscionable conduct or that
9 unconscionable conduct has occurred in the collection of a claim arising from the lease contract,
10 the court may grant appropriate relief.

11 (c) ~~Before making a finding of unconscionability under subsection (a) or (b),[or~~
12 ~~(c) the court, on motion of a party or its own motion, shall afford~~ When it is claimed or appears
13 to the court that the contract or any term of the contract may be unconscionable, the parties a
14 must be afforded a reasonable opportunity to present evidence as to the setting, purpose, and
15 ~~effect of the lease contract or term thereof or of the conduct~~ its commercial setting, purpose and
16 effect of the lease contract or of the conduct to aid the court in making the determination.

17 (d) In an action in which a lessee claims unconscionability with respect to a
18 consumer lease the following rules apply:

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

21 (2) If the court does not find unconscionability and the lessee claiming
22 unconscionability has brought or maintained an action the lessee knew to be groundless, the

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1 court shall award reasonable attorney's fees to the party against which the claim is made.

2 (3) In determining attorney's fees, the amount of the recovery on behalf of
3 the claimant under subsections (a) and (b) is not controlling. (Section 2-105)

4 Drafting Comment

5 In the October, 1996 meeting, the Drafting Committee voted to retain present Section
6 2A-108 (new Section 2A-107) with the slight word change in subsection (c). At the February,
7 1997 meeting, the Committee rejected a proposal to delete the reference to unconscionable
8 conduct in collection.

9 The final version of Article 2A will contain a Comment modeled on a U3C comment of
10 unconscionable inducement. (2-105)

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

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

17 (b) In a consumer lease, the burden of establishing good faith under subsection
18 (a) is on the party that exercised the power. In all other leases, the burden of establishing lack of
19 good faith is on the party against which the power has been exercised.

20 Drafting Comment

21 If Article 1 is ready for promulgation at the same time as revised Article 2A, a
22 modification of present 1-208, or a statement in the comments thereto, making it clear that 1-208
23 applies to leases would make this section unnecessary.

24 **SECTION 2A-109. EFFECT OF AGREEMENT.**

25 (a) Except as otherwise expressly provided in Section 1-102(3) and this article,

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1 the effect of any provision may be varied by agreement.

2 (b) The absence of a phrase such as “unless otherwise agreed” does not by itself
3 preclude the parties from varying the provision by agreement.

4 (c) Whenever this article allocates a risk or imposes a burden as between the
5 parties, an agreement may shift the allocation and apportion the risk or burden, (2-108)

6 Drafting Comment

7 Should Article 2A adopt this provision? Do we create an undesirable negative
8 implication if we do not, and Article 2 does?

1 **PART 2**
2 **FORMATION, TERMS, AND**
3 **READJUSTMENT OF LEASE CONTRACT**

4 **[SECTION 2A-201. FORMAL REQUIREMENTS.**

5 **Alternative A (Present 2A version)**

6 [(a) Except as otherwise provided in this section, a lease contract is not
7 enforceable by way of action or defense unless:

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

10 (2) there is a record, authenticated by the party against which enforcement
11 is sought or ~~by the party's~~ its authorized agent as the record of that person and which is sufficient
12 to indicate that a lease contract has been made between the parties and to describe the goods
13 leased and the duration of the lease.]

14 **Alternative B (Based on Revised Article 2)**

15 [(a) A lease contract under which total payments, excluding payments for options
16 to rebew are buy, is more than [\$1,000][\$5,000] is not enforceable by way of action or defense
17 against a person that denies facts from which an agreement may be found, unless there is a record
18 authenticated by the party against which enforcement is sought which is sufficient to indicate that
19 a contract has been made between the parties. A record is not insufficient merely because it omits
20 a term, including a quantity term, or incorrectly states a term agreed upon, but if the record
21 contains a quantity term the contract is not enforceable beyond the quantity of goods shown in
22 the record.

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

4 (c) An otherwise valid lease contract that does not satisfy the requirements of
5 subsection (a) is nevertheless enforceable if:

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

11 [(2) the conduct of both parties in performing the agreement recognizes
12 that a contract was formed; [or]

13 [(2)][3] if the party against which enforcement is sought admits in its
14 pleading, testimony, or otherwise in court that a lease contract was made, but the lease contract is
15 not enforceable under this provision beyond the quantity of goods admitted; or

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

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

19 (1) if there is a record authenticated by the party against which
20 enforcement is sought or by that party's authorized agent specifying the duration of the lease, the
21 period so specified;

22 (2) if the party against which enforcement is sought admits in that party's

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pleading, testimony, or otherwise in court, the duration of the lease, the period so admitted; or
(3) a reasonable duration.

[(f) An enforceable lease contract under this section is not made unenforceable on the ground that it is not capable of being performed within one year or any other applicable period after its making.]

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

Comment

Article 2 has reinstated a statute of frauds section.

To what extent should Article 2A follow new Section 2-201. Among the issues are:

(1) Should the dollar threshold be raised?

(2) Should a party pleading the statute be forced to deny that a contract was made?

(3) Should the admission which makes the contract enforceable be extended to an admission under oath not made in the pleading or testimony?

(4) Should a reference to the one-year statute of frauds be included (subsection bracked (f))?.

(5) Should 2A follow the style of 2-201?

SECTION 2A-202. PAROL OR EXTRINSIC EVIDENCE. Terms ~~with respect to~~ on which the confirmatory records of the parties agree, or which are otherwise set forth in a record intended by the parties as a final expression of their agreement with respect to the included terms, may not be contradicted by evidence of any previous agreement or of a contemporaneous

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1 oral agreement. However, terms in such a record may be ~~explained~~ or supplemented by evidence
2 of

3 (1) noncontradictory additional terms, unless the court finds that:

4 (A) the record was intended as a complete and exclusive statement of the terms of
5 the agreement; or

6 (B) the additional terms if agreed upon by the parties would certainly have been
7 included in the record; and

8 (2) course of performance, usage of trade, or course of dealing.

9 (b) Terms in a record may be explained by evidence of course of performance, course of
10 dealing, or usage of trade without a preliminary determination by the court that the language use
11 is ambiguous. [Terms in a record may also be explained by evidence of the surrounding
12 circumstances and other sources as determined by a court.]

13 [**SECTION 2A-203. SEALS INOPERATIVE.** The affixing of a seal to a record
14 evidencing a lease contract or an offer to enter into a lease contract does not render the record a
15 sealed instrument. The law with respect to sealed instruments does not apply to the lease contract
16 or offer.]

17 Comment

18 This provision may be added to the statute of frauds section.

19 **SECTION 2A-204. FORMATION IN GENERAL.**

20 (a) A lease contract may be ~~formed~~ made in any manner sufficient to show
21 agreement, including by offer and acceptance, conduct of both parties, [or operations of
22 electronic agents] which recognize the existence of a contract.

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1 **(b) If the parties so intend, an agreement sufficient to constitute a contract may be**
2 **found even if the time of its making is undertermined, one or more terms are left open or to be**
3 **agreed upon, the records of the parties do not otherwise establish a contract, or one party reserves**
4 **the right to modify terms.**

5 ~~(b) A lease contract may be found If the parties intend to form a contract, even if~~
6 ~~the time that the agreement was made cannot be determined, one or more terms are left open or~~
7 ~~to be agreed upon, or one party reserves the right to modify terms.~~

8 (c) Even if one or more terms are left open or to be agreed upon, a lease contract
9 does not fail for indefiniteness if the parties intended to make a contract and there is a reasonably
10 certain basis for giving an appropriate remedy. (Section 2-203)

11 **(d) Language that expressly conditions the intention to make a contract upon**
12 **agreement by the other party to terms proposed prevents contract formation unless the required**
13 **agreement is given or conduct by both parties recognizes the existence of a contract. However, an**
14 **express condition contained in a record must be conspicuous.**

15 **SECTION 2A-205. FIRM OFFERS: SEALED INSTRUMENTS.** An offer by a
16 merchant to enter into a lease contract made in an authenticated record that by its terms gives
17 assurance that the offer will be held open is not revocable for lack of consideration during the
18 time stated. If a time is not stated, the offer is irrevocable for a reasonable time not exceeding 90
19 days. A term of assurance in a record supplied by the offeree is ineffective unless the term is
20 conspicuous.

21 **SECTION 2A-206. OFFER AND ACCEPTANCE.**

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

4 (b) A definite and seasonable expression of acceptance operates as an acceptance
5 even though it contains terms that vary the offer.

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

9 Comment

10 The second sentence in subsection (a) is another remnant of present 2-207.

11 **SECTION 2A-207. UNFORCEABLE TERMS IN CONSUMER LEASE**
12 **CONTRACTS.**

13 (a) In a consumer lease contract, a court may refuse to enforce a standard term in a
14 record the inclusion of which was materially inconsistent with reasonable commercial standards
15 of fair dealing in contracts of that type, or subject to 2A-202, conflicts with one or more non-
16 standard terms in the record.

17 (b) If it is claimed or appears to the court that any terms of a consumer lease
18 contract may be unenforceable, the parties, to aid the court in making the determination, must be
19 afforded a reasonable opportunity to present evidence as to the term's commercial setting,
20 purpose, and effect or as to whether it was consistent with reasonable commercial standards of
21 fair dealing in contracts of that type.

22 (c) This section does not apply to a term disclaiming or modifying an implied

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1 warranty that complies with Section 2A-XXX.

2 3/99 comment. This is the latest attempt to deal with surprise terms in Article 2.

3 **[SECTION 2-207A. EFFECT OF VARYING TERMS IN RECORDS.**

4 (a) This section is subject to Sections 2A-207 and 2A-107.

5 (b) Unless otherwise provided in subsection (d), if a contract is formed by offer
6 and acceptance and the acceptance is by a record containing terms additional to or different from
7 the offer or if the conduct of the parties recognizes the existence of a contract but the records of
8 the parties do not otherwise establish a lease contract, the terms of the contract include:

9 (1) terms in the records of the parties to the extent that they agree;

10 (2) non-standard terms, whether or not in a record, to which the parties
11 have otherwise agreed;

12 (3) standard terms in a record supplied by a party to which the other party
13 has expressly agreed.; and

14 (4) terms supplied or incorporated under any provision of [The Uniform
15 Commercial Code.

16 (c) Unless otherwise provided in subsection (d), if a party confirms a contract by
17 a record received by the other party that contains terms that add to or differ from the previous
18 agreement, the terms of the contract include:

19 (1) terms in the confirmation of the parties to the extent that they agree;

20 (2) terms to which the parties have previously agreed;

21 (3) standard terms in a confirming record that add to or differ from the
22 previous agreement to which the other party expressly agrees, and

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1 (4) terms supplied or incorporated under any provision of this article

2 (d) If at the time of full or partial payment for goods by a lessee, a lessor intend
3 the agreement to contain additional terms and after payment but not later than delivery of the
4 goods those terms are proposed to the lessee, the following rules apply:

5 (1) If it was reasonable under the circumstances for the lessor to disclose
6 or make available [a source of] the terms to the lessee at or before the time of payment and it
7 fails to do so, the terms provided after payment do not become part of the agreement [contract]
8 unless the lessee expressly agrees to them;

9 (2) If it was not reasonable under the circumstances for the lessor to
10 disclose the terms or make available a source of the terms to the lessee, the lessor shall inform
11 the lessee at or before the time for payment that additional terms will be proposed.

12 (A) If the lessee is not informed by the lessor, the subsequently
13 proposed terms do not become part of the agreement [contract] unless expressly agreed to by the
14 lessee.

15 (B) If informed by the lessor, the lessee may either accept the
16 subsequently proposed terms by agreement or reject them by promptly notifying the lessor. If the
17 terms are rejected, the lessee, subject to paragraph (3), must return the goods within a reasonable
18 time.

19 (3) Upon returning the goods to the lessor under subsection (2)(B), the
20 lessee has:

21 (A) a right to a refund of any rental payments made;

22 (B) a right to reimbursement of any reasonable expenses incurred

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1 related to the return and in compliance with any instructions of the lessor for return, or, in the
2 absence of instructions, return postage or similar reasonable expense in returning the goods;

3 (C) the rights and duties of a lessee who has rightfully rejected
4 goods under 2A-XXX and 2A-XXX.

5 (D) [additional maerial under review]

6 (e) In this section, a term is not expressly agreed to by the mere retention or ise of
7 goods.

8 **Comment**

9 This section is set out to faciliate discussion of whether the 2A Committee continues to
10 hold the view that it should not be included in 2A. Present 2A omits a section comparable to
11 present 2-207 because lease contracts are seldom concluded by an exchange of forms and
12 because the original 2A drafting committee was unsure that the 2-207 rules were sound policy.
13 Revised 2-207 may be free from many of the policy objections made to original 2-207, but it
14 probably remains true that few if any leasing contracts are concluded through an exchange of
15 forms.

16 **Comment on the following sections**

17 **These sections follow the May 1, 1988 draft of Article 2. The Article 2 Committee is**
18 **awaiting further drafting in relation to this matters by the Article 2B and Uniform**
19 **Electronic Transactions Act. It is probably not worthwhile to spend significant time on**
20 **these sections now. 3/99/ These sections are still under review by the Article 2 committee.**
21 **The sections below have not been conformed to the latest Article 2 draft.**

22 **SECTION 2A-208. LEGAL RECOGNITION OF ELECTRONIC RECORDS AND**

23 **SIGNATURES.** A record or authentication may not be denied legal effect, validity, or
24 enforceability solely on the ground that it is electronic.

25 **SECTION 2A-209. ATTRIBUTION PROCEDURE.**

26 (a) Except as otherwise provided in [2B 115a], if a person requires use of a

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1 procedure that would be an attribution procedure that would be an attribution procedure if it were
2 commercially reasonable and a loss to the other person occurs because the procedure was not
3 commercially reasonable:

4 (1) The person that required use of the procedure bears the loss unless it
5 disclosed the nature of the risk to the other person and offered reasonable alternatives that the
6 other person rejected.

7 (2) The liability of the person that required use of the procedure does not
8 include losses that could have been prevented by the exercise of reasonable care by the other
9 person.

10 (b) The commercial reasonableness of an attribution procedure is determined by
11 the court. In making that determination, the following rules apply:

12 (1) An attribution procedure established by law or regulation is
13 commercially reasonable for the purposes for which it was established.

14 (2) Except as provided in subsection (b)(1), commercial reasonableness
15 is determined in light of the purposes of the procedure and the commercial circumstances at the
16 time the parties agree to or adopt the procedure.

17 (3) An attribution procedure may require the use of any security devices
18 that are reasonable under the circumstances, such as algorithms or other codes, identifying words
19 or numbers, encryption, callback procedures, or any other reasonable security device.

20 **SECTION 2A-210. ATTRIBUTION OF ELECTRONIC RECORD, MESSAGE,**
21 **OR PERFORMANCE TO A PARTICULAR PERSON.**

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1 (a) Subject to subsection (b), an electronic authentication, message, record, or
2 performance is attributable to a person if:

3 (1) it was in fact the action of that person, a person authorized by it, or the
4 person's electronic agent;

5 (2) the other party, using an attribution procedure for identifying a person,
6 in good faith concluded that it was the act of the other person, a person authorized by it, or the
7 person's electronic agent; or

8 (3) it resulted from acts of a person that obtained, from a source under the
9 control of the person to whom it is attributed, access numbers, codes, computer programs, or the
10 like the use of which created the appearance that it came from that person and

11 (A) occurred because of a failure to exercise reasonable care by
12 that person; and

13 (B) caused the other party reasonably to rely to its detriment on the
14 apparent source of the message or performance.

15 (b) Attribution under subsection (a)(2) creates a presumption that the
16 authentication, message, record or performance was that of the person to which it is attributed.

17 (c) In a case governed by subsection (a)(3), the following rules apply:

18 (1) The relying party has the burden of proving reasonable reliance, and
19 the alleged actor has the burden of proving reasonable care.

20 (2) Reliance that does not comply with an attribution procedure that exists
21 between the parties is not reasonable unless authorized by an individual representing the other
22 party.

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1 (d) Except as provided in subsection (a), if a loss occurs because a party relied on
2 an electronic authentication, message, record, or performance as that of another party, as between
3 the parties, the party who relied bears any loss caused by its reliance.

4 **SECTION 2A-211. ATTRIBUTION PROCEDURE FOR DETECTION OF**
5 **CHANGES AND ERRORS; EFFECT OF USE.** If the parties use an attribution procedure to
6 detect errors or changes in the content of an electronic record, between the parties the following
7 rules apply

8 (1) An electronic message, record or performance that the attribution procedure
9 shows to have been unaltered since a point in time is presumed to have been unaltered since that
10 time.

11 (2) An electronic message, record, or performance created or sent pursuant to the
12 attribution procedure to detect error is presumed to have the content intended by the person
13 creating or sending it as to portions to which the procedure applies.

14 (3) If the sender complied with the attribution procedure and the change or error
15 would have been detected had the other party also complied, the sender is not bound by a change
16 or error.

17 (4) If the sender receives a notice required by the attribution procedure which
18 describes the content as received, the sender must review the notice and report any error detected
19 by it in a commercially reasonable manner.

20 **[SECTION 2A-112, ELECTRONIC ERROR: CONSUMER DEFENSES.**

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1 (a) In this section, “electronic error” means an error created by an information
2 processing system, by electronic transmission of a record, or by an error of the consumer in an
3 electronic system that did not reasonably allow for correction or avoidance of such errors.

4 (b) In an automated transaction with a consumer, the consumer is not responsible
5 for an electronic message that the consumer did not intend and that was caused by an electronic
6 error if:

7 (1) promptly on learning of the other party’s reliance on the message, the
8 consumer:

9 (A) in good faith notifies the other party of the error and that it did
10 not intend the message received, and

11 (B) delivers all copies of any information received to the other
12 party, or delivers or destroys all copies pursuant to any reasonable instructions received from
13 the other party; and

14 (2) the consumer has not used or received value from the information or
15 caused the information to be made available to a third party.]

16 **SECTION 2A-213. AUTHENTICATION PROOF; ELECTRONIC AGENT**
17 **OPERATIONS.**

18 (a) Operations of an electronic agent constitute the authentication or manifestation
19 of assent of a party if a party used, selected or programmed the electronic agent for the purpose
20 of achieving results of that type.

21 (b) Compliance with an attribution procedure for authenticating a record

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1 authenticates the record as a matter of law. Otherwise, authentication may be proven in any
2 manner including by showing that a procedure existed by which a party or an electronic agent
3 must have engaged in conduct or operations that authenticated the record in order to proceed
4 further in the use it made of the information.

5 **SECTION 2A-214. ELECTRONIC MESSAGES; TIMING OF CONTRACT;**
6 **EFFECTIVENESS OF MESSAGE; ACKNOWLEDGING MESSAGES.**

7 _____ (a) Except as provided in subsection (b), an electronic message is effective when
8 received even if no individual is aware of its receipt. If an electronic message initiated by a party
9 or an electronic agent evokes an electronic message in response, a contract exists;

10 _____ (1) if a response signifying acceptance is received; or
11 _____ (2) if the response consists of furnishing the information or access to the
12 information, when the notice of access is received, unless the originating message prohibited
13 that form of response.

14 _____ (b) If the originator of an electronic message requests or has agreed with the
15 addressee that receipt be acknowledged electronically, the following rules apply:

16 _____ (1) A message expressly conditioned on receipt of an acknowledgment
17 does not bind the originator until acknowledgment is received and expires if acknowledgment is
18 not received within a reasonable time after the message was sent.

19 _____ (2) If the message was not expressly conditioned on acknowledgment and
20 acknowledgment is not received within the time specified for receipt or, in the absence of a
21 specified time, within a reasonable time after the message was sent, on notice to the other party,

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1 the originator may:

2 (A) treat the message as expired and ineffective; or

3 (B) specify a further reasonable time for acknowledgment and, if
4 acknowledgment is not received within that time, treat the message as expired and ineffective.

5 (c) Receipt of acknowledgment establishes that the message was received but
6 does not in itself establish that the content sent corresponds to the content received.

7 **SECTION 2A-215, OFFER AND ACCEPTANCE; ELECTRONIC AGENTS.**

8 (a) Operations of one or more electronic agents which confirm the existence of a
9 contract, or indicate agreement, form a contract even if no individual was aware of or reviewed
10 the actions or results.

11 (b) In an automated transaction, the following rules apply:

12 (1) A contract may be formed by the interaction of electronic agents. A
13 contract is formed if the interaction results in the electronic agents engaging in operations that
14 confirm the existence of a contract or indicate agreement. The terms of the contract are
15 determined under Section 2B-209(b).

16 (2) A contract may be formed by the interaction of an electronic agent and
17 an individual.

18 (A) A contract is formed if an individual has reason to know that
19 the individual is dealing with an electronic agent and the individual takes actions that

20 (i) the individual should know will cause the agent to
21 perform, provide benefits, or permit use of the information or access that is the subject of the

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1 contract, or

2 (ii) are clearly indicated as constituting acceptance

3 regardless of other expressions or actions of the individual to which the electronic agent cannot

4 react.

5 (B) The terms of the contract are determined under 2B-207 or 2B-

6 206, as applicable, but do not include terms provided by the individual in a manner to which the

7 electronic agent cannot react.

1 **PART 3**

2 **CONSTRUCTION OF LEASE CONTRACT**

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

5 (a) A “course of performance” is a sequence of conduct between the parties to a
6 particular lease transaction that exists if:

7 (1) the agreement of the parties with respect to the transaction involves
8 repeated occasions for performance by a party;

9 (2) that party performs on one or more occasions; and

10 (3) the other party, with knowledge of the nature of the performance and
11 opportunity for objection to it, accepts the performance or acquiesces in it without objection.

12 (b) A course of performance between the parties is relevant to ascertaining the
13 meaning of the parties’ agreement, ~~may give particular meaning to specific terms of the~~
14 ~~agreement,~~ and may supplement or qualify the terms of the agreement.

15 (c) Except as otherwise provided in subsection (d), the express terms of an
16 agreement and any applicable course of performance, course of dealing, or usage of trade must
17 be construed, whenever reasonable, as consistent with each other. If this construction is
18 unreasonable:

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

21 (2) course of performance prevails over course of dealing and usage of

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1 trade, and

2 (3) course of dealing prevails over usage of trade.

3 (d) Subject to Section 2A-302, course of performance is relevant to show a
4 waiver or modification of a term inconsistent with the course of performance. (Section 2-208)

5 Drafting Comment

6 This section will probably be moved to Article 1.

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

8 (a) An agreement made in good faith ~~which~~ modifying a lease contract ~~is binding~~
9 ~~without~~ needs no consideration to be binding.

10 (b) [Except in a consumer lease contract,] [a lease contract that contains a term
11 that excludes modification or rescission except by an authenticated record may not be otherwise
12 modified or rescinded.] [an authenticated record that excludes modification or rescission except
13 by an authenticated record may not be otherwise modified or rescinded. Such an exclusion in a
14 form record supplied by a merchant to a non-merchant must be separately authenticated.] A
15 party whose language or conduct is inconsistent with the term is precluded from asserting the
16 term if the assertion is unjust in view of a material change of position in reliance on the language
17 or conduct.

18 (c) Except as otherwise provided in subsection (b), a ~~term~~ condition in a contract
19 may be waived by the party for whose benefit it was included. Language or conduct, including a
20 course of performance between the parties ~~may~~ is be relevant to show a waiver. ~~The~~ A waiver of
21 affecting an executory portion of a contract may be retracted by ~~seasonable~~ reasonable
22 notification received by the other party that strict performance ~~is~~ will be required of any term

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1 waived, unless ~~the waiver induced the other party to change its position reasonably and in good~~
2 ~~faith.~~ Unless the retraction would be unjust in view of a material change of position in reliance
3 on the waiver. (Section 2-209)

4 Drafting Comment

5 The draft now returns to the present Code language under which a waiver can be retracted
6 “unless the retraction would be unjust in view of a material change of position in reliance on the
7 waiver:?”

8 The new language from 2-209 is subsection (b) is bracketed because I have doubt about
9 referring to “an authenticated record that excludes modification” rather than referring to a
10 “contract contain a term that excludes modification.

11 Should we consider again whether Article 2A should continue to exempt consumer leases
12 from the no-modification-except-in-writing rules? Is the conspicuousness requirement which
13 Article 2 proposes a satisfactory substitute?

14 The strikeouts and inserts show the many language changes being made, some of which
15 clearly have no substantive significance, some which do, and some which may have substantive
16 significance. The change from “seasonable” to “reasonable” in subsection (c) has substantive
17 significance.

18 [SECTION 2A-303. CONTINUING CONTRACTUAL TERMS.

19 (a) Terms of a lease contract involving successive performances apply to all
20 performances unless the terms are modified in accordance with this article or the contract, even if
21 the terms are not displayed or otherwise brought to the attention of a party with respect to each
22 successive performance.

23 (b) If a lease contract provides that its terms may be changed as to future
24 performances by compliance with a described procedure, a change proposed in good faith
25 pursuant to that procedure becomes part of the contract if the procedure:

26 (1) reasonably notifies the other party of the change; and

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1 (2) in a consumer transaction, permits the other party to terminate the
2 contract as to future performances if the change alters a material term and such party in good
3 faith determines that the alteration is unacceptable.

4 (c) The parties by agreement may determine the standards for reasonable notice
5 unless the agreed standards are manifestly unreasonable in light of the commercial
6 circumstances.] (2B-304)

7 Drafting Comment

8 The coordination group, at its May, 1997, meeting suggested that the Article 2A
9 Committee consider adding this section from 2B.

10 **SECTION 2A-304. LESSEE UNDER FINANCE LEASE AS BENEFICIARY OF**
11 **SUPPLY CONTRACT.**

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

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

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

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

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

10 **[SECTION 2A-305. ELECTRONIC REGULATION OF PERFORMANCE.]**

11 (a) In this section, "restraint" means a program, code, device, or similar electronic
12 or physical limitation that restricts use of goods.

13 (b) A party entitled to enforce a limitation on the use of goods may include a
14 restraint [device] in the information goods and use that restraint if:

15 (1) a term in the contract authorizes use of the restraint;

16 (2) the restraint prevents use of the goods after expiration of the stated
17 duration of the lease, or a stated number of uses; or

18 (3) the restraint prevents use when the contract terminates, other than on
19 expiration of a stated duration or number of uses, and the lessor gives reasonable notice to the
20 lessee before further use is prevented.

21 (c) Unless authorized by a term of the agreement, this section does not permit a

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1 restraint that affirmatively prevents or makes impracticable a lessee's use of its own goods in the
2 lessee's possession by means other than by use of the lessor's goods.

3 (d) A party that includes or uses a restraint pursuant to subsection (b) or (c) is
4 not liable for any loss caused by its authorized use of the restraint.

5 (2B-310)

6 Comment

7 The coordination committee suggested that 2A consider adding this provision from 2B.
8 If such a section is limited to information, it probably is not relevant to 2A. But it is possible that
9 electronic disablement of leased goods should be dealt with in the statute. With satellite tracking
10 devices, it is possible to disable vehicles if they leave a designed territory, for example. I believe
11 that some European auto rental companies are using, or at least, threatening to use such devices.
12 Similar devices could be used to disable equipment for other reasons. Should 2A include any
13 statutory provisions dealing with the matter.

14 The section has been changed to apply only to goods.

15 **SECTION 2A-306. IDENTIFICATION.** Identification of existing goods as goods to
16 which a lease contract refers may be made at any time and in any manner expressly agreed to by
17 the parties. In the absence of express agreement, identification occurs when:

18 (1) the lease contract is made, if the contract is for the lease of already existing
19 and ~~described~~ designated goods;

20 (2) if the contract is for the lease of future goods other than those described in
21 subsection (3), when the goods are shipped, marked, or otherwise designated by the lessor as
22 goods to which the lease contract refers, if the lease contract is for a lease of goods that are not
23 existing and identified; or

24 (3) ~~young are conceived~~, if the lease contract is for a lease of unborn young of
25 animals, when the young are conceived. (Section 2-502)

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1 **SECTION 2A-308. INSURANCE AND PROCEEDS.**

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

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

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

10 (d) This section does not affect any insurable interest recognized under any other
11 law.

12 (e) The parties, by agreement, may determine that one or more parties have an
13 obligation to obtain and pay for insurance covering the goods and determine the beneficiary of
14 the proceeds of the insurance. (Section 2-502)

15 **SECTION 2A-309. RISK OF LOSS.**

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

18 (b) If under the lease contract risk of loss will pass to the lessee but the agreement
19 does not specify when the risk passes, except as otherwise provided in subsection (c). risk of
20 loss passes to the lessee regardless of the conformity of the goods to the contract, as follows:

21 (1) Subject to this subsection, the risk of loss passes to a lessee upon

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1 receipt of the goods. If the lessee does not intend to take possession, risk of loss passes to the
2 lessee when the lessee receives control of the goods.

3 (2) If the lease contract requires or authorizes a lessor to ship goods by
4 carrier, the following rules apply:

5 (A) If the contract does not require delivery at a particular
6 destination, the risk of loss passes to the lessee when the goods are duly delivered to the carrier.

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

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

13 (d) A default under the lease contract by either party affects risk of loss only in
14 the following cases:

15 (1) If the lessee rightfully ~~and effective~~ rejects the goods or justifiably
16 revokes acceptance of the goods, the lessor has the risk of loss from the time when the rejection
17 or revocation is effective.

18 (2) If the lessor has tendered nonconforming goods so that the buyer
19 would have the right to reject the goods or revoke acceptance of the goods, the goods are
20 damaged or lost before the lessee effectively rejects or revokes acceptance, and the risk of loss
21 ~~has~~ would have otherwise passed to the lessee under subsection (b) or (c), the lessor has the risk
22 of loss to the extent the nonconformity of the goods caused the damage or loss.

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1 (3) If conforming goods are identified to the lease contract when the
2 lessee repudiates or is otherwise in breach and the risk of loss has not otherwise passed to the
3 lessee, the lessee has the risk of loss for those goods for a commercially reasonable time after the
4 breach or repudiation. (Section 2-612)

5 Drafting Comment

6 At the October, 1996, Committee meeting, the Committee asked that subsection (b)
7 contain some language referring to the failure of the agreement to specify when risk passes if
8 under the agreement risk is to pass to the lessee.

9 **SECTION 2A-310. CASUALTY TO IDENTIFIED GOODS.** If the lease contract
10 requires for its performance goods identified when the contract is made and the goods suffer
11 casualty without the fault of the lessee, the lessor, or the supplier before delivery, or if the goods
12 suffer casualty before risk of loss passes to the lessee under the lease agreement or Section
13 2A-309, ~~and no commercially reasonable substitute is available~~, the following rules apply:

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

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

17 (3) If the loss is partial or the goods no longer conform to the lease contract, the
18 lessee may nevertheless demand inspection and may treat the lease contract as avoided or, except
19 in a finance lease that is not a consumer lease, accept or retain the goods with due allowance
20 from the rent payable for the balance of the duration of the lease for the nonconformity but
21 without further right against the lessor. (Section 2-714)

22 Drafting Comment

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

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1 **SECTION 2A-311. TERMINATION; SURVIVAL OF OBLIGATIONS.**

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

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

5 (1) a right based on a previous default or performance of the contract;

6 (2) a term limiting the scope, manner, method, or location of the exercise
7 of rights in the goods;

8 (2) an obligation of confidentiality, nondisclosure, or noncompetition;

9 (3) a choice of law or forum;

10 (4) an onligation to return or dispose of goods or return any unearned part
11 of the rent;

12 (4) an obligation to arbitrate or otherwise resolve disputes through
13 alternative dispute resolution procedures;

14 (5) a term limiting the time for bringing an action or for providing notice;

15 (6) an indemnity term;

16 (7) a limitation of remedy or disclaimer of warranty;

17 (8) an obligation to provide an accounting and make any payment due
18 under the accounting;

19 [(9) other rights, remedies, or limitations stated in the agreement as
20 surviving to the extent enforceable under applicable law;] and

21 [[9]][(10)] other rights, remedies, or limitations if in the circumstances such

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1 survival is necessary to achieve the purposes of the parties.]

2 (Section 2-310, 2B-625).

3 Drafting Comment

4 Present Article 2A addresses termination in the section on Termination and Cancellation
5 (present Section 2A-505(2)). That section merely says : On termination of the lease contract, all
6 obligations that are still executory on both sides are discharged, but any right based on prior
7 default or performance survives. The revised version of present Section 2A-505 (Section
8 2A-709) deals only with cancellation.

9 Subsection (b)(6) was added by decision of the Article 2A Drafting Committee in
10 February. Bracketed (9) appears in 2B but not in Article 2. Bracketed 10 appears in Article 2
11 but not in 2B.

1 **PART 4**

2 **EFFECT OF LEASE CONTRACT**

3 **SECTION 2A-401. ENFORCEABILITY OF LEASE CONTRACT.** Except as
4 otherwise provided in [this article][the Uniform Commercial Code], a lease contract is effective
5 and enforceable according to its terms between the parties, against purchasers of the goods, and
6 against creditors. (9-201(a))

7 **Comment**

8 Present Article 2A says except as provided in “this Article. Old and new Article 9 (9-
9 201) said except as provided in “this Act (old) or the “Uniform Commercial Code (new). I
10 don’t know why 2A used “this Article . The comments to the 2A section (2A-301) say that
11 enforceability is also a function of the lease contract conforming to the principles of construction
12 and interpretation contained in Article 1. Therefore, it seems that reference to the UCC is more
13 accurate than reference to this article.

14 **SECTION 2A-402. TITLE TO AND POSSESSION OF GOODS.** Except as
15 otherwise provided in this article, the application of this article is not affected by whether the
16 lessor or a third party has title to the goods, or the lessor, the lessee, or a third party has
17 possession of the goods, or by any statute or rule of law that possession or the absence of
18 possession is fraudulent. (Section 2-501,9-202)

19 **Comment**

20 Section 2-501(a) reads: “Each section of this article that establishes the rights,
21 obligations, and remedies of the seller, the buyer, purchasers, or other third parties applies
22 regardless of title to the goods or any statute or rule of law that possession or the absense of
23 possession os fraudulent, unless expressly provided otherwise.

24 Section 9-202 reads: ‘... the provisions of this article with regard to rights, obligations,
25 and remedies apply whether title to collateral is in the secured party or the debtor.

26 Is there any reason to try to conform to either?

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

4 (a) In this section, "creation of a security interest" includes the sale of a lease
5 contract that is subject to Article 9 by reason of Section 9-109(a)3.

6 (b) Except as otherwise provided in ~~subsections~~ subsection (c) and ~~(d)~~ Section 9-
7 407, a ~~term~~ provision in a lease agreement which (i) prohibits the voluntary or involuntary
8 transfer, including a transfer by sale, sublease, creation or enforcement of a security interest, or
9 attachment, levy, or other judicial process, of an interest of a party under the lease contract or of
10 the lessor's residual interest in the goods, or (ii) makes such a transfer an event of default, gives
11 rise to the rights and remedies provided in subsection (d), but a transfer that is prohibited or is an
12 event of default under the lease agreement is otherwise effective.

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

16 ~~(d) A term of a lease agreement which prohibits the creation or enforcement of a~~
17 ~~security interest in an interest of a party under the lease contract or in the lessor's residual interest~~
18 ~~in the goods, or which makes such a transfer an event of default, is enforceable only to the extent~~
19 ~~that there is a transfer by the lessee of the lessee's right of possession or use of the goods in~~
20 ~~violation of the provision or a delegation of a material performance of either party to the lease~~
21 ~~contract in violation of the provision. Neither the granting nor the enforcement of a security~~

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1 ~~interest in the lessor's interest under the lease contract, or the lessor's residual interest in the~~
2 ~~goods, is a transfer that materially impairs the prospect of obtaining return performance by,~~
3 ~~materially changes the duty of, or materially increases the burden or risk imposed on, the lessee~~
4 ~~within the meaning of subsection (c) unless, and only to the extent that, there is a delegation of a~~
5 ~~material performance of the lessor.~~

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

13 (e) Subject to subsections (d) and Section 9-407:

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

17 (2) if paragraph (1) does not apply and a transfer is made that (i) is
18 prohibited under a lease agreement or (ii) materially impairs the prospect of obtaining return
19 performance by, materially changes the duty of, or materially increases the burden or risk
20 imposed on, the other party to the lease contract, unless the party not making the transfer agrees
21 at any time to the transfer in the lease contract or otherwise or unless limited by contract, (i) the
22 transferor is liable to the party not making the transfer for damages caused by the transfer to the

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

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

10 (h) Unless otherwise agreed by the lessor and the lessee, a delegation of
11 performance does not relieve the transferor as against the other party of any duty to perform or
12 liability for default. (Section 2-503)

13 Comment

14 In the Article 9 deliberations, subsection (3) was stricken to be replaced by the rules of 9-
15 407. That section is appended to this draft. There are a few stylistic changes in the section , no
16 doubt made by the style committee, which I have not indicated by stricken out.

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

18 (a) Subject to Section 2A-403, a subsequent lessee from a lessor of goods under
19 an existing lease contract obtains, to the extent of the leasehold interest transferred, the leasehold
20 interest which the lessor had or had power to transfer, and except as otherwise provided in
21 subsections (b) and Section 2A-720(d), takes subject to the existing lease contract.

22 (b) A lessor with voidable rights or voidable title acquired in a purchase of goods
23 from a transferor ~~that has relinquished possession or control has power to transfer a good~~

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1 ~~leasehold interest to a good-faith, subsequent lessee for value until the transferor regains~~
2 ~~possession or control, but only to the extent provided in subsection (a).~~ has power to transfer a
3 good leasehold interest to a good faith subsequent lessee for value to whom the goods have been
4 delivered. Under this subsection, voidable rights or voidable title is acquired when the goods
5 have been delivered under a transaction of purchase even if:

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

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

16 (d) A subsequent lessee from the lessor of goods that are subject to an existing
17 lease contract and are covered by a certificate of title issued under a statute of this State or of
18 another jurisdiction takes no greater rights than those provided both by this section and by the
19 certificate-of-title statute. (Section 2-504)

20 Drafting Comment

21 Section 2-504 provides that “entrusting of goods to a merchant . . . gives the merchant
22 and a buyer from that merchant power to transfer all rights and title of the entruster . . . Should
23 Article 2A similarly extend the entrusting protection to a lessee from a first lessee that was not
24 itself a lessee in ordinary course?

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1 If lessee A entrusts goods to lessor who leases to lessee B who is not a lessee in the
2 ordinary course of business, and lessee B then subleases to lessee C, should lessee C take free of
3 lessee A's interest? If lessee B is a lessee in ordinary course, the shelter principle would protect
4 lessee C. If that is the correct rule, is it worth five more words in the statute?

5 The Article 2 revision makes clear that a good faith buyer gets no rights under the
6 voidable title rules until the buyer gets possession or control. Under present Article 2 and 2A is
7 is possible to argue that if the seller or lessor had possession the voidable title rules protect the
8 good faith buyer or lessee even though the buyer or lessee does not yet have possession.

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

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

14 (b) A lessee with a voidable leasehold interest acquired in a lease transaction
15 from a lessor ~~that has relinquished possession or control has power to transfer a good leasehold~~
16 ~~interest to a good faith buyer for value or a good faith sublessee for value unless the lessor~~
17 ~~regains possession or control, but only to the extent provided in subsection (a).~~ has power to
18 transfer a good leasehold interest to a good faith subsequent lessee for value to whom the goods
19 have been delivered. Under this subsection, a voidable leasehold interest is acquired when the
20 goods have been delivered under the lease contract even if:

- 21 (1) the lessor was deceived as to the identity of the lessee;
22 (2) the delivery was in exchange for a check later dishonored; or
23 (3) the delivery was procured through fraud punishable under criminal
24 law.

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

5 (d) A buyer or sublessee from the lessee of goods that are subject to an existing
6 lease contract and are covered by a certificate of title issued under a statute of this State or of
7 another jurisdiction takes no greater rights than those provided both by this section and by the
8 certificate-of-title statute. (Section 2-504)

9 Comment

10 See the comment to the previous section.

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

12 **OF LAW.** If a person in the ordinary course of its business furnishes services or materials with
13 respect to goods subject to a lease contract, a lien upon those goods in the possession of that
14 person given by statute or rule of law for those materials or services has priority over any interest
15 of the lessor or lessee under the lease contract or this article unless the lien is created by statute
16 and the statute provides otherwise, or the lien is created by rule of law and the rule of law
17 provides otherwise.

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

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

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

3 the creditor holds a lien that attached to the goods before the lease contract became enforceable;

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

6 ~~(3) the creditor holds a security interest in the goods which was perfected~~
7 ~~under Article 9 before the lease contract became enforceable.~~

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

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

17 (c) Except as otherwise provided in Sections 9-317, 9-321, and 9-323, a lessee
18 takes a leasehold interest subject to a security interest held by a creditor of the lessor.

19 Drafting Comment

20 Subsections (b)(2), (b)(3), (c), and (d) of Section 2A-407 are now in Article 9. The
21 Article 9 package of amendments should include repeal of those parts of Section 2A-407.
22 Section 9-317 covers rights of third parties against unperfected security interests. Section 9-321
23 covers lessees in ordinary course of business. 9-323 covers rights of third parties as against
24 future advances made under perfected security interests.

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

2 (a) Except as otherwise provided in subsections (b) and (c), the rights of creditors
3 of the lessor with respect to goods identified to a lease contract and retained by the lessor are
4 subject to the lessee's rights under Sections 2A-709, 2A-723(d), and 2A-738 if the lessee's rights
5 vest before a creditor's claim in rem attaches to the goods.

6 ~~(b) A creditor of a lessor which has retained possession of goods subject to a~~
7 ~~lease contract may treat the lease contract as void or voidable if, as against the creditor, retention~~
8 ~~of possession by the lessor is fraudulent or void or voidable under any statute or rule of law.~~
9 ~~However, it is not fraudulent for a lessor, for a commercially reasonable time after the goods are~~
10 ~~identified to the lease to retain possession in good faith and current course of trade.~~

11 (b) A creditor of a lessor may treat a lease or an identification of goods to a lease
12 contract as void if as against the creditor a retention of possession or identification by the lessor
13 is fraudulent under any law of the state in which the goods are situated. However, the retention
14 of possession in good faith and current course of trade by a merchant-lessor for a commercially
15 reasonable time after a lease or identification is not fraudulent.

16 (c) Except as otherwise provided in subsection (a) and Sections 2A-404 and 2A-
17 405, this article does not impair the rights of a creditors of the lessor:

18 [(1) under Article 9; or

19 (2)] in a case in which if identification to the lease contract or delivery is
20 not made other than in current course of trade but is made in satisfaction of or as security for a
21 preexisting claim for money, security, or the like and under circumstances that under any law of
22 the state where the goods are situated, apart from this Article, would constitute a fraudulent

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1 ~~transfer or a voidable preference. such that the transaction would constitute a fraudulent transfer~~
2 ~~or voidable preference under a statute or rule of law other than this section.~~

3 (d) A creditor of a seller may treat a sale or an identification of goods to a
4 contract for sale as void ~~or voidable~~ if, as against the creditor a retention of possession by the
5 seller is fraudulent ~~or void or voidable~~ under any law of the state where the goods are situated.
6 ~~statute or rule of law.~~ However, it is not fraudulent for a seller to retain possession of the goods
7 pursuant to a lease contract entered into by the seller as lessee and the buyer as lessor in
8 connection with the sale or identification of the goods if the buyer bought for value and in good
9 faith. (Section 2-505)

10 Drafting Comment

11 The coordination group, at its May, 1997, meeting, suggested that the reference to Article
12 9 is not necessary. In present Section 2A-308 there is no reference to Article 9.

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

15 [(a) In this section:

16 (1) "Encumbrance" includes a real estate mortgage, other lien on real
17 estate, and any other right in real estate which is not an ownership interest.

18 (1) "fixtures" means goods that have become so related to particular real
19 estate that an interest in them arises under real estate law;

20 (2) "fixture filing" means a filing, in the office where a mortgage on the
21 real estate would be filed or recorded, of a financing statement covering goods that are or are to
22 become fixtures and conforming to the requirements of Section 9-502(a);

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1 (3) “purchase money lease means a lease in which the lessee does not
2 have possession or use of the goods or the right to possession or use of the goods [before] [until]
3 the lease agreement is enforceable;

4 (4) A mortgage is a “construction mortgage to the extent that it secures
5 an obligation incurred for the construction of an improvement on land including the acquisition
6 cost of the land, if a recorded record of the mortgage so indicates.]

7 [(a)][(b)] A lease under this article may be of goods that are fixtures or may
8 continue in goods that become fixtures, but there may be no lease under this article of ordinary
9 building materials incorporated into an improvement on land.

10 [(b)][(c)] This article does not prevent creation of a lease of fixtures under real
11 estate law.

12 [(c)][(d)] The perfected interest of a lessor of fixtures has priority over a
13 conflicting interest of an encumbrancer or owner of the real estate if if the lessee has an interest
14 of record in or is in possession of the real estate and:

15 (1) except as otherwise provided in subsection (f), the lease is a purchase
16 money lease, the interest of the encumbrancer or owner arises before the goods become fixtures,
17 the interest of the lessor is perfected by a fixture filing before the goods become fixtures or
18 within ~~10~~ 20 days thereafter, ~~and the lessee has an interest of record in the real estate or is in~~
19 ~~possession of the real estate;~~ or

20 (2) the interest of the lessor is perfected by a fixture filing before the
21 interest of the encumbrancer or owner is of record, the lessor’s interest has priority over any
22 conflicting interest of a predecessor in title of the encumbrancer or owner, ~~and the lessee has an~~

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1 ~~interest of record in the real estate or is in possession of the real estate.~~

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

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

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

10 (3) the encumbrancer or owner has, in a [signed] [authenticated] record,
11 consented to the lease or has disclaimed an interest in the goods as fixtures; or

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

15 [(e)][(f)] [A mortgage is a construction mortgage to the extent that it secures an
16 obligation incurred for the construction of an improvement on land , including the acquisition
17 cost of the land, if the recorded record so indicates. Subject to Except as otherwise provided in
18 subsections [(c)][(d)] and [(d)][(e)], the interest of a lessor of fixtures, including the lessor's
19 residual interest, is subordinate to the conflicting interest of an encumbrancer of the real estate
20 under a construction mortgage recorded before the goods become fixtures if the goods become
21 fixtures before the completion of the construction. ~~To the extent that it is given to refinance a~~
22 ~~construction mortgage, a~~ A mortgage has this priority to the same extent as ~~the~~ a construction

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1 mortgage to the extent that it is given to refinance a construction mortgage..

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

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

17 [(h)][(i)] Even if the lease agreement does not create a security interest, the
18 interest of a lessor of fixtures, including the lessor's residual interest, is perfected by filing a
19 financing statement as a fixture filing for leased goods that are or are to become fixtures in
20 accordance with the relevant provisions of Article 9. (9-334)

21 Comment

22 In revised 9 the definitions in subsection (a) are moved. All except "construction
23 mortgage" are moved to the general definitions section. "Construction mortgage" is moved to

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1 the substantive subsection. We can leave the definitions here, move them to the 2A definitions
2 section, or merely cross-reference to the Article 9 definitions in the general definitions section.

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

5 (a) "Accessions mean goods that are [installed in or affixed to other goods]
6 [physically united with other goods in a manner such that the identity of the original goods is
7 lost].

8 (b) Except as provided in subsection (d), the interest of a lessor or a lessee under
9 a lease contract entered into before the goods become accessions is superior to all interests in the
10 whole.

11 (c) Except as provided in subsection (d) the interest of a lessor or a lessee under a
12 lease contract entered into at the time or after the goods became accessions is valid against all
13 persons subsequently acquiring interests in the whole but is invalid against any person with an
14 interest in the whole which has not in a record consented to the lease or disclaimed an interest in
15 the goods as part of the whole.

16 (d) The interest of a lessor or a lessee under a lease contract described in
17 subsection (b) or (c) is subordinate to the interest of

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

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

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(e) If under this section a lessor or lessee holds an interest in accessions which has priority over the claims of all persons that have interests in the whole, the lessor or lessee may 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, if necessary to enforce other rights under this article, remove the goods from the whole. However, the lessor or lessee shall reimburse any holder of an interest in the whole which is not the lessee and which 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 the goods until the party seeking removal gives adequate security for the performance of this obligation.

Comment

Revised Article 9 has completely rewritten and substantially changed the substance of its accessions section (Section 9-335). New Article 9 treats all parts of the whole as separate accessions when a new part subject to a separate security interest is added. If, for example, SP-1 has a security interest in a tractor and SP-2 has a security interest in a new engine added to the tractor, both SP-1 and SP-2 now have an accession interest. Carrying out that line of thought, the accessions section states that other provisions of Article 9 determine priorities between the two parties. The new section also provides that a security interest in an accession loses to a security interest in the whole that is perfected by compliance with a certificate of title law.

Since Article 2A cannot leave priority issues to other provisions of Article 2A, Article 2A probably should continue its present accession rules. If so, the Committee probably should reject the alternative underlined definition of accession set out above.

The Committee should consider whether it wishes to permit persons who deal with the whole through certificates of title to take priority over a lessor's interest in accessions to the certificate of title goods.

A copy of new Section 9-335 is attached to the notes accompanying this draft.

SECTION 2A-411. PRIORITY SUBJECT TO SUBORDINATION. Nothing in this

1 article prevents subordination by agreement by any person entitled to priority.

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1 **PART 5**

2 **WARRANTIES**

3 **SECTION 2A-501. DEFINITIONS.** In this part:

4 (1) "Damage" means all loss resulting ~~in the ordinary course~~ from a breach of
5 warranty, ~~including injury to a person or property as permitted in Section 2A-707.~~ Including
6 direct, incidental, and consequential damages.

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

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

10 (4) "Remote lessee" means a lessee from a lessor other than the lessor or seller
11 against which a claim under this part ~~for breach of warranty~~ is asserted.

12 (5) "Representation" means a description, ~~demonstration, or depiction of the~~
13 ~~goods~~, an affirmation of fact or promise about the quality or performance of ~~relating~~ to the goods
14 to be delivered, or a sample or model of the goods. (2-401)

15 **Drafting Comment**

16 The definition of representation is moved from Section 2A-503.

17 **SECTION 2A-502. WARRANTY AGAINST INTERFERENCE AND AGAINST**
18 **INFRINGEMENT; LESSEE'S OBLIGATION AGAINST INFRINGEMENT.**

19 (a) Except in a finance lease, a lessor in a lease contract warrants that, except for
20 claims by any person by way of infringement or the like, for the duration of the lease no person
21 holds a:

22 (1) claim to or interest in the goods which will interfere with the lessee's

1 enjoyment of its leasehold interest, or

2 (2) colorable claim to or interest in the goods which will unreasonably
3 expose the lessee to litigation.

4 (b) A finance lessor warrants that, except for claims by way of infringement or
5 the like, for the duration of the lease no person holds a:

6 (1) claim or interest in the goods that arose from an act or omission of the
7 lessor which will interfere with the lessee's enjoyment of its leasehold interest, or

8 (2) colorable claim to or interest in the goods that arose from an act or
9 omission of the lessor which will unreasonably expose the lessee to litigation.

10 (c) Except in a finance lease, a lessor that is a merchant regularly dealing in
11 goods of the kind warrants that the goods will be delivered free of the rightful claim of a third
12 party by way of infringement or the like. However, a lessee that furnishes specifications to the
13 lessor holds the lessor harmless against any claim of infringement or the like that arises out of
14 compliance with the specifications.

15 (d) A warranty under subsections (a) through (c) may be disclaimed or modified
16 only by ~~express~~ specific language or by circumstances which give ~~giving~~ the lessee reason to
17 know that the lessor purports to transfer only such right as the lessor or a third party may have.
18 In an electronic transaction that does not involve review of the record by an individual, language
19 is sufficient if it is conspicuous and related to the warranty against third party claims. Otherwise,
20 language in a record is sufficient to disclaim warranties under this section if it is conspicuous and
21 states "There is no warranty against third-party claims that may interfere with lessee's enjoyment
22 of his leasehold interest or against infringement in this lease , or words of similar import.

23 (e) A lessor's warranty under this section, made to an immediate lessee, extends

1 to any ~~remote lessee~~ member of the family or household or guest of or transferee from an
2 immediate consumer lessee that may be reasonably expected to ~~lease~~ use or be affected by the
3 goods and which suffers that is damaged from by a breach of warranty. The rights and
4 remedies of a ~~remote lessee~~ persons protected under this subsection against the lessor for breach
5 of the warranty are determined by the terms of the contract between the lessor and the immediate
6 lessee and [this article][2A-XXX(f)(2)and (3)] . (2A-XXX would be the 2A version of 2-408)
7 (Section 2-402)

8 Drafting Comment

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

14 At the February meeting, the Committee recommended that "colorable claims be dealt
15 with in a separate sentence. Is the above draft satisfactory?

16 Present Article 2 and 2A say nothing about whether title warranties extend to subsequent
17 buyers or lessees or others.

18 **SECTION 2A-503. EXPRESS WARRANTIES TO IMMEDIATE LESSEE.**

19 (a) Any representation made by the lessor to the immediate lessee, including a
20 representation made in any medium of communication to the public, including advertising,
21 which relates to the goods and becomes part of the basis of the bargain creates an express
22 warranty that the goods will conform to the representation or, with respect to a sample or model,
23 that the whole of the goods will conform to the sample or model.

24 (b) It is not necessary to create an express warranty that the lessor use formal
25 words such as "warranty or "guaranty or have a specific intention to make a warranty.
26 However, a representation merely of the value of the goods or an affirmation purporting to be

1 merely the lessor's opinion or commendation of the goods does not create an express warranty
2 under subsection (a).

3 (c) A representation, including a representation made in any medium of
4 communication to the public, including advertising, which was made to the immediate lessee and
5 which relates to the goods becomes part of the basis of the bargain unless:

6 (1) the immediate buyer knew that the representation was not true; or

7 (2) a reasonable person in the position of the immediate buyer would not
8 believe that the representation was part of the agreement; or

9 (3) in the case of a representation was made in a medium for
10 communication to the public, including advertising, the immediate buyer did not know of the
11 representation at the time of the agreement.

12 (d) A right of action for breach of warranty under this section accrues as provided
13 under 2A-XXX (statute of limitations section)

14 ~~(a) If a lessor makes a representation or promise relating to the goods to an~~
15 ~~immediate lessee the representation or the promise becomes part of the agreement, unless a~~
16 ~~reasonable person in the position of the immediate lessee would not believe that the~~
17 ~~representation or promise became part of the agreement or would believe that the representation~~
18 ~~was merely of the value of the goods or purported to be merely the seller's opinion or~~
19 ~~commendation of the goods. An obligation may be created under this section even though the~~
20 ~~lessor does not use formal words such as "warranty" or "guaranty."~~

21 ~~(b) A representation or a promise that becomes part of the agreement is an~~
22 ~~express warranty and the lessor has an obligation to the immediate lessee that the goods will~~
23 ~~conform to the representation, or, if a sample is involved, that the whole of the goods will~~

1 conform to the sample, or that the promise will be performed. The obligation is breached if the
2 goods do not conform to any representation at the time when tender of delivery was completed or
3 if the promise was not performed when due.

4 (c) ~~A lessor's obligation to the immediate lessee under this section may be~~
5 ~~created by representations and promises made in a medium for communication to the public,~~
6 ~~including advertising, if the immediate lessee has knowledge of them at the time of the~~
7 ~~agreement.~~ (Section 2-403)

8 **SECTION 2A-504. IMPLIED WARRANTY OF MERCHANTABILITY; USAGE**
9 **OF TRADE.**

10 (a) Except in a finance lease and subject to Section 2A-506 and 2A-507, a
11 warranty that the goods are merchantable is implied in a contract for their lease if the lessor that
12 is a merchant with respect to goods of that kind. ~~makes in a lease contract an implied warranty~~
13 ~~that the goods are merchantable.~~

14 (b) Goods, to be merchantable, ~~at a minimum~~ must:

15 (1) pass without objection in the trade under the contract description;

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

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

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

22 (5) be adequately contained, packaged, and labeled as the lease agreement

1 or circumstances may require; and

2 (6) conform to any representations ~~promises or affirmations of fact made~~
3 on the container or label ~~if any~~.

4 (c) Subject to 2A-506, other implied warranties ~~other than those described in this~~
5 ~~section~~ may arise from course of dealing or usage of trade. (Section 2-404)

6 **SECTION 2A-505. IMPLIED WARRANTY OF FITNESS FOR PARTICULAR**
7 **PURPOSE.** Except in a finance lease and subject to Section 2A-506, if a lessor at the time of
8 contracting has reason to know any particular purpose for which the goods are required and that
9 the lessee is relying on the lessor's skill or judgment to select or furnish suitable goods, there is
10 an implied warranty that the goods are fit for that purpose. (Section 2-405)

11 Drafting Comment

12 Section 2B-405 contains a special fitness warranty that components of an integrated
13 system will work together. See Section 2B-405(b). Should Article 2A contain that warranty in
14 addition to the general fitness warranty?

15 **SECTION 2A-506. DISCLAIMER OR MODIFICATION OF WARRANTY.**

16 (a) Words Language or conduct relevant to the creation of an express warranty
17 and words language or conduct tending to disclaim or modify an express warranty must be
18 construed wherever reasonable as consistent with each other. Subject to Section 2A-202 with
19 regard to parol or extrinsic evidence, words language or conduct disclaiming or modifying an
20 express warranty is ineffective to the extent that this construction is unreasonable.

21 (b) [Subject to subsection (c), Alternative A] An implied warranty arising under
22 Sections 2A-504 and 2A-505 is disclaimed or modified by:

23 (1) language or conduct that makes it clear to the lessee that there is no

1 implied warranty or that there is a modified implied warranty, but unless the circumstances
2 indicate otherwise, expressions like “as is” or “with all faults” or similar language or conduct are
3 effective to disclaim or modify an implied warranty if in common understanding the expressions
4 make it clear to the lessee that the lessor assumes no responsibility or only a limited
5 responsibility for the quality or fitness of the goods;

6 _____ (2) course of performance, course of dealing, or usage of trade; or

7 _____ (3) To satisfy the requirements of (b)(1) in a consumer contract,
8 conspicuous language and expressions must be in a record.

9 ~~(b) Except as otherwise provided in subsection (c) or (e), an implied warranty is~~
10 ~~disclaimed or modified by language or an expression that, under the circumstances, makes it~~
11 ~~clear that the implied warranty has been disclaimed or modified~~

12 _____ (c) In any contract conspicuous language in a record disclaiming or modifying an
13 implied warranty satisfies the requirements of subsection (b) if:

14 **Alternative A**

15 _____ (1) in the case of the implied warranty or merchantability, the language states
16 “The lessor make no representations about and is not responsible for the quality of the goods
17 except as otherwise provided in this contract , or words of similar import.

18 **Alternative B**

19 _____ (1) in the case of the implied warranty of merchantability, the language states that
20 “The lessor makes no representations about and is not responsible for the quality of the goods
21 except as otherwise provided in this contract , or words of similar import, but in a consumer
22 contract, language, expressions, or conduct, no matter how conspicuous or clear, are not effective
23 to disclaim or modify an implied warranty that new goods and goods sold as new goods are fit

1 for the ordinary purposes for which goods of that description are used; or

2 **End of Alternatives**

3 (2) in the case of the implied warranty of fitness, the language states: “The lessor
4 makes no representations that the goods will be fit for any particular purpose for which you may
5 be leasing these goods, except as otherwise provided in this contract , or words of similar import.

6 (d) In other than a consumer lease contract, conspicuous language in a record
7 disclaiming or modifying an implied warranty is sufficient under subsection (b) if: Except as
8 otherwise provided in Section 2A-502(d) and subsection (e), language in a record is sufficient to
9 disclaim or modify an implied warranty if the language is conspicuous and:

10 (1) in the case of the implied warranty of merchantability, the language
11 mentions merchantability;

12 (2) in the case of the implied warranty of fitness, the language states that
13 “the goods are not warranted to be fit for any particular purpose or words of similar import;

14 (3) ~~unless the circumstances indicate otherwise, states that the goods are~~
15 ~~leased “as is” or “with all faults” or words of similar import.~~

16 (e) ~~When the~~ If a lessee before entering into the contract has examined the goods
17 or the sample or model as fully as desired or has refused declined to examine the goods them,
18 there is no implied warranty with regard to defects which conditions that a reasonable
19 examination in the circumstances would have revealed to the lessee.

20 (e) ~~Language in a consumer lease contract is sufficient to disclaim or modify an~~
21 ~~implied warranty only if:~~

22 (1) ~~At the time of contracting, a lessor in good faith passes through to a~~
23 ~~lessee an express warranty obligation created by a seller under Section 2-408(a) that is~~

1 reasonable in scope, duration and remedies and there is conspicuous language in a record stating,
2 for example, "You are receiving an express warranty obligation from the [manufacturer] instead
3 of any implied warranty of merchantability or fitness from us; or

4 (2) ~~Conspicuous language is in a record which language the consumer~~
5 ~~lessee has separately authenticated [expressly agreed] states: "Unless we say otherwise in the~~
6 ~~contract, we make no promises about the quality or usefulness of what you are leasing. They~~
7 ~~may not work. They may not be fit for any specific purpose you may have in mind."~~

8 (f) Remedies for breach of warranty may be limited in accordance with this
9 article with respect to liquidation or limitation of damages and contractual modification of
10 remedy. (Section 2-406)

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

12 Warranties, whether express or implied, shall be construed as consistent with each other and as
13 cumulative. However, if that construction is unreasonable, the intention of the parties determines
14 which warranty is dominant ~~prevails~~. In ascertaining that intention, the following rules apply:

15 (1) Exact or technical specifications displace ~~prevail over~~ an inconsistent sample
16 or model ~~or demonstration~~ or general language of description.

17 (2) A sample from an existing bulk or a model ~~displaces or demonstration~~
18 ~~prevails over~~ inconsistent general language of description.

19 (3) Except in a consumer lease, ~~an~~ express warranty displaces ~~prevail over~~
20 inconsistent implied warranties other than an implied warranty of fitness for a particular purpose.
21 (Section 2-407)

1 **SECTION 2A-508. EXTENSION OF EXPRESS OR IMPLIED WARRANTY.**

2 (a) [In a consumer lease contract,] A lessor's express or implied warranty or a
3 remedial promise made to an immediate consumer lessee extends to any member of the family or
4 household or an invite of the immediate lessee that may reasonably be expected to use or be
5 affected by the goods and who suffers damage other than injury to the person resulting from a
6 breach of warranty. As to damages other than injury to person, the operation of this section may
7 not be disclaimed, modified, or limited unless the lessor has a substantial interest based on the
8 nature of the goods in having a warranty or a remedial promise extend only to the immediate
9 consumer lessee.

10 (b) Damages for personal injury to an individual other than the immediate lessee
11 that proximately result from any breach of warranty may be recovered by

12 **Alternative A**

13 any individual who is in the family or household of the immediate lessee or who is a
14 guest in the immediate lessee's home if it is reasonable for the lessor to expect that the individual
15 may use, consume, or be affected by the goods. A lessor may not disclaim or limit the operation
16 of this subsection.

17 **Alternative B**

18 Any individual who may reasonably be expected to use, consume, or be affected by the
19 goods. A lessor may not disclaim or limit the operation of this subsection.

20 **End of Alternatives**

21 (c) The scope of any Warranty extended under this section to other than the
22 immediate lessee and the remedies for breacvh may be limited by the enforceable terms of the
23 contract between the lessor and the immediate lessee. To the extent not limited, the scope of the

1 warranty is determined by Sections 2A-402, 2A-403, 2A-404, and 2A-405, and the remedies for
2 breach of warranty or a remedial promise for other than the immediate lessee are determined by
3 Section [the equivalent of 2-408(f)(2)and(3).]

4 (d) Nothing in this article diminishes the rights and remedies of any third-party
5 beneficiary or assignee under the law of contracts or of persons to whom goods are transferred by
6 operation of law or dsplaces any other law that extends a warranty to or for the benefit of any
7 other person.

8 (e) A right of action for breach of warranty or breach of a remedial promise
9 under this section accrues under 2A-705.

10 Drafting Note

11 At the February, 1997, meeting, the Article 2A Committee voted to delete references to
12 remote lessees in this section. (Section 2-409)

13 See the May, 1998 Draft of Article 2, pages 74-76 and page 78 for a discussion of the
14 treatment of warranties to remote parties in Article 2. Article 2 contains two sections, 2-408 and
15 2-409. 2-408 deals with express warranties which run directly to third parties. 2-409 deals with
16 warranties to the immediate buyer which also pass to remote parties. We have not adopted 2-408
17 which deals with express warranties directly to remote lesssoes and have limited 2-409 to family,
18 household. It should be noted that present 2A gives adopting states the choice between the three
19 altenatives which also apparent in present Article 2. Therefore, the rule stated above cuts back
20 on third party rights in those states which chose Alternatives B or C of 2A-216.

21 The bracketed part of subsection (b) comes from Article 2 but is bracketed becaause of
22 doubt whether it is necessary in 2A. Everything except the denial of lost profits would seem to
23 be the rule anyway.

1 **PART 6**

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

4 **SECTION 2A-601. RIGHT TO ADEQUATE ASSURANCE OF PERFORMANCE.**

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

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

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

14 (d) After receipt of a demand under subsection (a), failure to provide within a
15 reasonable time, not exceeding 30 days, assurance of due performance which is adequate under
16 the circumstances of the particular case is a repudiation of the contract under Section 2A-602.
17 (Section 2-711)

18 **SECTION 2A-602. ANTICIPATORY REPUDIATION.**

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

22 (1) await performance by the repudiating party for a commercially

1 reasonable time, or resort to any remedy for default ~~under the lease contract or this article~~, even if
2 it has urged the repudiating party to retract the repudiation or has notified the repudiating party
3 that it would await the agreed performance; and

4 (2) in either case, suspend its own performance or, if a lessor, proceed in
5 accordance with Section 2A-719.

6 (b) Repudiation includes language that one party will not or cannot make a
7 performance still due under the contract or voluntary, affirmative conduct that reasonably
8 appears to the other party to make a future performance impossible. (Section 2-712)

9 Drafting Comment – January, 1997

10 The final text will contain a Comment noting that a failure to give assurances under
11 Section 2A-402 is a repudiation giving the other party the rights given by this section. Note the
12 added language in Section 2A-601 which also makes the point.

13 **SECTION 2A-603. RETRACTION OF ANTICIPATORY REPUDIATION.**

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

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

20 (c) Retraction reinstates a repudiating party's rights under the lease contract with
21 due excuse and allowance to the aggrieved party for any delay caused by the repudiation.
22 (Section 2-713)

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

March 10, 1999

1 (a) If, without the fault of the lessee, lessor, or supplier, agreed berthing, loading,
2 or unloading facilities, or an agreed type of carrier becomes unavailable, or an agreed manner of
3 delivery otherwise becomes commercially impracticable, a party may claim excuse under Section
4 2A-605 unless a commercially reasonable substitute is available. In that case, reasonable
5 substitute performance must be tendered and accepted.

6 (b) If an agreed means or manner of payment fails because of domestic or foreign
7 governmental regulation, the lessor may withhold or stop delivery or cause the supplier to
8 withhold or stop delivery until the lessee provides a means or manner of payment which is
9 commercially a substantial equivalent. If delivery has already been made, payment by the means
10 or in the manner provided by the regulation discharges the lessee's obligation unless the
11 regulation is discriminatory, oppressive, or predatory. (Section 2-715)

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

13 (a) Subject to Section 2A-604 and subsection (b), delay in performance or
14 nonperformance by the lessor or supplier is not a default under the lease contract if performance
15 as agreed has been made impracticable by:

16 (1) the occurrence of a contingency whose nonoccurrence was a basic
17 assumption on which the lease contract was made; or

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

20 (b) A party claiming excuse under subsection (a) shall seasonably notify the other
21 party that there will be delay or nonperformance. If the claimed excuse affects only a part of the
22 lessor's or supplier's capacity to perform, the lessor or supplier shall also allocate production and

1 deliveries among its customers in a manner that is fair and reasonable and notify the lessee of the
2 estimated quota made available. In allocating production and deliveries, the lessor or supplier
3 may include regular customers not them under contract as well as its own requirements for
4 further manufacture. (Section 2-716)

5 Drafting Comment

6 This is the latest Article 2 version of Section 2-716.

7 **SECTION 2A-606. PROCEDURE ON NOTIFICATION CLAIMING EXCUSE.**

8 (a) A ~~lessee~~ party that receives notification of a material or indefinite delay in
9 performance or an allocation permitted under Section 2A-307 or 2A-605 as to any delivery
10 concerned, or of there is a breach of the whole contract under Section 2A-726(c), by notification
11 in a record may:

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

14 (2) except in a finance lease that is not a consumer lease, modify the
15 contract by ~~accepting~~ agreeing to take the available allocation in substitution under 2A-605 or by
16 accepting the goods with due allowance from the rent payable for the balance of the lease term
17 for the deficiency ~~but without further right against the lessor~~ as provided in Section 2A-604..

18 (b) If, after receipt of a notification ~~from a lessor~~ under Section 2A-604 or
19 2A-605, ~~the lessee~~ a party fails to terminate or modify the lease contract within a reasonable time
20 not exceeding 30 days, the contract ~~lapses~~ is terminated with respect to any performance
21 affected.

22 (c) This section may be varied by agreement only to the extent that the parties
23 have assumed a different obligation under Sections 2A-604 and 2A-605. (Section 2-717)

March 10, 1999

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

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

4 (b) A promise that has become irrevocable and independent under subsection (a):
5 (1) is effective and enforceable between the parties and by or against third
6 parties including assignees of the parties; and

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

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

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[A. GENERAL]

SECTION 2A-702. DEFAULT: PROCEDURE.

[(b)] To determine whether the value of an installment or the whole contract has
ally impaired by a default under Sections 2A-602, 2A-726 or 2A-733, the court

(2) the extent to which the aggrieved party will be compensated for the loss of the property or interest that has been deprived;

(3) whether cure of the breach is permitted and likely;

(4) whether adequate assurance of due performance has been given; and

(5) whether the party in breach acted in good faith; and

(6) whether the party in breach will suffer a forfeiture.

1 (c) The cumulative effect of individual, insubstantial defaults may substantially
2 impair the value of the whole contract to the other party.]

3 (d) If ~~the lessor or the lessee~~ a party is in default under the lease contract, the
4 ~~aggrieved~~ party seeking enforcement:

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

7 (2) may reduce its claim to judgment or otherwise enforce the lease
8 contract by self-help or any available administrative or judicial procedure or the like, including;
9 ~~if agreed to by the parties~~, arbitration or other dispute-resolution procedure if agreed to by the
10 parties;and

11 (3) may enforce the rights granted by and remedies available under other
12 law.

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

17 (Sections 2-701, 2-802)

18 Drafting Comment

19 Bracketed subsections (b) and (c) come from Section 2-702(c) and (d) in the Article 2
20 draft. We have not so far included subsections (b) and (c) in Article 2A. The cited sections in
21 subsection (b) deal with repudiation, rejection in installment contracts, and revocation of
22 acceptance. There is some reason to define substantial impairment in the context of those
23 sections.

24 Article 2A has not so far included subsection (b) of Section 2-701 which reads:

25 “(b) A breach of contract occurs in the following circumstances, among others:

1 (1) A seller is in breach if it fails to deliver or perform an obligation,
2 makes a nonconforming tender of performance, or repudiates the contract.

3 (2) A buyer is in breach if it wrongfully rejects a tender of delivery,
4 wrongfully revokes acceptance, repudiates the contract, or fails to make a required
5 payment or to perform an obligation.

6 It seems unnecessary to define the things mentioned in subsection (b) as breaches (or
7 defaults).

8 Section 2-701 now says that whether a party is in breach is determined by the contract.
9 Since contract is defined as the total legal obligation arising from agreement, saying that default
10 is determined by the agreement and this article, as Article 2A does, is the same as saying is
11 determined by the contract . But there may be reasons of emphasis to continue the present
12 language.

13 **SECTION 2A-703. WAIVER OF DEFAULT; PARTICULARIZATION OF**
14 **NONCONFORMITY.**

15 (a) Except as otherwise provided in subsections ~~(b) and (c)~~, a party that knows
16 that the other party's performance constitutes a default [or breach of warranty] but accepts that
17 performance the following rules apply:

18 _____ (1) that party is precluded from relying on the default to cancel the
19 contract if it fails within a reasonable time to object to the default;and

20 (2) that party's acceptance of that performance and failure to object does
21 not preclude a claim for damages unless the party in breach has changed its position reasonably
22 and in good faith in reliance on the aggrieved party's inaction.

23 (b) Failure to object to a nonconforming performance under subsection (a) does
24 not foreclose objection to the same or similar default in future performances of like kind unless
25 the party foreclosed expressly so states. A statement waiving future performance may be
26 retracted by sasonable notification received by the other party that strict performance will be
27 required unless retraction would be unjust in view of a material change of position in reliance on

1 the waiver.

2 (c) A party is precluded from relying on a nonconforming performance as
3 follows:

4 (1) The lessee's failure to state, in connection with a rejection under
5 Section 2A-725, a particular nonconformity that is ascertainable by reasonable inspection
6 precludes reliance on the unstated nonconformity to justify rejection or to [establish default] if:

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

9 (B) between merchants, the lessor or the supplier after rejection has
10 made a request in a record for a full and final statement in a record of all nonconformities on
11 which the lessee proposes to rely.

12 (2) The ~~A~~ lessee's failure to state, in connection with a revocation of
13 acceptance under Section 2A-7, the nonconformity that justifies the revocation precludes the
14 lessee from relying on the nonconformity to justify the revocation or to establish default if the
15 lessor had a right to cure the default under Section 2A-730 and [would] [could] have cured the
16 breach. (Section 2-702)

17 Drafting Comment

18 Section 2A-703 was Section 2A-730 in the previous draft. The section has been moved
19 here because subsection (a) now applies to lessors as well as lessees. Present Section 2A-514,
20 which is based on present Section 2-605 deals only with lessee's failure to state defects on
21 rejection. Is subsection (a) inconsistent with Section 2A-704 which states that a lessor or lessee
22 in default is not entitled to notice of default? Should 2A-704 be combined with Section 2A-703?

23 **SECTION 2A-704. NOTICE AFTER DEFAULT.** Except as otherwise provided in
24 this article or the lease agreement, a lessor or lessee in default under a lease contract is not
25 entitled to notice of default or notice of enforcement from the other party.

March 10, 1999

1 **SECTION 2A-705. REMEDIES IN GENERAL.**

2 (a) In accordance with Section 1-106, the remedies provided in this article must
3 be liberally administered with the purpose of placing the aggrieved party in as good a position as
4 if the other party had fully performed.

5 (b) Unless the lease contract provides for liquidated damages enforceable under
6 Section 2A-710 or a limited remedy enforceable under Section 2A-711, an aggrieved party may
7 not recover that part of a loss resulting from a default that could have been avoided by reasonable
8 measures under the circumstances. The burden of establishing a failure to take reasonable
9 measures under the circumstances is on the defaulting party.

10 (c) The rights and remedies provided in this article are cumulative, but a party
11 may not recover more than once for the same injury. ~~Unless the the contract contains an~~
12 ~~enforceable agreement provides for liquidated damages provision or a limited remedy~~
13 ~~enforceable under Section 2A-710 or 2A-711, a court may deny or limit a remedy if, under the~~
14 ~~circumstances, it would put the aggrieved party in a substantially better position than if the other~~
15 ~~party had fully performed.~~

16 (d) This article does not impair a remedy for breach of any obligation or promise
17 collateral or ancillary to a lease contract. (Section 2-803)

18 **SECTION 2A-706. MEASUREMENT OF DAMAGES IN GENERAL.** [Subject to
19 2-803, if][If] there is a default , the aggrieved party may recover compensation for the loss
20 resulting in the ordinary course from the default as determined ~~by~~ under Sections 2A-717
21 through 2A-737 or ~~recover compensation for the loss resulting in the ordinary course from the~~
22 ~~default~~ as determined in any reasonable manner, together with incidental damages and
23 consequential damages, less expenses and costs ~~avoided~~ saved as a result of the default. (Section

2-804)

Drafting Comment

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

SECTION 2A-707. INCIDENTAL DAMAGES. Incidental damages resulting from a default under a lease contract include compensation for any commercially reasonable charges, expenses, or commissions with respect to:

(1) inspection, receipt, transportation, care, or custody of identified goods which are the subject of the ~~lease contract~~ default;

(2) stopping delivery or shipment;

(3) effecting cover, return, or disposition of the goods;

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

and

(5) otherwise dealing with the goods or effectuating other remedies [after the default]. (Section 2-805)

SECTION 2A-708. CONSEQUENTIAL DAMAGES.

(a) Consequential damages resulting from a default include compensation for:

(1) any loss, including loss to property other than the goods leased, resulting from the aggrieved party's general or particular requirements and needs of 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~~ and which could not reasonably be prevented ~~have been avoided by reasonable measures under the circumstances~~; and

1 (2) injury to [a person][an individual] proximately resulting from any
2 breach of warranty.

3 ~~(b) The aggrieved party may not recover any consequential damages pursuant to~~
4 ~~subsection (a)(1) that result in unreasonably disproportionate compensation to the aggrieved~~
5 ~~party. Compensation may be unreasonably disproportionate if the circumstances indicate that the~~
6 ~~risk of the consequential loss is significantly greater than the party in breach has received or~~
7 ~~would have received from the contract or the parties were informal in their dealing. The~~
8 ~~breaching party has the burden of establishing that the consequential damages under subsection~~
9 ~~(a)(1) result in disproportionate compensation to the aggrieved party. (Section 2-806)~~

10 **SECTION 2A-709. SPECIFIC PERFORMANCE.**

11 (a) A court may enter a decree for specific performance if ~~the parties have~~
12 ~~expressly agreed to that remedy or the goods or the agreed performance of the defaulting party~~
13 ~~are unique or in other proper circumstances. In a lease other than a consumer lease, a court may~~
14 ~~enter a decree for specific performance if the parties have agreed to that remedy.~~ However, even
15 if the parties ~~expressly~~ agree to specific performance, a court shall not enter a decree for specific
16 performance if the breaching party's sole remaining contractual obligation is the payment of
17 money.

18 (b) The decree for specific performance may include terms and conditions as to
19 payment of the rent, damages, or other relief the court considers just. (Section 2-807)

Drafting Comment

Article 2 has now adopted the rule that if the only remaining performance is the payment of money, specific performance is not available. Should Article 2A adopt the same rule? That rule probably would not prohibit specific performance actions for rent in most cases since lessees are likely to have obligations other than payment. Should we continue our earlier rule that specific performance actions for rent are not available unless the conditions of Section 2A-723 are satisfied. If we did that, specific performance actions would be available if the lessee does not return the goods, the goods have been damaged after risk of loss had passed to the lessee, or the lessor is unable to resell or relet. Perhaps we should have a flat rule that an obligation to pay money cannot be enforced by a decree for specific performance.

Following Article 2, subsection (c) (dealing with replevin, etc.) has been moved to Section 2A-737 which covers lessee's right to get the goods from lessor.

SECTION 2A-710. CANCELLATION; EFFECT.

(a) An aggrieved party may cancel a contract if the conditions of Section 2A-717 or 2A-725 are satisfied or the agreement so provides unless there is a waiver of the breach or the right to cancel under Section 2A-302 or there is a right to cure the breach under Section 2A-730.

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

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

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

(e) The obligations surviving cancellation include:

(1) a right based on previous default or performance of the contract;

(2) any term limiting disclosure of information;

1 (3) an obligation to return or dispose of goods
2 (4) a term establishing a choice of law or forum;
3 (5) a term creating an obligation to arbitrate or otherwise resolve disputes
4 by alternative dispute resolution procedures;
5 (6) a term limiting the time for commencing an action or for providing
6 notice,
7 (7) a remedy for breach of the whole contract or any unperformed balance;
8 (8) any right, remedy, or obligation stated in the agreement as surviving
9 cancellation to the extent enforceable under other law; and
10 (8) other rights, remedies, or limitations if in the circumstances such
11 survival is necessary to achieve the purposes of the parties.

12 (f) Unless a contrary intention clearly appears, language of cancellation,
13 rescission, or avoidance of the lease contract, or similar language ~~is not~~ shall not be construed as
14 a renunciation or discharge of any claim in damages for an antecedent default. (Section 2-808)

15 Drafting Comment – May, 1997

16 Subsection (a) does not follow exactly Article 2. Article 2 provides that there is a right to
17 cancel if there is a breach under Section 2-701 or 2-710 (right to reject). It is probably better to
18 refer to the basic remedies sections for lessor and lessee which include a reference to the right to
19 cancel. Therefore, Article 2A refers to those sections, Sections 2A-718 and 2A-726, rather than
20 to the rejection sections.

21 Subsection (e)(8) is an attempt to follow the direction of the Article 2A Drafting
22 Committee that it be made clear that the specific listing is not exclusive. There is probably a
23 better way to make the point. Possibly a Comment would be sufficient.

24 **SECTION 2A-711. LIQUIDATION OF DAMAGES; DEPOSITS.**

25 (a) Damages for default or any other act or omission, including indemnity for loss
26 or diminution of anticipated tax benefits or loss or damage to lessor's residual interest, may be

1 liquidated in the lease agreement but only at an amount or by a formula that is reasonable in light
2 of either the actual loss or the then anticipated loss caused by the default or other act or omission.
3 If a term liquidating damages is unenforceable under this subsection, the aggrieved party ~~has~~
4 may pursue the remedies provided in this article. A term that does not liquidate damages but
5 attempts to limit damages available to the aggrieved party must be evaluated under Section 2A-
6 712.

7 (b) If the lessor justifiably withholds delivery of goods or stops performance
8 because of the lessee's default or insolvency, the lessee is entitled to restitution of the amount by
9 which the sum of payments exceeds the amount to which the lessor is entitled under a term
10 liquidating damages in accordance with subsection (a).

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

15 Drafting Comment

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

20 Article 2A continues to follow original Article 2A in not making enforceability of
21 liquidated damages clauses dependent on actual damages being difficult to ascertain. The
22 comments to present Section 2A-504 speak at some length to the point. Does the Committee
23 wish to adhere to that original position. Article 2 continues to include difficulty of ascertaining
24 actual damages as a factor.

25 **ALTERNATIVE A**

26 **SECTION 2A-712. CONTRACTUAL MODIFICATION OF REMEDY.**

1 (a) Except as otherwise provided in this article, the lease agreement may include
2 rights and remedies for default in addition to or in substitution for those provided in this article
3 and may limit or alter the measure of damages recoverable under this article.

4 (b) Resort to a remedy provided under this article or in the lease agreement is
5 optional unless the remedy is expressly agreed to be exclusive. If circumstances cause an
6 exclusive or limited remedy to fail of its essential purpose, or provision for an exclusive remedy
7 is unconscionable, remedy may be pursued as provided in this article.

8 (c) Consequential damages may be liquidated under Section 2A-710, or may
9 otherwise be limited, altered, or excluded unless the limitation, alteration, or exclusion is
10 unconscionable. Limitation, alteration, or exclusion of consequential damages for injury to the
11 person in the case of consumer goods is presumed to be unconscionable, but limitation,
12 alteration, or exclusion of damages where the loss is commercial is not presumed to be
13 unconscionable.

14 (d) Rights and remedies on default by the lessor or the lessee with respect to any
15 obligation or promise collateral or ancillary to the lease contract are not impaired by this article.

16 **ALTERNATIVE B**

17 **[SECTION 2A-712. CONTRACTUAL MODIFICATION OF REMEDY.**

18 (a) Subject to subsections (b) and (c) and Section 2A-712 the following rules
19 apply:

20 (1) A lease agreement may add to or substitute for the remedies available
21 under this article and may limit or alter the measure of damages recoverable for default such as
22 by limiting the lessee's remedies to return of the goods and repayment by the lessor of any
23 amounts paid by the lessee under the lease contract or to repair and replacement of

1 nonconforming goods or parts by the lessor

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

4 (3) A remedial promise is an agreed remedy under this section.

5 (b) If circumstances cause an exclusive or limited remedy to fail of its essential
6 purpose, the following rules apply:

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

11 (2) In a consumer lease contract, an aggrieved party may reject the goods
12 or revoke acceptance and, to the extent of the failure, may resort to all remedies available under
13 this article including the right to recover consequential damages, despite any term purporting to
14 exclude or limit that remedy..

15 (c) Subject to subsection (b), consequential damages and incidental damages may
16 be limited or excluded by agreement unless the operation of the limitation or exclusion is
17 unconscionable. Limitation of consequential damages for injury to the person in the case of a
18 consumer lease is presumed to be unconscionable but limitation of such damages if the loss is
19 commercial is not.]

20 Drafting Comment

21 At the February, 1997, the Article 2A Drafting Committee voted to reinstate the present
22 Article 2A section on modification of remedy. That is done here. The present Article 2A section
23 is alternative A. The revised Article 2 provision is alternative B.
24 The Article 2 section has been substantially altered since our February, 97 decision. We should
25 consider whether we have objection to the present Article 2 language.

March 10, 1999

1 **SECTION 2A-713. REMEDIES FOR MISREPRESENTATION OR FRAUD.**

2 Remedies for material misrepresentation or fraud include all remedies available under this article
3 for non-fraudulent default. Rescission or a claim for rescission of a lease contract or rejection or
4 return of the goods does not bar and is not inconsistent with a claim for damages or other
5 ~~consistent~~ remedy. (Section 2-811)

6 Drafting Comment

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

9 **SECTION 2A-714. PROOF OF MARKET RENT.**

10 (a) Damages based on market rent are determined according to the rent for the
11 use of the goods concerned for a lease term identical to the remaining period of the original lease
12 agreement and prevailing at the times specified in Sections 2A-723 and 2A-736.

13 (b) If evidence of rent for the use of the goods concerned for a period identical to
14 the remaining period of the original lease agreement and prevailing at the times or places
15 described in this article is not readily available, the following rules apply:

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

18 (2) The rent prevailing at any other place or for a different lease period
19 which in commercial judgment or usage of trade is a reasonable substitute may be used, making
20 proper allowance for the difference, including the cost of transporting the goods to or from the
21 other place.

22 (3) Evidence of a relevant rent prevailing at another time or place or for a
23 lease period other than the one described in this section offered by one party is not admissible

1 unless the party has given the other party notice that the court finds sufficient to prevent unfair
2 surprise.

3 (c) If the prevailing rent or value of goods regularly leased in any established
4 market is in dispute, reports in official publications or trade journals or in newspapers,
5 periodicals, or other means of communication in general circulation and published as the reports
6 of that market are admissible in evidence. The circumstances of the preparation of such a report
7 may be affect the weight of the evidence but not its admissibility. (Section 2-812)

8 **SECTION 2A-715. LIABILITY OF THIRD PARTIES FOR INJURY TO GOODS.**

9 (a) If a third party deals with goods identified to a lease contract and causes
10 actionable injury to the goods, the lessor has a right of action against the third party, and the
11 lessee has a right of action against the third party, if the lessee:

12 (1) has a security interest in the goods;

13 (2) has an insurable interest in the goods; or

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

16 (4) If at the time of the injury the plaintiff did not bear the risk of loss as
17 against the other party to the lease contract and there is no arrangement between them for
18 disposition of the recovery, any recovery or settlement is, subject to the plaintiff's interest as
19 fiduciary for the other party to the lease contract.

20 (5) Either party with the consent of the other may maintain an action for
21 the benefit of ~~an interested~~ a concerned party. (Section 2-813)

22 Drafting Comment

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

SECTION 2A-716. STATUTE OF LIMITATIONS.

(a) An action for default under a lease contract, including breach of warranty or indemnity, must be commenced within four years after the right of action has accrued. Except in a consumer lease or an action for indemnity, the original lease agreement may reduce the period of limitations to not less than one year.

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

(c) If an action commenced within the applicable period of limitation is terminated 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 and within six months after the termination of the first action unless the termination resulted from voluntary discontinuance or from dismissal for failure to prosecute.

(d) This section does not alter the law on tolling of the statute of limitations and does not apply to a right of action that accrued before this article took effect. (Section 2-814)

Drafting Comment

The second sentence of subsection (b) is in present 2A. Isn't the drafting very awkward? Can a party who has actually discovered the breach argue that the statute of limitations doesn't start until the later time when he should have discovered it? Probably the concluding phrase should be "whichever is earlier. . . or should be deleted.

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1 [B. LESSOR'S REMEDIES]

2 **SECTION 2A-717. LESSOR'S REMEDIES IN GENERAL.**

3 (a) If a lessee wrongfully rejects or revokes acceptance of goods or fails to make
4 a payment when due or repudiates with respect to a part or the whole, the lessee is in default
5 under the lease contract with respect to any goods involved, and with respect to all of the goods
6 if under an installment lease contract the value of the whole lease contract is substantially
7 impaired, and the lessor may do one or more of the following:

8 (1) withhold delivery of the goods and take possession of goods previously
9 delivered;

10 (2) stop delivery of the goods by any carrier or bailee ~~pursuant to~~ under
11 Section 2A-720(b);

12 (3) proceed under Section 2A-719 with respect to goods still unidentified
13 to the lease contract or unfinished;

14 (4) obtain specific performance under Section 2A-709 or recover the rent
15 under Section 2A-723;

16 (5) dispose of the goods and recover damages under Section 2A-721 or
17 retain the goods and recover damages under Section 2A-722;

18 (6) recover incidental and consequential damages under Sections 2A-707
19 and 2A-708;

20 (7) cancel the lease contract under section 2A-710;

21 [(8) recover liquidated damages under section 2A-711;

22 (9) enforce limited remedies under section 2A-712; or]

1 [(8) exercise any other rights or pursue any other remedies provided in the
2 lease agreement;or]

3 [(9)][(10)] recover damages under section 2A-706.

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

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

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

13 (2) if the default does not substantially impair the value of the lease
14 contract to the lessor, the lessor may recover under subsection (b). (Section 2-815)

15 Drafting Comment

16 The expanded listing of rights on default follows the expanded listing in Article 2, but
17 does not follow the sequence of Article 2 exactly. New bracketed (a)(8) and (9) are from the
18 present version of Article 2. Are they better than the second bracketed subsection (a)(8)?

19 **SECTION 2A-718. LESSOR'S RIGHT TO POSSESSION OF GOODS.**

20 (a) Upon a default by the lessee under a lease contract of the type described in
21 Section 2A-717(a) or (c)(1) or, if agreed, upon other default by the lessee, the lessor may take
22 possession of the goods. If the lease agreement so provides, the lessor may require the lessee to
23 assemble the goods and make them available to the lessor at a place to be designated by the
24 lessor which is reasonably convenient to both parties. Without removal, the lessor may render

1 unusable any goods employed in trade or business and may dispose of goods on the lessee's
2 premises.

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

5 Drafting Comment

6 In revised Article 2, the provision on seller's right to recover the goods on buyer's
7 insolvency is moved to the stoppage in transit section. In present Article 2A that provision is
8 subsection (1) of this section (2A-525). I have followed revised 2 in moving that provision.

9 **SECTION 2A-719. LESSOR'S RIGHT TO IDENTIFY GOODS TO LEASE**
10 **CONTRACT DESPITE DEFAULT OR TO SALVAGE UNFINISHED GOODS.**

11 (a) Upon default by the lessee under the lease contract of the type described in
12 Section 2A-717(a) or (c)(1) or, if agreed, after other default by the lessee, the lessor may:

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

16 (2) dispose of goods that are shown to have been intended for the
17 particular lease contract even if ~~they~~ those goods are unfinished.

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

23 **SECTION 2A-720. LESSOR'S REFUSAL TO DELIVER BECAUSE OF**

1 **LESSEE'S INSOLVENCY; STOPPAGE IN TRANSIT OR OTHERWISE.**

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

4 (b) Subject to subsection (d), a lessor may stop delivery of goods in the
5 possession of a carrier or other bailee if the lessee is insolvent or repudiates or fails to make a
6 payment due before delivery, whether for rent, security, or otherwise under the lease contract or
7 if, for any other reason, the lessor has a right to withhold or reclaim the goods.

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

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

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

13 (3) acknowledgement to the lessee by a carrier by reshipment or as
14 warehouseman that the carrier holds the goods for the lessee.

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

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

18 (2) After notification, the carrier or bailee shall hold and deliver the goods
19 according to the directions of the lessor. The lessor is liable to the bailee or carrier for any
20 resulting charges or damages. A carrier or bailee need not stop delivery if the lessor does not
21 provide indemnity for charges or damages upon the carrier's or bailee's demand.

22 (3) A carrier or bailee that has issued a nonnegotiable document need not
23 obey a notification to stop received from a person other than the person named in the document

1 as the person from which the goods have been received for shipment or storage. (Section 2-818)

2 Drafting Comment

3 Article 2A omitted any reference to negotiable documents of title in this section because
4 of an assumption that they would not be used in leasing transactions. I assume we will continue
5 to do so. I have added the reference to acknowledgement by carrier. As leases of computers and
6 other office equipment become more common, and buying or leaseing over the internet become
7 more common, the carrier rules perhaps become more relevant. In any event, reference to
8 them does no harm.

9 **SECTION 2A-721. LESSOR'S RIGHTS TO DISPOSE OF GOODS.**

10 (a) Upon a default by a lessee under the lease contract of the type described in
11 Section 2A-717(a) or (c)(1), or upon the lessor's refusal to deliver or takes possession of goods
12 under Section 2A-718 or 2A-720, or, if agreed, upon other default by a lessee, the lessor may
13 dispose of the goods concerned or the undelivered balance thereof by lease, sale, or otherwise.

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

19 (1) accrued and unpaid rent as of the date of the commencement of the
20 period of the new lease agreement;

21 (2) the present value, as of the same date, of the total rent for the then
22 remaining lease period of the original lease agreement, minus the present value, as of the same
23 date, of the rent under the new lease agreement applicable to that part of the new lease period
24 which is comparable to the then remaining period of the original lease agreement; and

25 (3) any incidental damages allowed under Section 2A-707, less expenses

1 avoided as a result of the lessee's default.

2 (c) If the lessor's disposition is by a lease agreement that for any reason does not
3 qualify for treatment under subsection (b), or is by sale or otherwise, the lessor may recover from
4 the lessee as if the lessor had elected not to dispose of the goods, and Section 2A-722 governs.

5 (d) A person that subsequently buys or leases from the lessor in good faith for
6 value as a result of a disposition under this section takes the goods free of the original lease
7 contract and any rights of the original lessee even if the lessor fails to comply with one or more
8 of the requirements of this article.

9 (e) A lessor is not accountable to the lessee for any profit made on any
10 disposition. A lessee that has rightfully rejected or justifiably revoked acceptance shall account to
11 the lessor for any excess over the amount of the lessee's security interest. (Section 2-819)

12 **SECTION 2A-722. LESSOR'S DAMAGES FOR NONACCEPTANCE, FAILURE**
13 **TO PAY, OR REPUDIATION.**

14 (a) Except as otherwise provided with respect to damages liquidated in the lease
15 agreement under Section 2A-711 or otherwise determined by agreement of the parties under
16 Sections 1-102(3) and 2A-712, if a lessor elects to retain the goods or elects to dispose of the
17 goods and the disposition is by lease agreement that for any reason does not qualify for treatment
18 under Section 2A-721(b) or is by sale or otherwise, the lessor may recover from the lessee as
19 damages for a default of the type described in Section 2A-717(a) or 2A-717(c)(1), or if agreed
20 for other default of the lessee:

21 (1) accrued and unpaid rent as of the date of default if the lessee has never
22 taken possession of the goods, or, if the lessee has taken possession of the goods, as of the date

1 the lessor repossesses the goods or an earlier date on which the lessee makes a tender of the
2 goods to the lessor,

3 (2) the present value, as of the date determined under paragraph (1), of the
4 total rent for the then remaining period of the original lease agreement, minus the present value
5 as of the same date of the market rent at the place where the goods are located computed for the
6 same lease term, and

7 (3) any incidental or consequential damages allowed under Section
8 2A-707 or 2A-708, less expenses saved in consequence of the lessee's default.

9 (b) If the measure of damages provided in subsection (1) or 2A-721 is inadequate
10 under 2A-705(a), a lessor may recover damages measured by other than the market price or the
11 amount received on a disposition of the goods, together with incidental and consequential
12 damages, including:

13 (1) the present value of lost profits, including reasonable overhead,
14 resulting from the default of the lessee determined in any reasonable manner; and

15 (2) reasonable expenditures made in preparing for or performing the
16 contract if, after the default, the lessor is unable to obtain reimbursement by salvage, resale, or
17 other reasonable measures.

18 Drafting Comment

19 At the February, 1997, meeting, the Article 2A Committee voted to return to the present
20 language for Section 2A-722 (present Section 2A-528). At that time, the January, 1997, draft of
21 Article 2, in cases of repudiation measured damages at a different time depending on whether the
22 action came to trial before or after the time for performance under the contract. Duplicating that
23 set of rules in Article 2A resulted in a complex section.

24 Article 2 has now abandoned that distinction, but does contain a special rule delaying the
25 time for measuring contract market in repudiation cases until the end of a commercially
26 reasonable time after repudiation.

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1 The above draft takes verbatim the first paragraph of present Section 2A-528 except that
2 reference is now made to consequential damages which are now allowed to lessors.

3 **SECTION 2A-723. LESSOR'S ACTION FOR THE RENT.**

4 (a) Upon a default by the lessee under the lease contract of the type described in
5 Section 2A-717(a) or (c)(1) or if agreed upon another default by the lessee, if the lessor complies
6 with subsection (c), the lessor may recover from the lessee the damages specified in subsection
7 (b) for:

8 (1) goods accepted by the lessee and not repossessed by or tendered to the
9 lessor;

10 (2) goods identified to the lease contract if the lessor is unable after
11 reasonable effort to dispose of them at a reasonable price or the circumstances reasonably
12 indicate that effort will be unavailing; and

13 (3) conforming goods lost or damaged after risk of loss passes to the
14 lessee, but if the lessor has retained or regained control of the goods, the loss or damage must
15 occur within a commercially reasonable time after the risk of loss has passed to the lessee:

16 (b) The damages available under the circumstances described in subsection (a)
17 are:

18 (1) accrued and unpaid rent as of the date of entry of judgment in favor of
19 the lessor;

20 (2) the present value as of the same date of the rent for the then remaining
21 lease term of the lease agreement; and

22 (3) any incidental or consequential damages allowed under Section
23 2A-707 or Section 2A-708, less expenses avoided as a result of the lessee's default.

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1 (c) Except as otherwise provided in subsection (d), a lessor shall hold for the
2 lessee for the remaining period of the lease agreement any goods that have been identified to the
3 lease contract and are in the lessor's control.

4 (d) A lessor may dispose of the goods at any time before collection of the
5 judgment for damages obtained pursuant to subsection (a). If the disposition is before the end of
6 the remaining period of the lease agreement, the lessor's recovery against the lessee for damages
7 is governed by Section 2A-721 or 2A-722, and the lessor shall provide an appropriate credit
8 against a judgment for damages to the extent that the amount of the judgment exceeds the
9 recovery available under Section 2A-721 or 2A-722.

10 (e) Payment of the judgment for damages obtained under subsection (a) entitles
11 the lessee to the use and possession of the goods not then disposed of for the remaining period of,
12 and in accordance with, the lease agreement.

13 (f) Upon default by the lessee under the lease contract of the type described in
14 Section 2A-717(a) or (c)(1) or if agreed upon other default by the lessee, a lessor that is not
15 entitled to rent under this section is still entitled to damages for nonacceptance under Section
16 2A-721 or 2A-722. (Section 2-822)

17 **SECTION 2A-724. LESSOR'S RIGHTS TO RESIDUAL INTEREST.** In addition
18 to any other recovery permitted by this article or other law, a lessor may recover from a lessee an
19 amount that will fully compensate the lessor for any loss of or damage to the lessor's residual
20 interest in the goods caused by the lessee's default.

21 [C. LESSEE'S REMEDIES]

1 **SECTION 2A-725. LESSEE'S REMEDIES IN GENERAL; LESSEE'S**
2 **SECURITY INTEREST IN REJECTED GOODS.**

3 (a) If a lessor fails to deliver the goods in conformity to the lease contract or
4 repudiates the contract, or a lessee rightfully rejects the goods or justifiably revokes acceptance
5 of the goods, with respect to any goods involved and with respect to all of the goods if under an
6 installment lease contract the value of the whole lease contract is substantially impaired, the
7 lessor is in default under the lease contract, and the lessee may do one or more of the following:

8 (1) cancel the lease contract under Section 2A-710;

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

11 (3) cover and obtain damages ~~as to all goods affected, whether or not they~~
12 ~~have been identified to the lease contract~~ under Section 2A-734, ~~2A-707, and 2A-708;~~

13 (4) recover damages for nondelivery under Section 2A-735, ~~2A-707, and~~
14 ~~2A-708;~~

15 (5) if an acceptance of goods has not been justifiably revoked, recover
16 damages for default with regard to accepted goods under Section 2A-736;

17 (6) enforce a security interest under subsection (d);

18 (7) recover identified goods under Section 2A-737;

19 (8) obtain specific performance under Section 2A-709;

20 (9) recover incidental and consequential damages under Sections 2A-707
21 and 2A-708;

22 (10) recover liquidated damages under Section 2A-711;

1 (11) enforce limited remedies under Section 2A-712;
2 (12) recover damages under 2A-706; or
3 [(13) exercise any other rights or pursue any other remedy provided in the
4 lease contract.]

5 ~~(b) If a lessor fails to deliver or repudiates the lease contract, the lessee may also:~~
6 ~~(1) recover identified goods under Section 2A-737; or~~
7 ~~(2) in a proper case, obtain specific performance or replevy the goods~~
8 ~~under Section 2A-709.~~

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

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

14 (d) On rightful rejection or justifiable revocation of acceptance, a lessee has a
15 security interest in goods in the lessee's possession or control for any rent and security that has
16 been paid and any expenses reasonably incurred in their inspection, receipt, transportation, care,
17 and custody. In that case, the lessee may hold the goods and dispose of them in good faith and in
18 a commercially reasonable manner. The disposition is subject to Section 2A-721(d) and (e).

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

22 Drafting Comment

23 The reference to Section 2A-721(d) in subsection (e) gives transferees after a lessee's sale
24 or lease to satisfy its security interest the same protection as transferees from a lessor under

1 Section 2A-721.

2 **SECTION 2A-726. LESSEE'S RIGHTS ON NONCONFORMING DELIVERY;**
3 **RIGHTFUL REJECTION.**

4 (a) Subject to Sections 2A-727, 2A-711, and 2A-712, if the goods or the tender or
5 delivery fail in any respect to conform to the lease contract, a lessee may:

6 (1) reject the whole;

7 (2) accept the whole; or

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

9 (b) Rejection of goods must be within a reasonable time after their delivery or
10 tender and ~~A rejection under subsection (a) is not effective unless the lessee notifies the lessor~~
11 ~~within a reasonable time. after tender or delivery. (Section 2-703)~~

12 **SECTION 2A-727. INSTALLMENT LEASE CONTRACT: DEFAULT.**

13 (a) An ~~In this section,~~ "installment lease contract" means a lease contract in
14 which the terms require or the circumstances permit the delivery of goods in separate lots to be
15 separately accepted, even if the lease agreement requires payment other than in installments or
16 contains a term stating "Each delivery is a separate lease" or words of similar import.

17 (b) In an installment contract, the lessee may reject any nonconforming
18 installment of delivery of goods ~~in an installment lease~~ if the nonconformity of the goods
19 substantially impairs the value of that installment to the buyer ~~[However, if a nonconforming~~
20 ~~tender by the lessor is not a breach of the whole contract under subsection (c) and the lessor or~~
21 ~~the supplier gives adequate assurance of its cure, the lessee shall accept that installment].~~

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1 (c) If a nonconformity or default with respect to one or more installments in an
2 installment contract is a substantial impairment of the value to the aggrieved party of the whole
3 contract, there is a breach of the whole contract and the aggrieved party may reject any
4 nonconforming unaccepted installment and cancel the contract. ~~However, the power to cancel~~
5 ~~the contract for default is waived, or a canceled contract is reinstated;~~ If the aggrieved party
6 accepts a nonconforming installment without seasonably giving notice of cancellation, brings an
7 action with respect only to past installments, or demands performance as to future installments,
8 the contract has not been cancelled. (Section 2-710)

9 Drafting Comment

10 The bracketing of the last sentence of subsection (b) follows draft Article 2. The
11 Comments to Article 2 suggest that the sentence is no longer necessary now that the Act defines
12 substantial impairment. Under the definition, whether the lessor is likely to cure is a factor in
13 determining substantial impairment. (See new subsections (c) and (d) of Section 2A-702).

14 **SECTION 2A-728. MERCHANT LESSEE'S DUTIES; LESSEE'S OPTIONS AS** 15 **TO SALVAGE.**

16 (a) Subject to a lessee's security interest under Section 2A-725(e), if the lessor or
17 supplier does not have an agent or place of business at the market where the goods were rejected
18 or acceptance was revoked, a merchant lessee, ~~upon~~ after an effective ~~rightful~~
19 justifiable revocation of acceptance of goods in the lessee's possession or control, shall follow
20 any reasonable instructions received from the lessor or supplier with respect to the goods. ~~in the~~
21 ~~lessee's possession or control and;~~ In the absence of such instructions, a merchant lessee shall
22 make a reasonable effort to sell, lease, or otherwise dispose of the goods for the lessor's account
23 if they threaten to decline speedily in value. In the case of a rightful rejection or justifiable
24 revocation of acceptance, instructions are not reasonable if on demand indemnity for expenses is

1 not forthcoming.

2 (b) In the case of a rightful rejection or justifiable revocation of acceptance:

3 (1) A merchant lessee that sells or leases goods under subsection (a) is
4 entitled to reimbursement from the lessor or supplier, or out of the proceeds, for the reasonable
5 expenses of caring for and disposing of them.

6 (2) If the expenses under paragraph (1) do not include a disposition
7 commission, the lessee is entitled to a commission usual in the trade or, if there is none, to a
8 reasonable sum not exceeding 10 percent of the gross proceeds.

9 (c) Except as otherwise provided in ~~Subject to subsection (a), unless a lessor or~~
10 ~~supplier gives instructions to a merchant lessee within a reasonable time after notification of a~~
11 ~~rightful an effective rejection or justifiable revocation of acceptance,~~ after an effective rejection
12 or a justifiable revocation of acceptance, a lessee may store the rejected goods for the account of
13 the lessor or supplier, reship them to the lessor or supplier, or resell them for the account of the
14 lessor or supplier, with reimbursement in the case of a rightful rejection or a justifiable
15 revocation of acceptance as provided in subsection (b).

16 (d) In complying with this section or Section 2A-729, the lessee shall act in good
17 faith. Conduct in good faith under this section does not constitute acceptance or conversion and
18 may not be the basis of a claim for damages.

19 [(e) A purchaser that purchases in good faith from a lessee under this section or
20 Section 2A-729 takes the goods free of any rights of the lessor and the supplier, even if the lessee
21 fails to comply with the requirements of this article.] (Section 2-705)

22 Drafting Comment

23 Subsection (e) above comes from present Article 2A. A similar provision does not
24 appear in present Article 2, nor in revised Article 2. Should subsection (e) be continued?

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SECTION 2A-729. LESSEE'S DUTIES AS TO RIGHTFULLY REJECTED GOODS.

(a) Subject to Sections 2A-725(e) and 2A-728, after an effective ~~rightful~~ rejection or justifiable revocation of acceptance, a lessee in physical possession of the ~~that takes~~ ~~delivery of~~ goods shall hold the goods with reasonable care at the disposal of the lessor's or supplier's disposition for a sufficient time to permit the lessor or supplier to remove them. However, the lessee has no further obligation with regard to the goods rightfully rejected or to which an acceptance has been justifiably revoked.

(b) An action by the lessee under subsection (a) is not acceptance or conversion.

~~(c) A lessee in possession that which wrongfully but effectively rejects but does not accept goods is subsection to the duty of care in subsection (a). (Section 2-704)~~

Drafting Comment

At the February meeting, the Drafting Committee voted to reject subsection (b) of Section 2-704. It is, therefore, stricken above. The Committee thought that whether use of rejected goods is inconsistent with the attempted rejection or is consistent with rejection as necessary mitigation of damages should be left to common law development, rather than codified. In leasing transactions, treated use as mitigation rather than as acceptance under the lease creates difficult fact issues regarded the obligations of the parties and the rent to be paid.

Subsection (b) of 2-704 reads:

“(b) If a buyer uses the goods after an effective rejection or justifiable revocation of acceptance, the following rules apply:

(1) Any use by the buyer which is unreasonable under the circumstances and which is either inconsistent with the seller's ownership or inconsistent with the buyer's claim of rejection or revocation of acceptance and is unreasonable under the circumstances is an acceptance if ratified by the seller.

(2) If the buyer wrongfully rejected the goods, any use of the goods by the buyer which is inconsistent with the seller's ownership or inconsistent with the buyer's claim of rejection is unreasonable.

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(3) If use of the goods is reasonable under the circumstances, the use is not an acceptance, the buyer, upon returning or disposing of the goods, shall pay the seller the reasonable value of the use to the buyer. The value must be deducted from the sum of the price paid to the seller, if any, and any damages to which the buyer is otherwise entitled under this article.

Do we wish to revisit this issue.

SECTION 2A-730. CURE.

(a) If a lessee ~~effectively and~~ rightfully rejects goods or a tender of delivery under Section 2A-726 or justifiably revokes an acceptance under Section 2A-733 and the agreed time for performance has not expired, the lessor or supplier, upon seasonable notice to the buyer and at its own expense, may cure any default by making a conforming tender of delivery within the agreed time. The lessor is obligated to ~~by~~ compensate the lessee for all of the lessee's reasonable and necessary expenses caused by the nonconforming tender and subsequent cure.

(b) If a lessee ~~effectively and~~ rightfully rejects goods or a tender of delivery under Section 2A-726 or justifiably revokes acceptance under Section 2A-733 and the agreed time for performance has expired, the lessor or supplier, upon seasonable notice to the lessee and at its own expense, may cure a default, if the cure is appropriate and timely under the circumstances, by making a tender of conforming goods. ~~and by~~ The lessor or supplier is obligated to compensate the lessee for all of the lessee's reasonable and necessary expenses caused by the nonconforming tender and subsequent cure. ~~if the cure is [appropriate and] timely under the circumstances and the buyer has no reasonable grounds to refuse the cure.~~ (Section 2-709)

SECTION 2A-731. WHAT CONSTITUTES ACCEPTANCE OF GOODS.

(a) ~~Acceptance of Goods~~ are accepted ~~occurs~~ when the lessee:

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

2 (1) The lessee, or a person entitled to enforce a warranty or warranty
3 obligation shall notify the party claimed against within a reasonable time after the default or
4 breach of warranty ~~lessee~~ was discovered or should have been discovered. ~~a default, shall notify~~
5 ~~the lessor and the supplier, if any, of the claimed default.~~ However, a failure to give timely
6 notice bars the lessee from a remedy only to the extent that the party entitled to notice establishes
7 that it was prejudiced by the failure.

8 (2) Except in the case of a consumer lease, if a claim for infringement or
9 the like is made against a lessee for which a lessor or supplier is answerable over and the lessee is
10 sued as a result of that claim, the lessee shall notify the lessor or supplier within a reasonable
11 time after receiving notice of the litigation or be barred from any remedy over for liability
12 established by the litigation.

13 (d) A lessee has the burden of establishing a default with respect to goods
14 accepted. A person entitled to enforce a warranty obligation under Section 2A-508 has the
15 burden of establishing that the warranty was breached.

16 (e) In a claim for breach of a warranty, indemnity, or other obligation against the
17 lessee for which another party is answerable over, the following rules apply:

18 (1) The lessee may give notice of the litigation to the other party in a
19 record, and the person notified may then give similar notice of the litigation to any other person
20 that is answerable over. If the notice invites the person notified to intervene in the litigation and
21 defend and states that failure to do so will bind the person notified in any action later brought by
22 the lessor as to any determination of fact common to the two actions, the person notified is so
23 bound, unless, after seasonable receipt of the notice, the person notified intervenes in the

1 litigation and defends.

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

7 (f) Subsections (c), (d), and (e) ~~govern~~ apply to an obligation of a lessee to hold
8 the lessor or the supplier harmless against infringement or the like. (Section 2-707)

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

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

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

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

17 (b) Except in the case of a finance lease that is not a consumer lease, a lessee may
18 revoke acceptance of a lot or commercial unit if the lessor defaults under the lease contract and
19 the default substantially impairs the value of that lot or commercial unit to the lessee.

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

22 (d) ~~To be effective,~~ A lessee's acceptance must be revoked under subsections (a)

1 and (b) within a reasonable time after the lessee discovers or should have discovered the ground
2 for it and before any substantial change in condition of the goods which is not caused by their
3 own defects. The revocation is not effective until the lessee notifies the lessor of it.

4 (e) A lessee that justifiably revokes acceptance has the same rights and duties
5 under Sections 2A-728 and 2A-729 with regard to the goods involved as if they had been
6 rejected. (Section 2-708)

7 Drafting Comment

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

13 **SECTION 2A-734. COVER; LESSEE'S ACQUISITION OF SUBSTITUTE** 14 **GOODS.**

15 (a) Upon a default by a lessor under the lease contract of the type described in
16 Section 2A-725(a), or if agreed, upon other default by the lessor, the lessee may cover by making
17 in good faith and without unreasonable delay any purchase or lease of, or contract to purchase or
18 lease, comparable goods to substitute for those due from the lessor.

19 (b) Except as otherwise provided with respect to damages liquidated in the lease
20 agreement or determined by agreement of the parties, if a lessee's cover is by a lease contract
21 substantially similar to the original lease contract and the new lease contract is made in good
22 faith and in a commercially reasonable manner, a lessee that covers in the manner required by
23 subsection (a); may recover damages measured by the present value, as of the date of the
24 commencement of the period of the new lease contract, of the rent under the new lease contract
25 applicable to that part of the new lease period which is comparable to the then remaining period

1 of the original lease contract minus the present value as of the same date of the total rent for the
2 then remaining lease period of the original lease contract together with any incidental or
3 consequential damages, less expenses avoided as a result of the lessor's default.

4 (c) If a lessee's cover is by a lease agreement that for any reason does not qualify
5 for treatment under subsection (b), or is by purchase or otherwise, the lessee may recover from
6 the lessor as if the lessee had elected not to cover, and Section 2A-735 governs. (Section 2-825)

7 **SECTION 2A-735. LESSEE'S DAMAGES FOR NON-DELIVERY,**
8 **REPUDIATION, DEFAULT, AND BREACH OF WARRANTY IN REGARD TO**
9 **ACCEPTED GOODS.**

10 (a) Except as otherwise provided with respect to damages liquidated in the lease
11 agreement or otherwise determined by agreement of the parties (Sections 1-102(3) and 2A-711),
12 if a lessee elects not to cover or a lessee elects to cover and the cover is by lease agreement that
13 for any reason does not qualify for treatment under Section 2A-734, or is by purchase or
14 otherwise, the measure of damages for nondelivery or repudiation by the lessor or for rejection or
15 revocation of acceptance by the lessee is the present value, as of the date of the default, of the
16 then market rent minus the present value as of the same date of the original rent, computed for
17 the remaining period of the original lease agreement, together with incidental and consequential
18 damages, less expenses saved in consequence of the lessor's default.

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

21 (c) Except as otherwise agreed, if the lessee has accepted goods and given
22 notification, the measure of damages for nonconforming tender or delivery or other default by a

1 lessor is the loss resulting in the ordinary course of events from the lessor's default as determined
2 in any manner that is reasonable together with incidental and consequential damages, less
3 expenses saved in consequence of the lessor's default.

4 (d) Except as otherwise agreed, the measure of damages for breach of warranty is
5 the present value at the time and place of acceptance of the difference between the value of the
6 use of the goods accepted and the value if they had been as warranted for the lease period unless
7 special circumstances show proximate damages of a different amount, together with incidental
8 and consequential damages, less expenses saved in consequence of the lessor's default or breach
9 of warranty. (Section 2-826)

10 Drafting Comment

11 At the February, 1997, meeting the Article 2A Committee voted to return Section 2A-735
12 to the language of present Section 2A-519. That has been done above.

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

15 (a) Except as otherwise agreed, a lessee that has accepted goods and not
16 justifiably revoked acceptance and given notice pursuant to Section 2A-732(c), may recover as
17 damages for any nonconforming tender or other default by a lessor the loss resulting in the
18 ordinary course of events from the lessor's default as determined in any reasonable manner.

19 (b) Except as otherwise agreed, a measure of damages for breach of a warranty of
20 quality is the present value at the time and place of acceptance of the difference between the
21 value of the use of the goods accepted and the value if they had been as warranted for the lease
22 period, unless special circumstances show proximate damages of a different amount.

23 (c) The measure of damages for breach of a remedial promise is the value of the

1 promise, less the value of any performance made.

2 (d) A lessee may also recover incidental and consequential damages. (Section
3 2-827)

4 **SECTION 2A-737. PREPAYING LESSEE'S RIGHT TO GOODS.**

5 (a) A lessee that pays all or a part of the rent or security for goods identified to
6 the lease contract, whether or not they have been shipped, on making and keeping good a tender
7 of any unpaid portion of the rent and security due under the lease contract, has a right to recover
8 them from the lessor if the lessor repudiates or fails to deliver as required by the contract.

9 (b) A lessee ~~has a right~~ may recover from the lessor by of replevin, detinue,
10 sequestration, claim and delivery, or the like, ~~to recover~~ goods identified to the lease contract if,
11 after reasonable efforts, the lessee is unable to effect cover for the goods or the circumstances
12 reasonably indicate that an effort to obtain cover would be unavailing.

13 (c) If the requirements of subsection (a) or (b) are satisfied, the lesser's right vests
14 upon identification of the goods to the lease contract even if the lessor has not then repudiated
15 the contract or failed to deliver as required by the contract. (Section 2-824)

16 **Drafting Comment**

17 My notes indicate that a Comment to this section should make it clear that this section
18 gives no rights to the lessee against a supplier.