

D R A F T  
FOR DISCUSSION ONLY

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

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NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS

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MEETING IN ITS ONE-HUNDRED-AND-SIXTH YEAR  
SACRAMENTO, CALIFORNIA  
JULY 25 – AUGUST 1, 1997

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

*WITH PREFATORY NOTE AND COMMENTS*

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# REVISION OF UNIFORM COMMERCIAL CODE ARTICLE 2A – LEASES

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# REVISION OF UNIFORM COMMERCIAL CODE

## ARTICLE 2A – LEASES

### PREFATORY NOTE

Article 2A is being revised to take account of the amendments to Articles 2 and 9 (primarily Article 2) and the promulgation of Article 2B. Article 2A is based largely on Article 2 and in general follows the Article 2 sequence of sections. However, many present Article 2 sections were not adopted in Article 2A because the Article 2 sections dealt with issues which were not significant in the leasing context or stated rules which were inappropriate in leases. Other Article 2 sections were followed exactly or very closely in the analogous Article 2A section. Some Article 2A sections follow the policy of present Article 2, but the specific rules are different because of the differences between sales and leases. Article 2A also contains a few provisions, such as the sections on lessors of fixtures or accessions, which are based on the similar provisions of Article 9.

The revision of Article 2 and the prospective promulgation of Article 2B raise the issue of the extent to which Article 2A should be revised to follow changes in policy or language in Article 2 or to adopt rules similar to some of those in new Article 2B. The Article 2A Drafting Committee was appointed to examine that question. The charge to the Committee is to review Article 2 changes to sections used as the basis for Article 2A sections and adopt those Article 2 changes in Article 2A unless differences between leases and sales justify a different rule for leases. Similarly new sections in Article 2 and the provisions of new Article 2B are being reviewed for possible addition to Article 2A. Also, changes made by the Article 9 Committee are being considered for possible adoption in the relevant Article 2A sections. The Article 2A Committee charge is not to second-guess the Article 2 Committee nor to decline to accept Article 2 changes in Article 2A merely because the Article 2A Committee disagrees with the Article 2 Committee decision.

The Article 2A Committee does not have authority to make substantive changes to Article 2A which are not related to changes in Articles 2 or 9 or to provisions of new Article 2B. If the Article 2A Drafting Committee discovers a need for substantive change in Article 2A not related to other articles, it must seek authorization from the Scope and Program and Executive Committees to make those changes.

The Article 2A Committee has met three times, the last time in February of this year. At each meeting the Article 2A Committee has reviewed the draft of revised Article 2 current at that time. A planned late May meeting of the Article 2A Committee was cancelled to await a more final version of revised Article 2, therefore the Article 2A Committee has not reviewed changes made since January of this year in the Article 2 draft. However, the Article 2A draft submitted to the Conference is based on the Article 2 draft, including changes made after last January, which is also being presented to the Conference this summer. Therefore, we are in the unusual position of presenting to the Conference a draft of Article 2A which contains many language changes and some new sections that have not been reviewed by the Drafting Committee.

1           However, many of the changes in revised Article 2 as it appears now were  
2 made by the time of the January, 1997, draft. The Article 2A Committee has  
3 considered those changes and concluded that a number of them should not be  
4 followed in Article 2A because of differences between leases and sales. The  
5 Committee has also identified one area of possible substantive changed unrelated to  
6 revisions in other articles.

7           As noted above, the instruction to the Article 2A Drafting Committee is to  
8 conform Article 2A to revised Article 2 unless there is a reason for a different rule  
9 in leases because of differences between sales and leases, including differences in  
10 relevant practice. Therefore, adoption of a revised Article 2 section in Article 2A  
11 doesn't necessarily indicate that the Article 2A Committee believes that the  
12 provision is desirable in leases or in sales. It may mean merely that the Article 2A  
13 Committee cannot see a reason for a different rule in leases than in sales. In one  
14 case the Article 2A Committee has rejected a revision in Article 2 where it may be  
15 difficult to argue that there is a reason for a different rule in lease transactions.

16           A discussion follows of (1) matters on which Article 2A has failed to  
17 follow revised Article 2 and (2) the one substantive amendment to Article 2A that  
18 the Article 2A Committee is considering that is not related to changes in other  
19 articles.

20           As a preliminary matter, it should be noted that draft revised Article 2A  
21 looks very different than present Article 2A. Language in almost every section,  
22 following similar changes in Article 2, has been changed, and the sections have  
23 been rearranged. Many of the language changes are not intended to be substantive.  
24 The new language usually merely tries to clarify the meaning of present sections or  
25 conform to the current style rules of the Conference. The section reordering is a  
26 result of the addition of a number of new sections from Articles 2B and 2 and  
27 reorganization, particularly, in the remedies parts of the Act.

28           **A. Special rule for determining whether terms in a record are binding**  
29           **on consumers (no Article 2A section)**

30           Section 2-206 of revised Article 2 provides that in a consumer transaction,  
31 "any non-negotiated term [in a record] that a reasonable consumer in a transaction  
32 of this type would not reasonably expect to be in the record is excluded from the  
33 contract, unless the consumer had knowledge of the term before agreeing to the  
34 record.

35           Lessors, particularly of automobiles for short terms, have strongly objected  
36 to incorporating such a provision in Article 2A. The Article 2A Committee has  
37 previously expressed opposition to earlier similar Article 2 provisions. There is  
38 some likelihood that the Article 2A Committee will be inclined to reject Section  
39 2-206 for Article 2A. The issue is, as noted, particularly acute in short term auto  
40 rentals. In such cases, the renter is usually in a hurry, other people are standing in  
41 line, and the renter often doesn't want to take time to read or indicate awareness of  
42 particular provisions of the contract. But, when, for example, an unexpected  
43 accident occurs and the lessor asserts that the renter has thousands of dollars of  
44 liability, the renter deny liability on the ground that a reasonable consumer would  
45 not have expected to incur such a large liability. What is the appropriate policy  
46 regarding the binding effect of unknown terms in a form contract in such a



1 situation? Should a distinction be drawn between short term leases and leases for  
2 longer terms? Can a distinction between leases and sales be justified?

### 3 **B. The battle of the forms (no Article 2A section)**

4 Present Article 2A does not contain a section analogous to present Section  
5 2-207. That section deals with formation of contract through the exchange of  
6 forms, typically a purchase order and an acknowledgment. The provision was  
7 omitted from Article 2A because leasing contracts are seldom, if ever, made  
8 through such an exchange of forms. The typical leasing pattern is the execution of  
9 a single writing (now “record ”) by both parties.

10 The Article 2 Drafting Committee has tried a number of different  
11 approaches to the battle of forms problem in revised Article 2. The present  
12 provisions in the revision are Sections 2-203(d), 2-205(a)(1), and 2-207. Under  
13 Sections 2-203(d) and 2-205(a)(1), a definite expression of acceptance in a record is  
14 an acceptance even though the record contains terms different from those of the  
15 offer, unless the record of one of the parties conspicuously states that the party  
16 intends contract only if the other party agrees to all terms in that record. Section  
17 2-207 then states rules for determining the terms of a contract created by an  
18 exchange of forms which contain differing terms.

19 The Article 2A Committee has decided to adhere to the original Article 2A  
20 decision and not include “battle of the forms” provisions in Article 2A.

### 21 **C. Statute of frauds (Section 2A-201)**

22 Present Article 2A has a statute of frauds provision modeled closely on the  
23 present Article 2 statute of frauds. Until early this year, the Article 2 Drafting  
24 Committee proposed repeal of the statute of frauds. The Article 2A Committee  
25 had rejected repeal of the statute in Article 2A. The Committee received strong  
26 representations from lessor representatives that the present Article 2A statute of  
27 frauds should be preserved. Now that Article 2 has adopted a statute of frauds very  
28 similar to the present Article 2 statute, the Article 2A Committee must decide  
29 whether to conform Section 2A-201 to the revised Article 2 provision or retain the  
30 present Article 2A version. There are two major differences between the revised  
31 Article 2 draft and present Article 2A. First, Article 2A requires a writing if the  
32 lease price is \$1,000 or more while revised Article 2 sets the threshold at \$10,000.  
33 Second, revised Article 2 includes a statutory estoppel provision which adopts the  
34 holdings of some courts that a party’s conduct may estop it from asserting the  
35 statute of frauds as a defense

36 The Article 2A Committee’s decision to reject repeal of the statute of frauds  
37 was strongly influenced by a memorandum prepared by Edwin Huddleson, III on  
38 behalf of the Equipment Leasing Association of America. Mr. Huddleson spoke for  
39 26 lawyers who represent companies engaged in leasing activity. Following is a  
40 brief reprise of those arguments which persuaded the Drafting Committee to retain  
41 the statute of frauds. The arguments may be relevant to whether the present Article  
42 2 version of the statute of frauds should be included in Article 2A.

43 The typical leasing transaction is more complex than the typical sale. Most  
44 commercially important leases create a long term continuing relationship between



1 the parties which often involves multiple duties on each side. Therefore, it is more  
2 important than in a sales transaction that the terms of the agreement be in writing.  
3 In fact, even small value leases are essentially always represented by a single  
4 written contract signed by both parties.

5 Retaining the statute of frauds creates some additional incentive for parties  
6 to get the deal in writing. And this is a good thing. Deleting the statute might lead  
7 to an undesirable casualness in making leasing deals. On the other hand, since  
8 leases are essentially always put in writing today, retaining the statute of frauds will  
9 not interfere with any significant practice of entering into oral leases. Therefore, a  
10 statute of frauds for leasing transactions, in any event, does less harm through  
11 allowing welshers to defeat deals actually made than may be true in sales.

#### 12 **D. Extension of express warranties to remote lessees (no Article 2A** 13 **section)**

14 Section 2-408 of the Article 2 draft gives remote buyers and lessees rights  
15 against sellers who make promises or representations in advertising or in materials  
16 distributed with products. The Article 2A Committee has decided not to include a  
17 similar provision in Article 2A because we know of no instances in which lessors  
18 advertise or make representations in material to be delivered to remote lessees.  
19 Industry advisors have argued that Article 2A should not contain a warranty  
20 provision which deals with a situation which does not exist in the industry. (The  
21 Article 2 provision itself extends **seller** advertised, or with-the-goods, warranties to  
22 remote lessees.) It should be noted that revised Section 2A-508 does extend lessor  
23 warranties, made to an immediate lessee, to transferees who may be expected to use  
24 or be affected by the goods.)

#### 25 **E. Contractual modification of remedy (Section 2A-712)**

26 Article 2A adopted unchanged Section 2-719 of present Article 2. The  
27 Article 2 Drafting Committee has changed that section (now Section 2-810) in two  
28 substantive ways. First the revised section states that an agreed remedy “may not  
29 be applied to deprive the aggrieved party of a minimum adequate remedy . Second,  
30 it makes limitations on consequential damages unenforceable in consumer contracts  
31 if the “agreed remedy fails to substantially achieve the intended purposes of the  
32 parties. The Article 2A Committee rejected these changes to the section.

33 On the first point, the revised Article 2 section retains the present rule that  
34 an agreed remedy is not effective if the agreed remedy fails to achieve its purpose.  
35 (The revised language is that the agreed remedy is ineffective if it “fails  
36 substantially to achieve the intended purpose of the parties. ) The section also adds  
37 a second statutory limitation on the effectiveness of an agreed remedy; it must not  
38 “deprive the aggrieved party of a minimum adequate remedy under the  
39 circumstances. In present Article 2, there is a reference to “adequate minimum  
40 remedy in the Comments to Section 2-719 which explains the intent of the “failure  
41 of essential purpose test. The Article 2A Committee rejected the incorporation of  
42 the adequate minimum remedy language in the statute because it creates uncertainty  
43 as to the relationship between the two stated tests and suggests increased  
44 restrictions on the effectiveness of agreed remedies.

1 On the second point, the Article 2A Committee does not believe that the  
2 failure of a repair or replacement warranty, for example, should automatically  
3 invalidate a disclaimer of liability for consequential damages, even in a consumer  
4 transaction. Most cases under present Article 2 hold that a limitation on  
5 consequential damages may be effective even if the seller is unable to provide the  
6 agreed limited remedy. (The usual agreed remedy is a repair or replacement  
7 promise. Therefore, the issue is whether, if the lessor is unable to repair or replace,  
8 a consumer lessee is, in all cases, entitled to recover consequential damages even  
9 though the contract also separately excludes liability for consequential damages.

10 It is fair to say that it is difficult to argue for a difference between sales and  
11 leases on these points, but perhaps the argument can be successfully made.

12 **F. Unconscionability and consumers (Section 2A-107 (continues**  
13 **existing variation))**

14 Present Article 2A expanded the unconscionability provisions of Article 2  
15 in three ways as to consumer lessees. First, Article 2A gives a court power to grant  
16 “appropriate relief” if it finds unconscionable conduct in the **collection of a claim**  
17 arising from a lease contract. Second, courts are given power to grant relief if  
18 agreement to the lease contract or to a term thereof was **induced by**  
19 **unconscionable conduct**. Third, attorney’s fees are given to consumers who  
20 prevail on an unconscionability claim (and attorney’s fees are given to the other  
21 party if the court finds that the consumer lessee knew an asserted unconscionability  
22 claim to be groundless).

23 The Article 2 Drafting Committee chose to adopt the unconscionable  
24 inducement concept and apply it to all sales, not just sales to consumers, but did not  
25 adopt the other Article 2A expansions of unconscionability protections in consumer  
26 transactions. The Article 2A Committee voted to retain the present Article 2A  
27 unconscionability provisions which give greater protection to consumers than does  
28 the Article 2 provision. The Article 2A Committee also decided not to extend the  
29 unconscionable inducement concept to business transactions.

30 **G. Limitation on choice of law and choice of forum in consumer**  
31 **transactions (Section 2A-107) (continues existing variation))**

32 Present Article 2A restricts the power of the parties to a consumer lease to  
33 choose the applicable law or applicable forum. The law chosen must be that of  
34 jurisdiction in which the lessee resides or the jurisdiction in which the goods will be  
35 used. A choice of forum is effective only if that jurisdiction would otherwise have  
36 jurisdiction over the lessee. Present Article 2 has no such provisions and the  
37 Article 2 Drafting Committee has chosen not to adopt similar provisions in Article  
38 2. The Article 2A Committee, adopting the principle that it would not reduce  
39 consumer protections in present Article 2A, has voted to retain those provisions.

40 **H. Statute of limitations, accrual of cause of action (Section 2A-708)**  
41 **(continues existing variation))**

42 In present Article 2 a cause of action accrues when the breach occurs  
43 whether or not the other party knows of the breach, and breach of warranty occurs  
44 when goods are delivered unless the warranty expressly extends to future

1 performance. The original Article 2A Drafting Committee rejected the time-of-  
2 breach rule and instead adopted the rule that the time the other party learned, or  
3 should have learned, of the breach is the time of the accrual of the cause of action.  
4 (Article 2A adopted the Article 2 four year period for bringing action after accrual  
5 of the cause of action.) The Article 2 revision has slightly modified the original  
6 statute by extending the statute for an additional year, to five years maximum, if the  
7 aggrieved party does not discover the breach until after it has occurred.

8 The Article 2A Committee decided to adhere to the present Article 2A  
9 position as to time of accrual of the cause of action. The Committee believes that  
10 generally the time the injured party learned, or should have learned, of the breach is  
11 a fairer rule and works even handedly between lessors and lessees. In sales, using  
12 the time the injured party learned, or should have learned, of the breach would  
13 create the possibility of a warranty claim against a seller ten or twenty or more years  
14 after the sale and long after the seller had any contact with the buyer or the goods.  
15 In leases that problem for lessors exists only to a small degree, if at all. In any  
16 event, the lessor business community is willing to accept that small additional risk  
17 in order to also gain the advantage of not having the statute of limitations run  
18 against lessors until the lessor discovers or should have discovered the breach.

19 **I. Proposed amendment of Article 2A title warranties not related to**  
20 **changes in Article 2 (Section 2A-502)**

21 Under present Section 2A-211 non-finance lessors warrant only “that no  
22 person holds a claim to or interest in the goods **“that arose from an act or**  
23 **omission of the lessor”** that will interfere with the leasehold estate. Finance  
24 lessors make no warranty of quiet enjoyment at all. The Article 2A Committee  
25 proposes to modify those warranties so that a non-finance lessor makes a general  
26 warranty of quiet enjoyment (which protects against title defects even though not  
27 caused by an act or omission of the lessor) and a finance lessor warranties against  
28 its own acts which cause interference with the leasehold interest. The warranty also  
29 covers unfounded but colorable claims which interfere with the leasehold interest.

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  
6 Commercial 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 to execute or adopt a symbol, or  
10 encrypt a record in whole or part, with present intent to identify the authenticating  
11 party or to adopt, or accept a record or term, or to establish the authenticity of a  
12 record or term that contains the authentication or to which a record containing the  
13 authentication refers.

14   (2) “Buyer in ordinary course of business” means a person that buys  
15 goods in good faith, without knowledge that the sale to violates the rights of  
16 another person in the goods, and in the ordinary course from a person, other than a  
17 pawnbroker, in the business of selling goods of that kind. A person buys in the  
18 ordinary course if the sale to the person comports with the usual or customary  
19 practices in the kind of business in which the seller is engaged or with the seller’s  
20 own usual or customary practices. A person that sells minerals or the like,  
21 including oil and gas, at the wellhead or minehead is a person in the business of  
22 selling goods of that kind. A buyer in the ordinary course of business may buy for  
23 cash, by exchange of other property, or on secured or unsecured credit, and may  
24 acquire goods or documents of title under a pre-existing contract for sale. Only a

1 buyer that takes possession of the goods or has a right to recover the goods from the  
2 seller (Section 2-807, 2-822, or 2-824) may be a buyer in ordinary course of  
3 business. A person that acquires goods in a transfer in bulk or in total or partial or  
4 total satisfaction of a money debt is not a buyer in ordinary course of business.

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

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

14 (5) "Conspicuous means so displayed or presented that a reasonable  
15 person against whom it operates ought to have noticed it or, in the case of an  
16 electronic message intended to evoke a response without the need for review by an  
17 individual, in a form that would enable a reasonably configured electronic agent to  
18 take it into account or react to it without the review of the message by an  
19 individual. A term is conspicuous if it is:

20 (A) a heading in capitals (e.g., NON-NEGOTIABLE BILL OF  
21 LADING) equal or greater in size to the surrounding text;

22 (B) language in the body or text of a record or display in larger or  
23 other contrasting type or color than other language;

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

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

4 (E) language readily distinguishable in another manner.

5 Drafting Comment

6 The definition of conspicuous is from Article 2B.

7 (6) “Conforming goods or performance under a lease contract means  
8 goods or performance that are in accordance with the obligations under the contract.

9 (7) “Consumer means an individual who leases or contracts to lease  
10 goods that, at the time of contracting, are intended by the individual to be used  
11 primarily for personal, family, or household use. The term does not include an  
12 individual who leases or contracts to lease goods that, at the time of contracting are  
13 intended by the individual to be used primarily for professional or commercial  
14 purposes.

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

17 Drafting Comment

18 Revised Article 2 defines “consumer goods” and does not include a dollar  
19 cap in the definition. Some States have not included a dollar cap in present Article  
20 2A and States which have adopted a dollar cap have stated varying amounts. If a  
21 State wishes to include a dollar cap, the cap should be inserted here. Any cap  
22 probably should be set high enough to bring within the definition most automobile  
23 leasing transactions for personal, family, or household use.

24 (9) “Delivery means the transfer of physical possession or control of  
25 goods.

26 (10) “Electronic agent means a computer program or other automated  
27 means used, selected, or programmed by a party to initiate or respond to electronic  
28 messages or performances in whole or in part without review by an individual.

1                   (11) “Electronic means electrical, digital, magnetic, optical,  
2                   electromagnetic, or any other form of wave propagation, or by any other technology  
3                   that entails capabilities similar to those technologies.

4                   (12) “Electronic message means a record that, for purposes of  
5                   communication to another person, is stored, generated, or transmitted by electronic,  
6                   optical, or similar means. The term includes electronic data interchange, electronic  
7                   or voice mail, facsimile, telex, telecopying, scanning and similar communications.

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

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

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

13                               (B) the lessor acquires the goods or the right to possession and use  
14                   of the goods in connection with the lease; and

15                               (C) one of the following occurs:

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

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

23                                       (iii) the lessee, before authenticating the lease agreement,  
24                   receives an accurate and complete statement designating the promises and  
25                   warranties, and any disclaimers of warranties, limitations or modifications of  
26                   remedies, or liquidated damages, including those of a third party, such as the



1 manufacturer of the goods, provided to the lessor by the person supplying the goods  
2 in connection with or as part of the contract by which the lessor acquired the goods  
3 or the right to possession and use of the goods; or

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

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

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

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

#### 18 Drafting Comment

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

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

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

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

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

## Drafting Comment

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

## Drafting Comment

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

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

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

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

Drafting Comment

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

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

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

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

Drafting Comment

Definition (22) will be moved to Article 1 when that Article is revised to conform to the Article 9 rules.

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

(24) “Lessor’s residual interest means the lessor’s interest in goods after expiration, termination, or cancellation of a lease contract.

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

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

7                   (27) “Merchant lessee means a lessee that is a merchant with respect to  
8                   goods of the kind subject to the lease.

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

16                  (29) “Receipt

17                         (A) with respect to goods, means taking delivery; and

18                         (B) with respect to an electronic record, means when it enters an  
19                  information processing system in a form capable of being processed by a system of  
20                  that type and the recipient uses or has designed that system for the purpose of  
21                  receiving such records or information. “Receive has an analogous meaning.

22                  (30) “Record means information that is inscribed on a tangible  
23                  medium, or that is stored in an electronic or other medium and is retrievable in  
24                  perceivable form.

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

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

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

(34) “Terminate” means to end a contract or a part thereof by an act by a party under a power created by agreement or law, or by operation of the terms of the agreement for a reason other than for a breach by the other party.

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

“Account . Section 9-103(a).

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

“Buyer . Section 2-102(3).

“Chattel paper . Section 9-102(a)(4).

“Consumer goods . Section 9-106(a).

“Document . Section 9-102(a)(14).

“Entrusting . . . Section 2-504(e).

“General intangibles . Section 9-103(b).

“Instrument . Section 9-102(a)(23).

“Merchant . Section 2-102(23).

“Mortgage . Section 9-102(a)(24).

“Pursuant to commitment . Section 9-102(a)(29).

“Sale . Section 2-102(27).

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

“Sale or return . Section 2-506(a)(2)

“Seller . Section 2-102(a)(28).

## Drafting Comment

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

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

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

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

6 (b) If a transaction involves both information and goods, this article applies  
7 to the aspects of the transaction which involve the goods and their performance and  
8 rights in the goods other than the physical medium containing the information, its  
9 packaging, and its documentation. However, this article applies to a lease of a  
10 computer program which was not developed specifically for a particular transaction  
11 and that is embedded in goods other than a copy of the program or an information  
12 processing machine, if the program is not the subject of a separate license with the  
13 lessor. (Section 2-103)

14 **Drafting Comment – January, 1997**

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

21 **Notes**

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

28 Subsection (b) deals with transactions in which both goods and information  
29 licensed under Article 2B are involved. See Section 2B-103 on the scope of Article  
30 2B. Presumably, Article 2B governs all disputes over “licenses of information and  
31 software contracts and “related support and maintenance agreements. Section  
32 2B-103(a). Article 2A, however, may apply to transactions excluded from Article  
33 2B under Section 2B-103(d). Under Section 2B-103(d) “a sale or lease of a copy of  
34 a computer program that was not developed specifically for a particular transaction

1 and that is embedded in goods other than a copy of the program or an information  
2 processing machine, if the program was not the subject of a separate license with  
3 the buyer or lease. Therefore all aspects of such a transaction would be governed  
4 by Article 2A if the underlying transaction is a lease of the goods in which the  
5 computer program is embedded.

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

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

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

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

14 (3) any applicable law which establishes a different rule for consumer  
15 leases.

16 (4) any other law of this State to which the subject matter of this article  
17 is subject, such as laws dealing with sale or lease of agricultural products, the  
18 consignment or transfer by artists of works of art or fine prints, distribution  
19 agreements, franchises and other relationships through which goods are leased,  
20 liability for products which cause injury to person or property, the making and  
21 disclaimer of warranties, and dealers in particular products, such as automobiles,  
22 motorized wheelchairs, agricultural equipment, and hearing aids.

23 (b) [Except for the rights of a lessee in the ordinary course of business, ]in  
24 case of conflict between this article, other than Sections 2A-105, 2A-401(c), and  
25 2A-402(c), and a statute or decision referred to in subsection (a), the statute or  
26 decision controls.

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



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

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

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

7 (d) With respect to this article, failure to comply with a statute or decision  
8 referred to in subsection (a) has only the effect specified therein. (Section 2-104)

9 Drafting Comment – May, 1997

10 The latest version of Section 2-104 raises a number of issues for Article 2A.  
11 First, Section 2-104(a)(1) overrides certificate of title legislation as to rights of  
12 buyers in ordinary course under Section 2-504(d) if their rights arose before “a  
13 certificate of title covering the goods is effective in the name of the buyer. The  
14 “buyer here is probably meant to be a competing buyer. If the last reference to  
15 “buyer is to the protected buyer in ordinary course, I don’t understand the  
16 subsection. Section 2-504(d) is the entrusting provision of Article 2. Perhaps we  
17 should include a similar rule in Article 2A, but Article 2A presently is subject to  
18 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  
20 2A-405 seems to state a rule contrary to that now being proposed in Article 2 and  
21 set out above. The Article 2A Committee must decide what position Article 2A  
22 should take. Apparently, a few western States require that lessees in leases longer  
23 than a few month by noted on certificates of title as owners with the lessor  
24 appearing as “lienholder . In most States, apparently, the practice is not to note the  
25 lessee’s interest on the certificate of title.

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

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

32 **SECTION 2A-105. TERRITORIAL APPLICATION OF ARTICLE TO**  
33 **GOODS COVERED BY CERTIFICATE OF TITLE.** Subject to Sections  
34 2A-401(c) and 2A-402(c), with respect to goods covered by a certificate of title  
35 issued under a statute of this State or of another jurisdiction, compliance and the

1 effect of compliance or noncompliance with a certificate-of-title statute are  
2 governed by the law, including the conflict-of-laws rules, of the jurisdiction issuing  
3 the certificate until the earlier of the time the certificate ceases to be effective under  
4 the law of that jurisdiction or the time the goods subsequently become covered by  
5 another certificate of title from another jurisdiction.

6 Drafting Comment – May 1997

7 Section 2A-105 is conformed to the new rules of Article 9. See Section  
8 9-303 in the April, 1997 draft.

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

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

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

21 Drafting Comment

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

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

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

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

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

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

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

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

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

24   Drafting Comment

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

The final version of Article 2A will contain a Comment modeled on a U3C comment of unconscionable inducement.

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

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

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

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

(a) Except as otherwise expressly provided in Section 1-102 and this article, the effect of any provision may be varied by agreement.

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

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

## Drafting Comment

Should Article 2A adopt this provision? Do we create an undesirable negative 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 (a) Except as otherwise provided in this section, a lease contract is not  
6 enforceable by way of action or defense unless:

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

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

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

16 (c) A record is not insufficient because it omits or incorrectly states a term  
17 agreed upon, but a lease contract is not enforceable under subsection (a)(2) beyond  
18 the duration of the lease and the quantity of goods agreed to in the authenticated  
19 record.

20 (d) An otherwise valid lease contract that does not satisfy the requirements  
21 of subsection (a) is enforceable:

22 (1) if the goods are to be specially manufactured or obtained for the less  
23 and are not suitable for lease or sale by the lessor to others in the ordinary course of  
24 business, and the lessor, before notice of repudiation is received and under  
25 circumstances that reasonably indicate that the goods are for the lessee, has made

1 either a substantial beginning of their manufacture or commitments for their  
2 procurement;

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

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

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

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

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

16 (3) a reasonable duration.

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

20 **[SECTION 2A-201. FORMAL REQUIREMENTS; STATUTE OF**  
21 **FRAUDS.**

22 (a) Except as otherwise provided in this section, a claim for default under a  
23 lease contract in which the total payments are \$10,000 or more is not enforceable  
24 by way of action or defense against a person that denies that an agreement was  
25 made unless there is a record authenticated by the person against which the claim is

1       asserted as the record of that person and which is sufficient to indicate that a  
2       contract was made. A record is not insufficient merely because it omits or  
3       incorrectly states a term, including a quantity term. If the record contains a quantity  
4       term, the claim is not enforceable beyond that quantity.

5               (b) If an authenticated record in confirmation of a contract is sufficient  
6       against the sender and is sent within a reasonable time to the other party, the record  
7       is sufficient against the other party who is a merchant, unless the merchant sends a  
8       notice of objection to the record within 10 days after the record is received.

9               (c) A claim for default under an otherwise valid lease contract which is  
10       barred under subsection (a) is enforceable if:

11               (1) the goods are to be specially manufactured or processed for the  
12       lessee, and the lessor substantially manufactures, processes the goods, or makes  
13       commitments for the procurement of the goods in performance of a contract  
14       believed in good faith to exist, and the lessor cannot relet or sell the goods at a  
15       reasonable price;

16               (2) the conduct of both parties in performing the agreement recognizes  
17       that a contract was formed;

18               (3) reliance by one party on representations or an agreement under law  
19       outside of this [Act] estops the other party from raising the lack of a sufficient  
20       authenticated record as a defense; or

21               (4) the party against which enforcement is sought, in pleading or  
22       testimony in court or otherwise under oath, admits facts from which lease contract  
23       can be found.

24               (d) A claim for breach of a lease contract enforceable under this section is  
25       not enforceable on the ground that it is not capable of being performed within one  
26       year or any other applicable period after its making.] (Section 2-201)



Drafting Comment – May 1997

At the February meeting of the Article 2A Committee, the Committee decided to return to present Section 2A-201 with style changes. It also decided that it would return to the statute of frauds issue after seeing the new Section 2-201 added by the Article 2 Drafting Committee. Therefore, both present Section 2-201, restyled, and the new Article 2 statute of frauds sections are set out above.

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 estoppel principles be stated in the statute?

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

**SECTION 2A-202. PAROL OR EXTRINSIC EVIDENCE.** Terms with respect to which 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 a previous agreement or contemporaneous oral agreement. However, terms in a record may be explained by any relevant evidence and may be supplemented by evidence of:

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

(2) noncontradictory additional terms, unless

(A) the terms if agreed upon would certainly have been included in the record, or

(B) the court finds that the record was intended as a complete and exclusive statement of the terms of the agreement. (Section 2-202)

Drafting Comment – May, 1997

This section, following Article 2, now a part of Section 2A-204.

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

2                   (a) A lease contract may be formed in any manner sufficient to show  
3                   agreement, including by offer and acceptance, conduct of both parties or the  
4                   operations of an electronic agent which recognizes the existence of a contract.

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

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

12   Drafting Comment – May, 1997

13                  The above draft includes changes made in the March and May Article 2  
14                  drafts. See Section 2-203(d) in the July Article 2 draft. That is, apparently, a small  
15                  remnant of the form contract material in Article 2. It is not included in the above  
16                  version of Section 2A-203. The Article 1 Committee, in its coordination mode,  
17                  suggests that the Article 2 Committee again consider whether to retain Section  
18                  2-203(d).

19                   **SECTION 2A-204. FIRM OFFERS: SEALED INSTRUMENTS.**

20                  (a) An offer by a merchant to enter into a lease contract made in an  
21                  authenticated record that by its terms gives assurance that the offer will be held  
22                  open is not revocable for lack of consideration during the time stated. If a time is  
23                  not stated, the offer is irrevocable for a reasonable time not exceeding 90 days. A  
24                  term of assurance in a record supplied by the offeree is ineffective unless the term is  
25                  conspicuous.

26                  (b) Affixing a seal to a writing evidencing a lease contract or an offer to  
27                  enter into a lease contract does not render the record a sealed instrument. The law

1 with respect to sealed instruments does not apply to the lease contract or offer.  
2 (Section 2-204)

3 **SECTION 2A-205. OFFER AND ACCEPTANCE.**

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

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

10 (c) Subject to subsection (d), actions taken by one or more electronic agents  
11 which confirm the existence of a contract are effective to form a contract even if no  
12 individual representing either party was aware of or reviewed the action or its  
13 results.

14 (d) In an electronic transaction, the following rules apply:

15 (1) An agreement is formed by the interaction of two electronic agents  
16 if the interaction results in both agents each engaging in operations that signify  
17 agreement, such as by engaging in performing the agreement, ordering or  
18 instructing performance, accepting performance, or making a record of the  
19 existence of an agreement.

20 (2) An agreement may be formed by the interaction of an electronic  
21 agent and an individual. An agreement is formed if an individual has reason to  
22 know that the individual is dealing with an electronic agent and performs actions  
23 the person should know will cause the agent to perform or to permit further use, or  
24 that are clearly indicated as constituting acceptance regardless of other

1 contemporaneous expressions by the individual to which the electronic agent  
2 cannot react.

3 (3) The terms of the contract include terms on which the parties have  
4 previously agreed, terms which the electronic agents could take into account, and,  
5 to the extent not covered by the foregoing, terms provided by this article or other  
6 law. (Sections 2-205, 2B-307(e) and (f))

7 **[SECTION 2A-206. CONSUMER CONTRACTS; RECORDS.**

8 (a) In a consumer lease, if a consumer agrees to a record by authentication  
9 or affirmative conduct, any non-negotiated term that a reasonable consumer in a  
10 transaction of this type would not reasonably expect to be in the record is excluded  
11 from the lease, unless the consumer had knowledge of the term before agreeing to  
12 the record.

13 (b) Before deciding whether to exclude a term under subsection (a), the  
14 court, on motion of a party or its own motion, after affording the parties a  
15 reasonable and expeditious opportunity to present evidence on whether the term  
16 should be included or excluded from the lease, shall decide whether the contract  
17 should be interpreted to exclude the term.

18 (c) This section shall not operate to exclude an otherwise effective term  
19 disclaiming or modifying an implied warranty.] (Section 2-206)

20 Drafting Comment – May 1997

21 In the February meeting, the Article 2A Committee decided to examine the  
22 latest Article 2 draft dealing with consumer contracting through use of forms.

23 Also note the latest version of Section 2-207, the battle of the forms  
24 section. Do we still regard that section as unnecessary in Article 2A?

25 **SECTION 2A-207. ATTRIBUTION PROCEDURE.**

1 (a) An attribution procedure is a procedure established by agreement or  
2 mutually adopted by the parties for the purpose of verifying that electronic records,  
3 messages, or performances are those of the respective parties or for detecting errors  
4 in the transmission or informational content of an electronic message, record, or  
5 performance, if the procedure is commercially reasonable.

6 (b) The commercial reasonableness of an attribution procedure is a question  
7 of law to be determined by the court in light of the purposes of the procedure and  
8 the commercial circumstances at the time of the agreement[, including the nature of  
9 the transaction, sophistication of the parties, volume of similar transactions engaged  
10 in by either or both of the parties, availability of alternatives offered to but rejected  
11 by the party, cost of alternative procedures, and procedures in general use for  
12 similar types of transactions]. An attribution procedure may require the use of  
13 algorithms or other codes, identifying words or numbers, encryption, callback  
14 procedures, key escrow, or any security devices that are reasonable under the  
15 circumstances.

16 **SECTION 2A-208. ATTRIBUTION OF ELECTRONIC RECORD,**  
17 **MESSAGE, OR PERFORMANCE.**

18 (a) As between the parties, an electronic message, record, or performance  
19 received by a party is attributable to the party indicated as the sender if:

20 (1) it was sent by that party, its agent, or its electronic agent;

21 (2) the receiving party, in good faith and in compliance with an  
22 attribution procedure concluded that it was sent by the other party; or

23 (3) subject to subsection (b), the message or performance:

1 (A) resulted from acts of a person that obtained access to access  
2 numbers, codes, computer programs, or the like from a source under the control of  
3 the alleged sender creating the appearance that it came from the alleged sender;

4 (B) the access occurred under circumstances constituting a failure to  
5 exercise reasonable care by the alleged sender; and

6 (C) the receiving party reasonably relied to its detriment on the  
7 apparent source of the message or performance.

8 (b) In a case governed by subsection (a)(3), the following rules apply:

9 (1) The receiving party has the burden of proving reasonable reliance,  
10 and the alleged sender has the burden of proving reasonable care.

11 (2) Reliance on an electronic record or performance that does not  
12 comply with an agreed authentication procedure is not reasonable unless authorized  
13 by an individual representing the alleged sender.

14 (c) If an electronic message was transmitted pursuant to an attribution  
15 procedure for the detection of error and the message contained an error the  
16 following rules apply:

17 (1) If the sender complied with the attribution procedure and the error  
18 would have been detected had the receiving party also complied with the attribution  
19 procedure, the sender is not bound if the error relates to a material element of the  
20 message or performance.

21 (2) If the sender receives a notice required by the attribution procedure  
22 of the content of the message or performance as received, the sender has a duty to  
23 in a commercially reasonable manner review the notice and report any error  
24 detected by it.

25 (d) Except as otherwise provided in subsection (a)(1) and (c), if a loss  
26 occurs because a party complies with a procedure for attribution that was not

1 commercially reasonable, the party that required use of the procedure bears the loss  
2 unless it disclosed the nature of the risk to the other party or offered commercially  
3 reasonable alternatives that the party rejected. The party's liability under this  
4 section is limited to losses that could not have been prevented by the exercise of  
5 reasonable care by the other party. (Section 2B-111)

6 **SECTION 2A-209. AUTHENTICATION EFFECT AND PROOF;**  
7 **ELECTRONIC AGENT AUTHENTICATION.**

8 (a) An authentication is intended to establish the party's identity, its  
9 adoption and acceptance of a record or a term, and the authenticity of the record or  
10 term.

11 (b) Operations of an electronic agent constitute the authentication of a party  
12 if the party designed, programmed, or selected the electronic agent for the purpose  
13 of achieving results of that type.

14 (c) A record or message is authenticated as a matter of law if party  
15 complied with an attribution procedure for authentication. Otherwise,  
16 authentication may be proven in any manner including by showing that a procedure  
17 existed by which a party necessarily must have executed or adopted a symbol in  
18 order to proceed further in the use or processing of the information, or adopted a  
19 symbol in order to proceed further in the use or processing of the information.  
20 (Section 2B-114)

21 **SECTION 2A-210. PROOF OF AUTHENTICATION.**

22 (a) Actions by an electronic agent constitute the authentication of a party if  
23 the party designed, programmed, or selected the electronic agent for the purpose of  
24 achieving results of that type.



1 (b) A record or message is authenticated as a matter of law if a party  
2 complied with an attribution procedure for authentication. Otherwise,  
3 authentication may be proven in any manner including by showing that a procedure  
4 existed by which a party necessarily must have executed.

5 **SECTION 2A-211. ELECTRONIC TRANSACTIONS AND MESSAGES:**  
6 **TIMING OF CONTRACT AND EFFECTIVENESS OF MESSAGE.**

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

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

14 (b) Subject to Section 2B-212, an electronic message is effective when  
15 received, even if no individual is aware of its receipt.

16 **SECTION 2A-212. ACKNOWLEDGMENT OF ELECTRONIC**  
17 **MESSAGE.**

18 (a) If the originator of an electronic message requests or has agreed with the  
19 addressee of the message that receipt of the message must be acknowledged  
20 electronically, the following rules apply:

- 21 (1) If the originator indicated in the message or otherwise that the  
22 message was conditional on receipt of an acknowledgment, the message does not  
23 bind the originator until acknowledgment is received and lapses if acknowledgment  
24 is not received in a reasonable time.

1                   (2) If the originator requested acknowledgment but did not state that the  
2                   message was conditional on acknowledgment and acknowledgment has not been  
3                   received within an reasonable time after the message was sent, on notice to the  
4                   other party, the originator may either retract the message or specify a further  
5                   reasonable time within which acknowledgment must be received or the message  
6                   will be treated as not having binding effect. If acknowledgment is not received  
7                   within that additional time, the originator may treat the message as not having  
8                   binding effect.

9                   (3) If the originator requested acknowledgment and specified a time for  
10                  receipt, the originator may exercise the options in subsection (a)(2) if receipt does  
11                  not occur within that time.

12                  (b) Receipt of acknowledgment establishes that the message was received  
13                  but does not in itself establish that the content sent corresponds to the content  
14                  received. (Section 2B-205)

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  
6 to a 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  
12 objection.

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

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

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

22 (2) course of performance prevails over course of dealing and usage of  
23 trade, and

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

1 (d) Subject to Section 2A-302, course of performance is relevant to show a  
2 waiver or modification of a term inconsistent with the course of performance.  
3 (Section 2-209)

4 Drafting Comment

5 This section will probably be moved to Article 1.

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

7 (a) An agreement made in good faith which modifies a lease contract is  
8 binding without consideration.

9 (b) Except in a consumer lease contract, a lease contract that contains a  
10 term that excludes modification or rescission except by an authenticated record may  
11 not be otherwise modified or rescinded. However, a party whose language or  
12 conduct is inconsistent with the term requiring an authenticated record may not  
13 assert that term if the language or conduct induced the other party to change its  
14 position reasonably and in good faith.

15 (c) Subject to subsection (b), a term in a contract may be waived by the  
16 party for whose benefit it was included. Language, conduct, or a course of  
17 performance between the parties may be relevant to show a waiver. The waiver of  
18 an executory portion of a contract, however, may be retracted by seasonable  
19 notification received by the other party that strict performance is required of any  
20 term waived unless the waiver induced the other party to change its position  
21 reasonably and in good faith. (Section 2-210)

22 Drafting Comment – May, 1997

23 At the October, 1996, meeting, the Committee expressed displeasure with  
24 the failure of revised Section 2-210 to retain the rule that a waiver can be retracted  
25 unless retraction would be unjust because of a material change of position by the  
26 other party. The Article 2 draft still refers merely to “change of position reasonably  
27 and in good faith. There is no reference to the materiality of the change of position.  
28 Such we return to the present Code language under which a waiver can be retracted  
29 “unless the retraction would be unjust in view of a material change of position in  
30 reliance on the waiver:?”

1           **[SECTION 2A-303. CONTINUING CONTRACTUAL TERMS.**

2           (a) Terms of a lease agreement involving repeated performances apply to  
3 all later performances unless modified pursuant to this article, even if the terms are  
4 not subsequently displayed or otherwise brought to the attention of the parties or  
5 electronic agents in the context of the later performance.

6           (b) A modification in good faith of a continuing lease contract made  
7 pursuant to a term in a contract providing that the contract may be modified as to  
8 future performances by compliance with a described contractual procedure is  
9 effective if:

10           (1) compliance with the procedure reasonably notifies the other party of  
11 the change; and

12           (2) in a consumer lease, the procedure permits the lessee to terminate the  
13 lease contract if the modified term is material and is in good faith unacceptable to  
14 the lessee.

15           (c) A contractual term that specifies standards for reasonable modification  
16 is enforceable unless the standards are manifestly unreasonable in light of the  
17 commercial circumstances.] (Section 2B-304)

18                               Drafting Comment – June, 1997

19           The coordination group, at its May, 1997, meeting suggested that the Article  
20 2A Committee consider adding this section

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

23           (a) The benefit of the supplier's promises to the lessor under a supply  
24 contract and of all warranties, whether express or implied, including those of any  
25 third party provided in connection with or as part of the supply contract, extends to  
26 the lessee to the extent of the lessee's leasehold interest under a finance lease

1 related to the supply contract but is subject to the terms of the warranty and supply  
2 contract and all defenses or claims arising therefrom.

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

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

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

20 **[SECTION 2A-305. ELECTRONIC VIRUSES.]**

21 (a) In this section "virus" means computer instructions intended to disrupt,  
22 damage, destroy, or interfere with use of a communications facility or a computer  
23 without the consent or permission of the owner.

1 (b) Unless the circumstances clearly indicate that a duty of care could not  
2 be expected, a party shall exercise reasonable care to ensure that its performance or  
3 message when completed by it does not contain an undisclosed virus.

4 (c) The duty described in subsection (b) is owed solely to the other party to  
5 the lease contract and is satisfied if:

6 (1) the party exercised reasonable care; or

7 (2) except with respect to a consumer lease involving delivery of a copy  
8 of information on a physical medium by a merchant dealing in information of the  
9 kind, language in a contract states that no action was taken to ensure exclusion of a  
10 virus or that a risk exists that viruses have not been excluded.

11 (d) A party is not liable if the virus was introduced by a third party after the  
12 party completed its performance or if the party injured by the virus failed to  
13 exercise reasonable care to prevent or avoid loss.

14 (e) In determining whether reasonable care has been exercised, the court  
15 shall consider the nature of the party, type and value of the transaction,  
16 consideration exchanged, circumstances of the transaction, language on packaging  
17 or in a display, and general standards of practice prevailing among persons of a  
18 similar type for similar transactions at the time of the performance or message. A  
19 party is deemed to have exercised reasonable care if it or its agent searches for  
20 known viruses using any commercially reasonable virus checking software at or  
21 before the time the licensor completes its performance or, as to the licensee, the  
22 time the licensee first uses the information.

23 (f) A party's obligations with respect to the existence of a virus are  
24 determined by this section and the express terms of the contract and not implied  
25 warranty.]

26 Drafting Comment

1           Addition of this section to Article 2A was recommended by the  
2 coordination group at its May, 1997, meeting. The section, if retained, probably  
3 should be moved to Part 5.

4           **[SECTION 2A-306. ELECTRONIC REGULATION OF**  
5 **PERFORMANCE.**

6           (a) A party entitled to enforce a limitation or restriction may include in the  
7 information and utilize a program, code, or device that restricts use in a manner  
8 consistent with the agreement if:

9                   (1) a term in the contract authorizes use of the program, code, or device;

10                   (2) the program, code, or device merely prevents uses of the information  
11 that are not consistent with the agreement but does not destroy or alter the  
12 information;

13                   (3) the program, code, or device merely prevents uses of the information  
14 that are not consistent with a licensor's rights under copyright or patent law and that  
15 were not granted to the licensee but does not destroy or alter the information.

16                   (4) the information is obtained for a stated period of time not more than  
17 30 days or a stated number of uses and the program, code, or device merely  
18 enforces that limitation; or

19                   (5) the program, code, or device prevents further use at the expiration of  
20 the term of the license and the program, code or device or the licensor gives  
21 reasonable notice to the licensee before further use is prevented.

22           (b) Operation of a program, code, or device that restricts use consistent  
23 with the agreement is not a breach of contract, and the party that included the  
24 program, code, or device is not liable for any loss created by its operation.  
25 Operation of a program, code, or device that prevents use permitted by the  
26 agreement is a breach of contract.]



1 (c) This section does not preclude electronic replacement or disabling of an  
2 earlier version of information by the licensor with a new version of the information  
3 pursuant to an agreement with the licensee.

4 (d) A program, code or device included in information pursuant to this  
5 section or as authorized under other law does not constitute a virus for purposes of  
6 Section 2B-313.

7 **SECTION 2A-307. IDENTIFICATION.** Identification of goods as goods to  
8 which a lease contract refers may be made at any time and in any manner expressly  
9 agreed to by the parties. In the absence of express agreement, identification occurs  
10 when:

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

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

16 (3) young are conceived, if the lease contract is for a lease of unborn young  
17 of animals. (Section 2-502)

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

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

22 (b) If a lessee has an insurable interest only by reason of the lessor's  
23 identification of the goods, the lessor may substitute other goods for those

1 identified until default or insolvency or notification to the lessee that the  
2 identification is final.

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

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

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

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

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

14 (b) If under the lease contract risk of loss will pass to the lessee but the  
15 agreement does not specify when the risk passes, except as otherwise provided in  
16 subsection

17 (c) Risk of loss passes to the lessee regardless of the conformity of the  
18 goods to the contract, as follows:

19 (1) Subject to this subsection, the risk of loss passes to a lessee upon  
20 receipt of the goods. If the lessee does not intend to take possession, risk of loss  
21 passes to the lessee when the lessee receives control of the goods.

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

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

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

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

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

12 (1) If the lessee rightfully and effectively rejects the goods or revokes  
13 acceptance of the goods, the lessor has the risk of loss from the time when the  
14 rejection or revocation is effective.

15 (2) If the lessor has tendered nonconforming goods, the risk of loss has  
16 passed to the lessee, and the goods are damaged or lost before the lessee effectively  
17 rejects or revokes acceptance, the seller has the risk of loss to the extent the  
18 nonconformity of the goods caused the damage or loss.

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

23 Drafting Comment – January, 1997

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

**SECTION 2A-310. CASUALTY TO IDENTIFIED GOODS.** If the parties to a lease contract assume the continued existence and eventual delivery to the lessee of goods identified when the lease contract is made and the goods suffer casualty without fault of the lessee, the lessor, or the supplier before delivery, or if the goods suffer casualty before risk of loss passes to the lessee under the lease agreement or Section 2A-309, and no commercially reasonable substitute is available, the following rules apply:

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

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

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

(Section 2-714)

Drafting Comment – May, 1997

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

The Comments to the May draft of Section 2-714 speak to the new language as follows:

“The language regarding commercially reasonable substitution is inserted for discussion to address the following scenario. Seller agrees to sell stock goods, those goods are identified and then destroyed. If the seller had other stock that was the commercially reasonable substitute for the identified goods, this section would not excuse the delivery. In part this narrows the excuse provided by this section back toward the original version of Section 6-613 which allowed an excuse only when the “contract required for its performance goods identified when the contract was made.

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

2           (a) Except as otherwise provided in subsection (b), on termination of a  
3 lease 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  
7 exercise of rights in the goods;

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

9                 (4) an obligation to return or dispose of goods;

10                (5) a choice of law or forum;

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

13                (7) a term limiting the time for commencing an action or for providing  
14 notice;

15                (8) an indemnity term;

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

17                (10) any term limiting disclosure of information;

18                (11) any right, remedy, or obligation stated in the agreement as  
19 surviving; and

20                (12) other rights, remedies, or limitations if in the circumstances such  
21 survival is necessary to achieve the purposes of the parties.

22           (c) The obligation under subsection (b)(3) must be promptly performed.  
23 (Section 2-310).

24                                 Drafting Comment – May 1997

25           Present Article 2A addresses termination in the section on Termination and  
26 Cancellation (present Section 2A-505(2)). That section merely says : On  
27 termination of the lease contract, all obligations that are still executory on both  
28 sides are discharged, but any right based on prior default or performance survives.

1       The revised version of present Section 2A-505 (Section 2A-709) deals only with  
2       cancellation.

3               The changes in this draft, other than subsection (b)(8), come from decisions  
4       of the Article 1 Drafting Committee serving as a coordination committee.  
5       Subsection (b)(8) was added by decision of the Article 2A Drafting Committee in  
6       February. (Section 2-311)

1 **PART 4**  
2 **EFFECT OF LEASE CONTRACT**

3 **SECTION 2A-401. ENFORCEABILITY OF LEASE CONTRACT.**

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

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

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

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

17 (b) Except as otherwise provided in subsections (c) and (d), a term in a  
18 lease agreement which prohibits the voluntary or involuntary transfer, including a  
19 transfer by sale, sublease, creation or enforcement of a security interest, or  
20 attachment, levy, or other judicial process, of an interest of a party under the lease  
21 contract or of the lessor's residual interest in the goods, or which makes such a  
22 transfer an event of default, gives rise to the rights and remedies provided in  
23 subsection (e). However, a transfer that is prohibited or is an event of default under  
24 the lease agreement is otherwise effective.

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

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

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

25          (f) Subject to subsections (d) and (e):



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

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

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

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

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

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

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

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

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

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

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

15 law.

16          (d) A subsequent lessee in the ordinary course of business from a lessor that  
17 is a merchant dealing in goods of that kind to which the goods were entrusted by  
18 the existing lessee of that lessor before the interest of the subsequent lessee became  
19 enforceable against that lessor obtains, to the extent of the leasehold interest  
20 transferred, all rights to the goods of that lessor and the existing lessee, and takes  
21 free of the existing lease contract.

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

26                                   Drafting Comment – June, 1997

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

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

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

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

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

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

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

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

24                   (3) the delivery was procured through fraud punishable under criminal  
25 law.

26           (d) A buyer in the ordinary course of business or a sublessee in the ordinary  
27 course of business from a lessee that is a merchant dealing in goods of that kind to  
28 which the goods were entrusted by the lessor obtains, to the extent of the interest

1 transferred, all of the rights of the lessor and lessee to the goods and takes free of  
2 the existing lease contract.

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

7 **SECTION 2A-406. PRIORITY OF CERTAIN LIENS ARISING BY**  
8 **OPERATION OF LAW.** If a person in the ordinary course of its business  
9 furnishes services or materials with respect to goods subject to a lease contract, a  
10 lien upon those goods in the possession of that person given by statute or rule of  
11 law for those materials or services has priority over any interest of the lessor or  
12 lessee under the lease contract or this article unless the lien is created by statute and  
13 the statute provides otherwise, or the lien is created by rule of law and the rule of  
14 law provides otherwise.

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

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

20 (b) Except as otherwise provided in subsections (c) and (d) and Sections  
21 2A-406 and 2A-408, a creditor of a lessor takes subject to the lease contract unless:

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

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

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

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

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

15                                   Drafting Comment – January, 1997

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

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

22                   (a) Except as otherwise provided in subsections (b) and (c), the rights of  
23 creditors of the lessor with respect to goods identified to a lease contract and  
24 retained by the lessor are subject to the lessee's rights under Sections 2A-709,  
25 2A-723(d), and 2A-738 if the lessee's rights vest before a creditor's claim in rem  
26 attaches to the goods.

27                   (b) A creditor of a lessor which has retained possession of goods subject to  
28 a lease contract may treat the lease contract as void or voidable if, as against the

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

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

11 (d) A creditor of a seller may treat a sale or an identification of goods to a  
12 contract for sale as void or voidable if, as against the creditor, retention of  
13 possession by the seller is fraudulent or void or voidable under any statute or rule of  
14 law. However, it is not fraudulent for a seller to retain possession of the goods  
15 pursuant to a lease contract entered into by the seller as lessee and the buyer as  
16 lessor in connection with the sale or identification of the goods if the buyer bought  
17 for value and in good faith. (Section 2-505)

18 Drafting Comment – June, 1997

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

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

24 (a) In this section:

25 (1) “Encumbrance” includes a real estate mortgage, other lien on real  
26 estate, and any other right in real estate which is not an ownership interest.

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

3                   (2) “fixture filing means a filing, in the office where a mortgage on the  
4                   real estate would be filed or recorded, of a financing statement covering goods that  
5                   are or are to become fixtures and conforming to the requirements of Section  
6                   9-502(a);

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

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

13                  (b) A lease under this article may be of goods that are fixtures or may  
14                  continue in goods that become fixtures, but there may be no lease under this article  
15                  of ordinary building materials incorporated into an improvement on land.

16                  (c) This article does not prevent creation of a lease of fixtures under real  
17                  estate law.

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

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

25                         (2) the interest of the lessor is perfected by a fixture filing before the  
26                         interest of the encumbrancer or owner is of record, the lessor’s interest has priority

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

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

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

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

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

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

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

24 (g) In cases not within subsections (c) through (g), priority between the  
25 interest of a lessor of fixtures, including the lessor's residual interest, and the  
26 conflicting interest of an encumbrancer or owner of the real estate who is not the



1 lessee is determined by the priority rules governing conflicting interests in real  
2 estate.

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

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

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

22 (a) "Accession mean goods that [are [installed in or affixed to other  
23 goods] [physically united with other goods in a manner such that the identity of the  
24 original goods is lost].

1           (b) Except as provided in subsection (d), the interest of a lessor or a lessee  
2           under a lease contract entered into before the goods an accession is superior to all  
3           interests in the whole.

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

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

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

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

17           (e) If under this section a lessor or lessee holds an interest in accessions  
18          which has priority over the claims of all persons that have interests in the whole, the  
19          lessor or lessee may on default, expiration, termination, or cancellation of the lease  
20          contract by the other party but subject to the provisions of the lease contract and  
21          this article or, if necessary to enforce other rights under this article, remove the  
22          goods from the whole. However, the lessor or lessee shall reimburse any holder of  
23          an interest in the whole which is not the lessee and which has not otherwise agreed  
24          for the cost of repair of any physical injury but not for any diminution in value of  
25          the whole caused by the absence of the goods removed or by any necessity for  
26          replacing them. A person entitled to reimbursement may refuse permission to

1 remove the goods until the party seeking removal gives adequate security for the  
2 performance of this obligation.

3 Drafting Note – May, 1997

4 The April 14, 1997 draft of Article 9 has completely rewritten and  
5 substantially changed the substance of its accessions section (Section 9-332). The  
6 new draft treats all parts of the whole as separate accessions when a new part  
7 subject to a separate security interest is added. If, for example, SP-1 has a security  
8 interest in a tractor and SP-2 has a security interest in a new engine added to the  
9 tractor, both SP-1 and SP-2 now have an accession interest. Carrying out that line  
10 of thought, the accessions section states that other provisions of Article 9 determine  
11 priorities between the two parties. The new section also provides that a security  
12 interest in an accession loses to a security interest in the whole that is perfected by  
13 compliance with a certificate of title law.

14 Since Article 2A cannot leave priority issues to other provisions of Article  
15 2A, Article 2A probably should continue its present accession rules. If so, the  
16 Committee should reject the alternative underlined definition of accession set out  
17 above.

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

21 A copy of new Section 9-332 is attached to the notes accompanying this  
22 draft.

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

24 Nothing in this article prevents subordination by agreement by any person entitled  
25 to priority.

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  
5 of warranty, including injury to a person or property as permitted in Section  
6 2A-707.

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  
11 seller against which a claim for breach of warranty is asserted.

12 (5) “Representation” means a description, demonstration, or depiction of  
13 the goods, an affirmation of fact relating to the goods, or a sample or model of the  
14 goods.

15 Drafting Comment – June, 1997

16 The definition of representation is moved from Section 2A-503.  
17 (Section 2-401)

18 **SECTION 2A-502. WARRANTY AGAINST INTERFERENCE AND**  
19 **AGAINST INFRINGEMENT; LESSEE’S OBLIGATION AGAINST**  
20 **INFRINGEMENT.**

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

24 (1) claim to or interest in the goods which will interfere with the lessee’s  
25 enjoyment of its leasehold interest, or

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

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

5                   (1) claim or interest in the goods that arose from an act or omission of  
6 the lessor which will interfere with the lessee's enjoyment of its leasehold interest,  
7 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  
12 of a third party by way of infringement or the like. However, a lessee that furnishes  
13 specifications to the lessor holds the lessor harmless against any claim of  
14 infringement or the like that arises out of compliance with the specifications.

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

24                  (e) A lessor's warranty under this section, made to an immediate lessee,  
25 extends to any remote lessee that may be reasonably expected to lease the goods  
26 and which suffers damage from breach of the warranty. The rights and remedies of

1 a remote lessee against the lessor for breach of the warranty are determined by the  
2 terms of the contract between the lessor and the immediate lessee and this article.  
3 (Section 2-402)

#### 4 Drafting Comment

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

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

### 12 **SECTION 2A-503. EXPRESS WARRANTIES TO IMMEDIATE** 13 **LESSEE.**

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

22 (b) A representation or a promise that becomes part of the agreement is an  
23 express warranty and the lessor has an obligation to the immediate lessee that the  
24 goods will conform to the representation, or, if a sample is involved, that the whole  
25 of the goods will conform to the sample, or that the promise will be performed.  
26 The obligation is breached if the goods do not conform to any representation at the  
27 time when tender of delivery was completed or if the promise was not performed  
28 when due.

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

5 **SECTION 2A-504. IMPLIED WARRANTY OF MERCHANTABILITY;**  
6 **USAGE OF TRADE.**

7 (a) Except in a finance lease and subject to Section 2A-506, a lessor that is  
8 a merchant with respect to goods of that kind makes in a lease contract an implied  
9 warranty that the goods are merchantable.

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

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

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

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

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

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

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

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

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

Drafting Comment – June, 1997

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

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

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

(b) Except as otherwise provided in subsection (c) or (e), an implied warranty is disclaimed or modified by language or an expression that, under the circumstances, makes it clear that the implied warranty has been disclaimed or modified. An implied warranty may also be disclaimed or modified by course of performance, course of dealing, or usage of trade.

(c) Except as otherwise provided in Section 2A-502(d) and subsection (e), language in a record is sufficient to disclaim or modify an implied warranty if the language is conspicuous and:



1                   (1) in the case of the implied warranty of merchantability, mentions  
2 merchantability;

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

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

7                   (d) If a lessee before entering into a contract, has examined the goods,  
8 sample, or model as fully as desired or has declined to examine them, there is no  
9 implied warranty with regard to conditions that an examination in the  
10 circumstances would have revealed to the lessee.

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

13                   (1) At the time of contracting, a lessor in good faith passes through to a  
14 lessee an express warranty obligation created by a seller under Section 2-408(a) that  
15 is reasonable in scope, duration and remedies and there is conspicuous language in  
16 a record stating, for example, “You are receiving an express warranty obligation  
17 from the [manufacturer] instead of any implied warranty of merchantability or  
18 fitness from us; or

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

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

1           **SECTION 2A-507. CUMULATION AND CONFLICT OF**

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

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

8                   (2) A sample, model or demonstration prevails over inconsistent general  
9                   language of description.

10                  (3) Except in a consumer lease, an express warranty prevails over  
11                  inconsistent implied warranties other than an implied warranty of fitness for a  
12                  particular purpose. (Section 2-407)

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

15                  (a) A lessor's express warranty under Section 2A-503 or implied warranty  
16                  under Section 2A-504 made to an immediate lessee extends to any transferee, and  
17                  in the case of a consumer transferee, to anyone in the family or household of the  
18                  remote transferee, that may reasonably be expected to use or be affected by the  
19                  goods and is damaged breach of warranty. The rights and remedies of the  
20                  transferee or members of the transferees family or household against the lessor for  
21                  breach of a warranty extended under this subsection are determined by the terms of  
22                  the contract between the lessor and the immediate lessee. However, the lessor is  
23                  not be liable for consequential loss profits for breach of warranty under this section.

24                  (b) This section and Section 2A-502 do not :

(1) diminish the rights and remedies of a third-party beneficiary or assignee under the law of contracts or of persons to which goods are transferred by operation of law; or

(2) displace principles of law and equity that extend an express or implied warranty to or for the benefit of a remote transferee, or other person.

(c) The operation of this section may not be excluded, modified, or limited unless the lessor has a substantial interest based on the nature of the goods in having a warranty extend only to the immediate lessee.

## Drafting Note

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

See May, 1997 Draft of Article 2, pages 74-76 for a discussion of the above provision.

1 **PART 6**  
2 **PERFORMANCE OF LEASE CONTRACT:**  
3 **REPUDIATED, SUBSTITUTED, AND EXCUSED**

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

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

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

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

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

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

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

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

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

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

(Section 2-712)

## Drafting Comment – January, 1997

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

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

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

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

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

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

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

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

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

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

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

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

1 (b) A party claiming excuse under subsection (a) shall seasonably notify the  
2 other party that there will be delay in performance. If the claimed excuse affects  
3 only a part of the lessor's or supplier's capacity to perform, the lessor or supplier  
4 shall also allocate production and deliveries among its customers in a manner that is  
5 fair and reasonable and notify the lessee of the estimated quota made available.  
6 However, the lessor or supplier may include regular customers not them under  
7 contract as well as its own requirements for further manufacture. (Section 2-716)

8 Drafting Comment – May, 1997

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

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

12 (a) A lessee that receives notification of a material or indefinite delay in  
13 performance or an allocation permitted under Section 2A-307 or 2A-605 as to any  
14 delivery concerned, or of there is a breach of the whole contract under Section  
15 2A-726(c), by notification in a record may:

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

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

22 (b) If, after receipt of a notification from a lessor under Section 2A-307 or  
23 2A-605, the lessee fails to terminate or modify the lease contract within a  
24 reasonable time not exceeding 30 days, the contract lapses with respect to any  
25 performance affected.

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

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

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

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

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

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

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



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**PART 7**  
**DEFAULT**

[A. GENERAL]

**SECTION 2A-701. SUBJECT TO GENERAL LIMITATIONS.** The remedies of the lessee and lessor and other protected persons under this article are subject to the general limitations and principles stated in Sections 2A-702 through 2A-715. (Section 2-801)

**SECTION 2A-702. DEFAULT: PROCEDURE.**

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

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

(1) has the rights provided in this article and, except as limited by this article, as provided in the lease agreement.

(2) may reduce its claim to judgment, or otherwise enforce the lease contract by self-help or any available administrative or judicial procedure or the like, including, if agreed to by the parties, arbitration .

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

1 (d) To determine whether the value of an installment or the whole contract  
2 has been substantially impaired by a default under Section 2A-602, 2A-726, or  
3 2A-733, the court may consider whether:

4 (1) the aggrieved party has been deprived of the benefit that it  
5 reasonably expected under the contract;

6 (2) cure of the default is permitted and likely;

7 (3) adequate assurance of due performance has been given; and

8 (4) the defaulting party acted in good faith.

9 (e) The cumulative effect of individual, insubstantial defaults may  
10 substantially impair the value of the whole contract to the other party. (Sections  
11 2-70 and 2-802)

12 Drafting Comment – May, 1997

13 Subsections (c) and (d) come from Section 2-702(c) and (d) in the April  
14 Article 2 draft. We have not so far included subsection (c) in Article 2A. The  
15 cited sections in subsection (c) deal with repudiation, rejection in installment  
16 contracts, and revocation of acceptance. There is some reason to define substantial  
17 impairment in the context of those sections.

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

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

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

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

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

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

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

3           (a) Except as otherwise provided in subsections (b) and (c), a party that  
4           knows that the other party's performance constitutes a default [or breach of  
5           warranty] but accepts that performance and fails within a reasonable time to object  
6           is precluded from relying on the default to cancel the contract. Except as provided  
7           in subsections (b) and (c), acceptance of that performance and failure to object do  
8           not preclude a claim for damages unless the party in breach has changed its position  
9           reasonably and in good faith in reliance of the aggrieved party's inaction.

10          (b) A lessee's failure to state, in connection with a rejection under Section  
11          2A-725, a particular nonconformity that is ascertainable by reasonable inspection  
12          precludes reliance on the unstated nonconformity to justify rejection or to establish  
13          default if:

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

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

19          (c) A lessee's failure to state, in connection with a revocation of acceptance  
20          under Section 2A-7, the nonconformity that justifies the revocation precludes the  
21          lessee from relying on the nonconformity to justify the revocation or to establish  
22          default if the lessor had a right to cure the default under Section 2A-730 and  
23          [would] [could] have cured the breach. (Section 2-702)

24                               Drafting Comment – May, 1997

25               Section 2A-703 was Section 2A-730 in the previous draft. The section has  
26               been moved here because subsection (a) now applies to lessors as well as lessees.  
27               Present Section 2A-514, which is based on present Section 2-605 deals only with  
28               lessee's failure to state defects on rejection. Is Section 2A-703(a) inconsistent with

1 Section 2A-703 which states that a lessor or lessee in default is not entitled to  
2 notice of default? Should the section be combined with Section 2A-703?

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

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

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

14 (b) The rights and remedies provided in this article are cumulative, but a  
15 party may not recover more than once for the same injury. Unless the agreement  
16 provides for liquidated damages or a limited remedy enforceable under Section  
17 2A-710 or 2A-711, a court may deny or limit a remedy if, under the circumstances,  
18 it would put the aggrieved party in a substantially better position than if the other  
19 party had fully performed.

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

22 **SECTION 2A-706. MEASUREMENT OF DAMAGES IN GENERAL.** If  
23 there is a default , the aggrieved party may recover compensation as determined by  
24 Sections 2A-717 through 2A-737 or recover compensation for the loss resulting in

1 the ordinary course from the default as determined in any reasonable manner,  
2 together with incidental damages and consequential damages, less expenses and  
3 costs avoided as a result of the default. (Section 2-804)

4 Drafting Comment

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

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

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

13 (2) stopping delivery or shipment;

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

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

17 (5) otherwise dealing with the goods or effectuating other remedies.

18 (Section 2-805)

19 **SECTION 2A-708. CONSEQUENTIAL DAMAGES.**

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

22 (1) any loss, including loss to property other than the goods leased,  
23 which the defaulting party at the time of contracting had reason to know would  
24 probably result from the aggrieved party's general or particular requirements and  
25 needs and which could not have been avoided by reasonable measures under the  
26 circumstances; and

1 (2) injury to person proximately resulting from any breach of warranty.

2 (b) The aggrieved party may not recover any consequential damages  
3 pursuant to subsection (a)(1) that result in disproportionate compensation to the  
4 aggrieved party. The breaching party has the burden of establishing that the  
5 consequential damages under subsection (a)(1) result in disproportionate  
6 compensation to the aggrieved party. (Section 2-806)

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

8 (a) A court may enter a decree for specific performance if the parties have  
9 expressly agreed to that remedy the goods or the agreed performance of the  
10 defaulting party are unique or in other proper circumstances. Even if the parties  
11 expressly agree to specific performance, a court shall not enter a decree for specific  
12 performance where the breaching party's sole remaining contractual obligation is  
13 the payment of money.

14 (b) A decree for specific performance may include terms and conditions as  
15 to payment of the rent, damages, or other relief the court considers just. (Section  
16 2-807)

17 **Drafting Comment**

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

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

1                   **SECTION 2A-710. CANCELLATION; EFFECT.**

2                   (a) An aggrieved party may cancel a contract if the conditions of Section  
3                   2A-717 or 2A-725 are satisfied or the agreement so provides unless there is a  
4                   waiver of the breach under Section 2A-302 or a right to cure the breach under  
5                   Section 2A-730.

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

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

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

14                  (e) The obligations surviving cancellation include:

15                         (1) a right based on previous default or performance;

16                         (2) any term limiting disclosure of information;

17                         (3) a remedy for default on the whole contract or any unperformed  
18                  balance[;

19                         (4) an obligation to return or dispose of goods

20                         (5) a choice of law or forum;

21                         (6) an obligation to arbitrate or otherwise resolve disputes through  
22                  alternative dispute resolution procedures;

23                         (7) a term limiting the time for commencing an action or for providing  
24                  notice,

25                         [(8) other rights, remedies, or limitations if in the circumstances such  
26                  survival is necessary to achieve the purposes of the parties.]

1 (f) Unless a contrary intention clearly appears, language of cancellation,  
2 rescission, or avoidance of the lease contract, or similar language is not a  
3 renunciation or discharge of any claim in damages for an antecedent default.  
4 (Section 2-808)

5 Drafting Comment – May, 1997

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

11 Subsection (e)(6) is an attempt to follow the direction of the Article 2A  
12 Drafting Committee that it be made clear that the specific listing is not exclusive.  
13 There is probably a better way to make the point. Possibly a Comment would be  
14 sufficient. The Article 2 Drafting Committee has not chosen to adopt subsection  
15 (e)(6). Subsection (e)(5) does not appear in Article 2, but it may be desirable in the  
16 lease context.

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

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

24 (b) If a lessor justifiably withholds or stops performance because of the  
25 lessee's default or insolvency, the lessee is entitled to restitution of the amount by  
26 which the sum of payments exceeds the amount to which the lessor is entitled under  
27 a term liquidating damages in accordance with subsection (a).

28 (c) A lessee's right to restitution under subsection (b) is subject to offset to  
29 the extent that the lessor establishes a right to recover damages under the provisions  
30 of this article other than subsection (a) and the amount or value of any benefits



1 received by the lessee directly or indirectly by reason of the lease contract. (Section  
2 2-809)

3 Drafting Comment – May, 1997

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

9 Article 2A continues to follow original Article 2A in not making  
10 enforceability of liquidated damages clauses dependent on actual damages being  
11 difficult to ascertain. The Comments to present Section 2A-504 speak at some  
12 length to the point. Does the Committee wish to adhere to that original position.  
13 Article 2 continues to include difficulty of ascertaining actual damages as a factor.

14 **ALTERNATIVE A**

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

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

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

25 (c) Consequential damages may be liquidated under Section 2A-710, or  
26 may otherwise be limited, altered, or excluded unless the limitation, alteration, or  
27 exclusion is unconscionable. Limitation, alteration, or exclusion of consequential  
28 damages for injury to the person in the case of consumer goods is presumed to be  
29 unconscionable, but limitation, alteration, or exclusion of damages where the loss is  
30 commercial is not presumed to be unconscionable.

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

4 **ALTERNATIVE B**

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

6 (a) Subject to Section 2A-710 [and except as otherwise provided in this  
7 article], the following rules apply:

8 (1) A lease agreement may add to, limit, or substitute for the remedies  
9 provided in this article, such as by limiting or altering the measure of damages  
10 recoverable for default or limiting the lessee's remedies to return of the goods and  
11 repayment by the lessor of any amounts paid by the lessee under the lease contract  
12 or to repair and replacement of nonconforming goods or parts by the lessor or  
13 supplier.

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

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

20 (b) Subject to subsection (a)(2) if, because of a default or other  
21 circumstances, an exclusive, agreed remedy fails substantially to achieve the  
22 intended purposes of the parties, the following rules apply:

23 (1) In a lease contract other than a consumer lease contract, the  
24 aggrieved party may resort to all remedies provided in this article, but an agreement  
25 expressly providing that incidental or consequential damages, including those

1 resulting from the failure to provide the limited remedy, are excluded is enforceable  
2 to the extent permitted under subsection (c).

3 (2) In a consumer lease contract, an aggrieved party may reject the  
4 goods or revoke acceptance and, to the extent of the failure, may resort to all  
5 remedies provided in this article, including the right to recover consequential or  
6 incidental damages despite any term purporting to exclude or limit such remedies.

7 (c) Subject to subsection (b), consequential damages and incidental  
8 damages may be limited or excluded by agreement, unless the limitation or  
9 exclusion is unconscionable. Limitation of consequential damages for injury to the  
10 person in the case of a consumer is presumed to be unconscionable]. (Section  
11 2-810)

12 Drafting Comment – May 1997

13 At the February, 1997, the Article 2A Drafting Committee voted to reinstate  
14 the present Article 2A section on modification of remedy. That is done here. The  
15 present Article 2A section is alternative A. The revised Article 2 provision is  
16 alternative B.

17 **SECTION 2A-713. REMEDIES FOR MISREPRESENTATION OR**  
18 **FRAUD.** Remedies for material misrepresentation or fraud include all remedies  
19 available under this article for nonfraudulent default. Rescission or a claim for  
20 rescission of a lease contract and rejection or return of the goods do not bar a claim  
21 for damages or other consistent remedy. (Section 2-811)

22 Drafting Comment – May, 1997

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

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

26 (a) Damages based on market rent are determined according to the rent for  
27 the use of the goods concerned for a lease term identical to the remaining period of

1 the original lease agreement and prevailing at the times specified in Sections  
2 2A-723 and 2A-736.

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

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

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

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

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

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

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

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

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

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

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

13 (c) Either party with the consent of the other may maintain an action for the  
14 benefit of an interested party. (Section 2-813)

15 Drafting Comment – January, 1997

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

19 **SECTION 2A-716. STATUTE OF LIMITATIONS.**

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

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

1 omission on which the claim for indemnity is based is or should have been  
2 discovered by the indemnified party, whichever is later.

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

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

12 Drafting Comment

13 Stricken subsection (c) dose not appear in present Article 2A and has  
14 disappeared from the Article 2 section.

15 [B. LESSOR’S REMEDIES]

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

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

23 (1) withhold delivery of the goods and take possession of goods  
24 previously delivered;

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

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

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

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

9                   (6) recover incidental and consequential damages under Sections  
10                  2A-707 and 2A-708;

11                  (7) cancel the lease contract under Section 2A-710; or

12                  (8) exercise any other rights or pursue any other remedies provided in  
13                  the lease agreement.

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

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

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

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

3 Drafting Comment – May, 1997

4 The expanded listing of rights on default follows the expanded listing in  
5 Article 2, but does not follow the sequence of Article 2 exactly.

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

7 (a) Upon a default by the lessee under a lease contract of the type described  
8 in Section 2A-717(a) or (c)(1) or, if agreed, upon other default by the lessee, the  
9 lessor may take possession of the goods. If the lease agreement so provides, the  
10 lessor may require the lessee to assemble the goods and make them available to the  
11 lessor at a place to be designated by the lessor which is reasonably convenient to  
12 both parties. Without removal, the lessor may render unusable any goods employed  
13 in trade or business and may dispose of goods on the lessee's premises.

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

17 Drafting Comment

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

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

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



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

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

6                   (b) If goods are unfinished at the time of default, an aggrieved lessor or the  
7                   supplier, in the exercise of reasonable commercial judgment to minimize loss and  
8                   for the purpose of effective realization, may complete the manufacture and wholly  
9                   identify the goods to the lease contract, cease manufacture and lease, sell, or  
10                  otherwise dispose of the goods for scrap or salvage value, or proceed in any other  
11                  reasonable manner. (Section 2-817)

12                  **SECTION 2A-720. LESSOR'S REFUSAL TO DELIVER BECAUSE OF**  
13                  **LESSEE'S INSOLVENCY; STOPPAGE IN TRANSIT OR OTHERWISE.**

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

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

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

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

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

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

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

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

12                   (3) A carrier or bailee that has issued a nonnegotiable document need  
13 not obey a notification to stop received from a person other than the person named  
14 in the document as the person from which the goods have been received for  
15 shipment or storage. (Section 2-818)

16                   Drafting Comment – May, 1997

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

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

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

26                   (b) Except as otherwise provided with respect to damages liquidated in the  
27 lease agreement or otherwise determined by agreement of the parties, if the

1 disposition is by lease agreement substantially similar to the original lease  
2 agreement and the new lease agreement is made in good faith and in a  
3 commercially reasonable manner, the lessor may recover from the lessee as  
4 damages compensation for:

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

7 (2) the present value, as of the same date, of the total rent for the then  
8 remaining lease period of the original lease agreement, minus the present value, as  
9 of the same date, of the rent under the new lease agreement applicable to that part  
10 of the new lease period which is comparable to the then remaining period of the  
11 original lease agreement; and

12 (3) any incidental damages allowed under Section 2A-707, less expenses  
13 avoided as a result of the lessee's default.

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

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

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

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

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

11                 (1) accrued and unpaid rent as of the date of default if the lessee has  
12           never taken possession of the goods, or, if the lessee has taken possession of the  
13           goods, as of the date the lessor repossesses the goods or an earlier date on which the  
14           lessee makes a tender of the goods to the lessor,

15                 (2) the present value, as of the date determined under paragraph (i), of  
16           the total rent for the then remaining period of the original lease agreement, minus  
17           the present value as of the same date of the market rent at the place where the goods  
18           are located computed for the same lease term, and

19                 (3) any incidental or consequential damages allowed under Section  
20           2A-707 or 2A-708, less expenses saved in consequence of the lessee's default.

21           (b) A lessor may recover damages measured by other than the market price,  
22           together with incidental and consequential damages, including:

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

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

4 **Following is the version of Section 2A-721 which appeared in the January,**  
5 **1997, Article 2A Draft. (Section 2-821)**

6 Drafting Comment – May, 1997

7 At the February, 1997, meeting, the Article 2A Committee voted to return to  
8 the present language for Section 2A-712 (present Section 2A-528). At that time,  
9 the January, 1997, draft of Article 2, in cases of repudiation measured damages at a  
10 different time depending on whether the action came to trial before or after the time  
11 for performance under the contract. Duplicating that set of rules in Article 2A  
12 resulted in a complex section.

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

16 The above draft takes verbatim the first paragraph of present Section  
17 2A-528 except that reference is now made to consequential damages which are now  
18 allowed to lessors.

19 Subsection (b) is modified to follow subsection (b) of draft Section 2-821.  
20 The change of substance is the right to lost profit damages is not limited to cases in  
21 which a contract-market remedy is inadequate to put the lessor in as good a position  
22 as performance would have done. Rather, the limitation is in Section 2A-705(c).  
23 Under that section, a court may deny or limit a remedy if it would put the lessor in a  
24 substantially better position than if the other party had fully performed.

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

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

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

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

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

8                   (b) The damages available under the circumstances described in subsection  
9 (a) are:

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

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

14                   (3) any incidental or consequential damages allowed under Section  
15 2A-707 or Section 2A-708, less expenses avoided as a result of the lessee's default.

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

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

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

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

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

## [C. LESSEE'S REMEDIES]

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

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

- (1) cancel the lease contract under Section 2A-710;
- (2) recover so much of the rent and security as has been paid and is just under the circumstances;

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

4                   (4) recover damages for nondelivery under Sections 2A-735, 2A-707,  
5 and 2A-708;

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

8                   (6) enforce a security interest under subsection (e).;

9                   (7) exercise any other rights or pursue any other remedy provided in the  
10 lease contract.

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

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

14                   (2) in a proper case, obtain specific performance or replevy the goods  
15 under Section 2A-709.

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

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

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



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

4 Drafting Comment – May, 1997

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

8 **SECTION 2A-726. LESSEE'S RIGHTS ON NONCONFORMING**  
9 **DELIVERY; RIGHTFUL REJECTION.**

10 (a) Subject to Sections 2A-727, 2A-711, and 2A-712, if the goods or the  
11 tender or delivery fail in any respect to conform to the lease contract, a lessee may:

12 (1) reject the whole;

13 (2) accept the whole; or

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

15 (b) A rejection under subsection (a) is not effective unless the lessee  
16 notifies the lessor within a reasonable time after tender or delivery. (Section 2-703)

17 **SECTION 2A-727. INSTALLMENT LEASE CONTRACT: DEFAULT.**

18 (a) In this section, "installment lease contract" means a lease contract in  
19 which the terms require or the circumstances permit the delivery of goods in  
20 separate lots to be separately accepted, even if the lease agreement requires  
21 payment other than in installments or states "Each delivery is a separate lease" or  
22 words of similar import.

23 (b) A lessee may reject any nonconforming installment of delivery of goods  
24 in an installment lease if the nonconformity substantially impairs the value of that  
25 installment to the buyer. [ However, if a nonconforming tender by the lessor [is not  
26 a breach of] [does not substantially impair the value of] the whole contract and the

1 lessor or the supplier gives adequate assurance of its cure, the lessee shall accept  
2 that installment].

3 (c) If a nonconformity or default with respect to one or more installments in  
4 an installment contract is a substantial impairment of the value of the whole  
5 contract, the aggrieved party may cancel the contract, However, the power to  
6 cancel the contract for default is waived, or a canceled contract is reinstated, if the  
7 aggrieved party accepts a nonconforming installment without seasonably giving  
8 notice of cancellation, brings an action with respect only to past installments, or  
9 demands performance as to future installments. (Section 2-710)

10 Drafting Comment – May, 1997

11 The bracketing of the last sentence of subsection (b) follows the April draft  
12 of Article 2. The Comments to Article 2 suggest that the sentence is no longer  
13 necessary now that the Act defines substantial impairment. (See new subsections  
14 (c) and (d) of Section 2A-702).

15 **SECTION 2A-728. MERCHANT LESSEE'S DUTIES; LESSEE'S**  
16 **OPTIONS AS TO SALVAGE.**

17 (a) Subject to a lessee's security interest under Section 2A-725(e), if the  
18 lessor or supplier does not have an agent or place of business at the market where  
19 the goods were rejected or acceptance was revoked, a merchant lessee, upon an  
20 effective rightful rejection or justifiable revocation of acceptance, shall follow any  
21 reasonable instructions received from the lessor or supplier with respect to goods in  
22 the lessee's possession or control and, in the absence of such instructions, shall  
23 make a reasonable effort to sell, lease, or otherwise dispose of the goods for the  
24 lessor's account if they threaten to decline speedily in value. Instructions are not  
25 reasonable if on demand indemnity for expenses is not forthcoming.

26 (b) A merchant lessee that sells goods under subsection (a) is entitled to  
27 reimbursement from the lessor or supplier, or out of the proceeds, for the

1 reasonable expenses of caring for and disposing of them. If the expenses do not  
2 include a disposition commission, the lessee is entitled to a commission usual in the  
3 trade or, if there is none, to a reasonable sum not exceeding 10 percent of the gross  
4 proceeds.

5 (c) Subject to subsection (a), unless a lessor or supplier gives instructions  
6 within a reasonable time after notification of a rightful rejection or justifiable  
7 revocation of acceptance, a lessee may store the rejected goods for the account of  
8 the lessor or supplier, reship them to the lessor or supplier, or resell them for the  
9 account of the lessor or supplier, with reimbursement as provided in subsection (b).

10 (d) In complying with this section or Section 2A-729, the lessee shall act in  
11 good faith. Conduct in good faith under this section does not constitute acceptance  
12 or conversion and may not be the basis of a claim for damages.

13 (e) A purchaser that purchases in good faith from a lessee under this section  
14 or Section 2A-729 takes the goods free of any rights of the lessor and the supplier,  
15 even if the lessee fails to comply with the requirements of this article. (Section  
16 2-705)

17 Drafting Comment – May, 1997

18 Subsection (e) above comes from present Article 2A. A similar provision  
19 does not appear in present Article 2, nor in revised Article 2. Should subsection (e)  
20 be continued?

21 **SECTION 2A-729. LESSEE’S DUTIES AS TO RIGHTFULLY**  
22 **REJECTED GOODS.**

23 (a) Subject to Section 2A-728, after an effective rightful rejection or  
24 justifiable revocation of acceptance, a lessee that takes delivery of goods shall hold  
25 the goods with reasonable care at the disposal of the lessor or supplier for a  
26 sufficient time to permit the lessor or supplier to remove them. However, the lessee  
27 has no further obligation with regard to the goods.

1 (b) An action by the lessee under subsection (a) is not acceptance or  
2 conversion.

3 (c) A lessee in possession which wrongfully but effectively rejects but does  
4 not accept goods is subsection to the duty of care in subsection (a). (Section 2-704)

5 Drafting Comment

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

10 At the February meeting, the Drafting Committee voted to reject subsection  
11 (b) of Section 2-704. It is, therefore, stricken above. The Committee thought that  
12 whether use of rejected goods is inconsistent with the attempted rejection or is  
13 consistent with rejection as necessary mitigation of damages should be left to  
14 common law development, rather than codified. In leasing transactions, treated use  
15 as mitigation rather than as acceptance under the lease creates difficult fact issues  
16 regarded the obligations of the parties and the rent to be paid.

17 **SECTION 2A-730. CURE.**

18 (a) If a lessee effectively and rightfully rejects goods or a tender of delivery  
19 under Section 2A-726 or justifiably revokes an acceptance under Section 2A-733  
20 and the agreed time for performance has not expired, the lessor or supplier, upon  
21 seasonable notice to the buyer and at its own expense, may cure any default by  
22 making a conforming tender of delivery within the agreed time and by  
23 compensating the lessee for all of the lessee's reasonable and necessary expenses  
24 caused by the nonconforming tender and subsequent cure.

25 (b) If a lessee effectively and rightfully rejects goods or a tender of delivery  
26 under Section 2A-726 or justifiably revokes acceptance under Section 2A-733 and  
27 the agreed time for performance has expired, the lessor or supplier, upon seasonable  
28 notice to the lessee and at its own expense, may cure a default by making a tender  
29 of conforming goods and by compensation the lessee for all of the lessee's  
30 reasonable and necessary expenses caused by the nonconforming tender and

1 subsequent cure, if the cure is [appropriate and] timely under the circumstances and  
2 the buyer has no reasonable grounds to refuse the cure. (Section 2-709)

3 **SECTION 2A-731. ACCEPTANCE OF GOODS.**

4 (a) Acceptance of goods occurs when the lessee:

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

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

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

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

16 (b) Acceptance of a part of a commercial unit is acceptance of the entire  
17 unit. (Section 2-706)

18 **SECTION 2A-732. EFFECT OF ACCEPTANCE OF GOODS; NOTICE**  
19 **OF DEFAULT; BURDEN OF ESTABLISHING DEFAULT AFTER**  
20 **ACCEPTANCE; NOTICE OF CLAIM OR LITIGATION TO PERSON**  
21 **ANSWERABLE OVER.**

22 (a) A lessee shall pay rent in accordance with the lease contract for any  
23 goods accepted.

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

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

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

10 (2) Except in the case of a consumer lease, if a claim for infringement  
11 or the like is made against a lessee for which a lessor or supplier is answerable  
12 over, the lessee shall notify the lessor or supplier within a reasonable time after  
13 receiving notice of the litigation or be barred from any remedy over for liability  
14 established by the litigation.

15 (d) A lessee has the burden of establishing a default with respect to goods  
16 accepted.

17 (e) In a claim for breach of a warranty, indemnity, or other obligation  
18 against the lessee for which another party is answerable over, the following rules  
19 apply:

20 (1) The lessee may give notice of the litigation to the other party in a  
21 record, and the person notified may then give similar notice of the litigation to any  
22 other person that is answerable over. If the notice invites the person notified to  
23 intervene in the litigation and states that failure to do so will bind the person  
24 notified in any action later brought by the lessor as to any determination of fact  
25 common to the two actions, the person notified is so bound, unless, after seasonable  
26 receipt of the notice, the person notified intervenes in the litigation and defends.

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

7                   (f) Subsections (c), (d), and (e) govern an obligation of a lessee to hold the  
8                   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 accepted:

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

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

17                  (b) Except in the case of a finance lease that is not a consumer lease, a  
18                  lessee may revoke acceptance of a lot or commercial unit if the lessor defaults  
19                  under the lease contract and the default substantially impairs the value of that lot or  
20                  commercial unit to the lessee.

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

23                  (d) To be effective, a lessee's acceptance must be revoked within a  
24                  reasonable time after the lessee discovers or should have discovered the ground for  
25                  it and before any substantial change in condition of the goods which is not caused

1 by their own defects. The revocation is not effective until the lessee notifies the  
2 lessor of it.

3 (e) A lessee that justifiably revokes acceptance has the same rights and  
4 duties with regard to the goods involved under Sections 2A-728 and 2A-729 as if  
5 they had been rejected. (Section 2-708)

6 Drafting Comment – May, 1997

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

12 **SECTION 2A-734. COVER; LESSEE'S ACQUISITION OF**  
13 **SUBSTITUTE GOODS.**

14 (a) Upon a default by a lessor under the lease contract of the type described  
15 in Section 2A-725(a), or if agreed upon other default by the lessor, the lessee may  
16 cover by making in good faith and without unreasonable delay any purchase or  
17 lease of, or contract to purchase or lease, comparable goods to substitute for those  
18 due from the lessor.

19 (b) Except as otherwise provided with respect to damages liquidated in the  
20 lease agreement or determined by agreement of the parties, if a lessee's cover is by  
21 a lease contract substantially similar to the original lease contract and the new lease  
22 contract is made in good faith and in a commercially reasonable manner, a lessee  
23 that covers in the manner required by subsection (a); may recover damages  
24 measured by the present value, as of the date of the commencement of the period of  
25 the new lease contract, of the rent under the new lease contract applicable to that  
26 part of the new lease period which is comparable to the then remaining period of  
27 the original lease contract minus the present value as of the same date of the total  
28 rent for the then remaining lease period of the original lease contract together with



1 any incidental or consequential damages, less expenses avoided as a result of the  
2 lessor's default.

3 (c) If a lessee's cover is by a lease agreement that for any reason does not  
4 qualify for treatment under subsection (b), or is by purchase or otherwise, the lessee  
5 may recover from the lessor as if the lessee had elected not to cover, and Section  
6 2A-735 governs. (Section 2-825)

7 Draft Comment – May, 1997

8 Stricken subsection (c) above in the January, 1997 draft of Article 2  
9 contained the implication that a "bad faith cover" barred the lessee from any other  
10 remedy. That implication has now been removed. Should Article 2A now adopt  
11 the shorter, Article 2, version of subsection (c)?

12 **SECTION 2A-735. LESSEE'S DAMAGES FOR NON-DELIVERY,**  
13 **REPUDIATION, DEFAULT, AND BREACH OF WARRANTY IN REGARD**  
14 **TO ACCEPTED GOODS.**

15 (a) Except as otherwise provided with respect to damages liquidated in the  
16 lease agreement or otherwise determined by agreement of the parties (Sections  
17 1-102(3) and 2A-711), if a lessee elects not to cover or a lessee elects to cover and  
18 the cover is by lease agreement that for any reason does not qualify for treatment  
19 under Section 2A-734, or is by purchase or otherwise, the measure of damages for  
20 nondelivery or repudiation by the lessor or for rejection or revocation of acceptance  
21 by the lessee is the present value, as of the date of the default, of the then market  
22 rent minus the present value as of the same date of the original rent, computed for  
23 the remaining period of the original lease agreement, together with incidental and  
24 consequential damages, less expenses saved in consequence of the lessor's default.

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

1 (c) Except as otherwise agreed, if the lessee has accepted goods and given  
2 notification, the measure of damages for nonconforming tender or delivery or other  
3 default by a lessor is the loss resulting in the ordinary course of events from the  
4 lessor's default as determined in any manner that is reasonable together with  
5 incidental and consequential damages, less expenses saved in consequence of the  
6 lessor's default.

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

13 (Section 2-826)

14 Drafting Comment – May, 1997

15 At the February, 1997, meeting the Article 2A Committee voted to return  
16 Section 2A-735 to the language of present Section 2A-519. That has been done  
17 above.

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

20 (a) Except as otherwise agreed, a lessee that has accepted goods and given  
21 notice pursuant to Section 2A-732(c), may recover as damages for any  
22 nonconforming tender or other default by a lessor the loss resulting in the ordinary  
23 course of events from the lessor's default as determined in any reasonable manner.

24 (b) Except as otherwise agreed, a measure of damages for breach of a  
25 warranty of quality is the present value at the time and place of acceptance of the  
26 difference between the value of the use of the goods accepted and the value if they

1 had been as warranted for the lease period, unless special circumstances show  
2 proximate damages of a different amount.

3 (c) A lessee may also recover incidental and consequential damages.  
4 (Section 2-827)

5 **SECTION 2A-737. PREPAYING LESSEE'S RIGHT TO GOODS.**

6 (a) A lessee that pays all or a part of the rent or security for goods identified  
7 to the lease contract, whether or not they have been shipped, on making and  
8 keeping good a tender of any unpaid portion of the rent and security due under the  
9 lease contract, has a right to recover them from the lessor if the lessor repudiates or  
10 fails to deliver as required by the contract.

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

15 (c) If the requirements of subsection (a) or (b) are satisfied, the lesser's  
16 right vests upon identification of the goods to the lease contract even if the lessor  
17 has not then repudiated the contract or failed to deliver as required by the contract.  
18 (Section 2-824)

19 Drafting Comment – May, 1997

20 My notes indicate that a Comment to this section should make it clear that  
21 this section gives no rights to the lessee against a supplier.