

REPORTER'S INTERIM DRAFT

FOR COMMENT

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

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

DECEMBER, 1999

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

With Reporter's Notes

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ON UNIFORM STATE LAWS

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

WILLIAM H. HENNING, University of Missouri-Columbia, School of Law, 313 Hulston Hall, Columbia, MO 65211, *Chair*

BORIS AUERBACH, 332 Ardon Lane, Wyoming, OH 45215, *Enactment Plan Coordinator*

MARION W. BENFIELD, JR., 10 Overlook Circle, New Braunfels, TX 78132

AMELIA H. BOSS, Temple University, School of Law, 1719 N. Broad Street, Philadelphia, PA 19122, *American Law Institute Representative*

NEIL B. COHEN, Brooklyn Law School, Room 904A, 250 Joralemon Street, Brooklyn, NY 11201, *American Law Institute Representative*

BYRON D. SHER, State Capitol, Suite 2082, Sacramento, CA 95814,

JAMES J. WHITE, University of Michigan Law School, Hutchins Hall, Room 300, 625 S. State Street, Ann Arbor, MI 48109-1215

HENRY DEEB GABRIEL, JR., Loyola University School of Law, 526 Pine Street, New Orleans, LA 70118, *Reporter*

LINDA J. RUSCH, Hamline University School of Law, 1536 Hewitt Avenue, St. Paul, MN 55104, *Associate Reporter from 1996 to 1999*

RICHARD E. SPEIDEL, Northwestern University, School of Law, 357 E. Chicago Avenue, Chicago, IL 60611, *Reporter from 1991 to 1999*

EX OFFICIO

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AMERICAN BAR ASSOCIATION ADVISOR

THOMAS J. MCCARTHY, E.I. Dupont de Nemours & Co., P.O. Box 800017, Wilmington, DE 19880-0017, *Advisor*

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WILLIAM J. PIERCE, 1505 Roxbury Road, Ann Arbor, MI 48104, *Executive Director Emeritus*

Copies of this Act may be obtained from:

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

DECEMBER 1999 INTERIM DRAFT

[Preliminary Note. This draft has not been considered by the Drafting Committee. It is the Reporter's Interim Draft, circulated for comment prior to the consideration of the Drafting Committee. The Reporter's Notes appended to the various sections are just that – notes. They are not official comments but merely describe the rationale for many of the decisions that have been made during the production of this draft.]

PART 1

GENERAL PROVISIONS

SECTION 2A–101. SHORT TITLE.

This Article may be cited as the Uniform Commercial Code—Leases.

[Reporter's Note – This section, which comes from the Summer 1999 Revised Draft, is modified to conform to the style of Article 3, Article 4, Article 4A, Article 5, and Article 8. It is also consistent with the draft of Revised Article 2.]

SECTION 2A-102. SCOPE.

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

(b) If there is a conflict between this Article and another Article of the [Uniform Commercial Code] that Article governs.

[Reporter's Note – Consistent with the policy I have adopted with the revision of Article 2, non-substantive changes for purposes of style alone are not being made. Thus, for example, although subsection (a) of the scope provision was rewritten in the Summer 1999 draft for stylistic purposes, I have kept the existing language of current code in this section.]

[Reporter's Note - Subsections (b) and (c) have been drafted to conform to Revised Article 2.]

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

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

(1) “Authenticate” means to execute or adopt a symbol, or encrypt or

similarly process a record in whole or in part, with present intent to identify the authenticating person or to adopt or accept a record or term.

(2) "Cancellation" occurs when either party puts an end to the lease contract for default by the other party.

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

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

(5) "Conspicuous", with reference to a term, means so written, displayed, or presented that a reasonable person against which it is to operate ought to have noticed it. A term in an electronic record intended to evoke a response by an electronic agent is conspicuous if it is presented in a form that would enable a reasonably configured electronic agent to take it into account or react without review of the record by an individual. Whether a term is "conspicuous" or not is a decision for the court. Conspicuous terms include the following:

(A) with respect to a person:

(i) a heading in capitals equal to or greater in size than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same or lesser size;

(ii) language in the body of a record or display in larger type

than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from surrounding text of the same size by symbols or other marks that call attention to the language; and

(B) with respect to a person or an electronic agent, a term that is so placed in a record or display that the person or electronic agent can not proceed without taking action with respect to the particular term.

[Reporter's Note – This conforms with Revised Article 2.]

(6) “Consumer” means an individual who leases or contracts to lease goods that, at the time of contracting, are intended by the individual to be used primarily for personal, family, or household purposes.

(7) “Consumer lease” means a lease between a merchant lessor and a consumer.

Legislative Note: Present Article 2A has a bracketed provision allowing States to insert a dollar cap on leases designated as consumer leases, Revised Article 2 defines “consumer contract” and does not include a dollar cap in the definition. Some States have not included a dollar cap in present Article 2A and States which have adopted a dollar cap have stated varying amounts. If a State wishes to include a dollar cap, the cap should be inserted here. Any cap probably should be set high enough to bring within the definition most automobile leasing transactions for personal, family, or household use.

(7) “Delivery” means the voluntary transfer of physical possession or control of goods.

[Reporter's Note – This definition comes from Revised Article 2.]

(9) “Electronic” means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(10) “Electronic agent” means a computer program or an electronic or

other automated means used independently to initiate an action or respond to electronic records or performances in whole or in part, without review or action by an individual.

(11) “Electronic record” means a record created, generated, sent, communicated, received, or stored by electronic means.

(12) “Finance lease” means a lease with respect to which:

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

(B) the lessor acquires the goods or the right to possession and use of the goods in connection with the lease or, in the case of goods that have been leased previously by the lessor and are not being leased to a consumer, in connection with another lease; and

(C) one of the following occurs:

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

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

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

acquired the goods or the right to possession and use of the goods; or

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

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

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

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

[Reporter' Note – This definition conforms with the July draft of Article 2A.]

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

(14) “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, letter-of-credit rights, instruments, investment property, accounts, chattel paper, deposit accounts, or general intangibles.

[Reporter's Note – This definition largely conforms with the latest draft of Article 2.]

(15) “Information processing system” means an electronic system for creating, generating, sending, receiving, storing, displaying, or processing information.

(16) “Installment lease contract” means a lease contract that authorizes or requires the delivery of goods in separate lots to be separately accepted, even though the lease contract contains a term “each delivery is a separate lease” or its equivalent.

(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.

[Reporter's Note – Consistent, with the July draft, the phrase “for a period” replaces “for a term” in the first sentence. The use of “term” with two different meanings in the same definition could cause confusion.]

(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 by implication from other circumstances including course of dealing or usage of trade or course of performance as provided in this Article. Unless the context clearly indicates otherwise, the term includes a sublease agreement.

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

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

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

(22) “Lessee in ordinary course of business” means a person that leases goods in good faith, without knowledge that the lease violates the rights of another person, and in the ordinary course from a person, other than a pawnbroker, in the business of selling or leasing goods of that kind. A person leases in ordinary course if the lease to the person comports with the usual or customary practices in the kind of business in which the lessor is engaged or with the lessor’s own usual or customary practices. A lessee in ordinary course of business may lease for cash, by exchange of other property, or on secured or unsecured credit, and may acquire goods or documents of title under a pre-existing lease contract. Only a lessee that takes possession of the goods or has a right to recover the goods from the lessor may be a lessee in ordinary course of business. A person that acquires goods in a transfer in bulk or as security for or in total or partial satisfaction of a money debt is not a lessee in ordinary course of business.

[Reporter’s Note – This definition follows the conforming amendments to 1-201(9) that were part of the Article 9 revision process (omitting only the reference to sales of minerals).]

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

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

(25) “Lien” means a charge against or interest in goods to secure payment

of a debt or performance of an obligation, but the term does not include a security interest.

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

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

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

(29) “Receipt” means:

(A) with respect to goods, taking delivery; or

(B) with respect to a notice:

(i) coming to a person’s attention; or

(ii) being delivered to and available at a location or at an information processing system designated by agreement for that purpose in a form capable of being processed by and perceived from a system of that type by a recipient, or, in the absence of an agreed location or system:

(I) in the case of a notice that is not an electronic record, being delivered at the person’s residence, or the person’s place of business through which the contract was made, or at any other place held out by the person as a place for receipt of

communications of the kind; or

(II) in the case of a notice that is an electronic record, being delivered to and available at a system or at an address in that system in a form capable of being processed by and perceived from a system of that type by a recipient, if the recipient uses, or otherwise holds out, that system or address for receipt of notices of the kind to be given and the sender does not know that the notice cannot be accessed from that place.

Whether the information processing system is designated by agreement or otherwise, an electronic record is not received if the sender or its information processing system inhibits the ability of the recipient to print or store the record.

(30) “Receive” means to take receipt.

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

(32) “Send” means to transmit as agreed, or in the absence of agreement with any costs provided for and properly addressed or directed as reasonable under the circumstances to deposit a record in the mail or with a commercially reasonable carrier, to deliver in a reasonable manner a record for transmission to or re-creation in another location or information processing system, or to take the steps necessary to initiate transmission to or re-creation of a record in another location or information processing system. In addition, with respect to an electronic record, the term includes to initiate operations that in the ordinary course will cause the record to be delivered to and available at an information processing system or at an address within that system in a form capable of being processed by and perceived from a system

of that type by the recipient, if the recipient uses, designates by agreement, or otherwise holds out, that system or address as a place for the receipt of communications of the kind sent. An electronic record is not sent if the sender or its information processing system inhibits the ability of the recipient to print or store the record. Receipt within the time in which it would have arrived if properly sent has the effect of a proper sending.

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

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

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

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

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

- | | |
|-------------------------|-----------------------|
| (1) “Account” | Section 9-102(a)(2). |
| (2) “Between merchants” | Section 2-102(2). |
| (3) “Buyer” | Section 2-102(3). |
| (4) “Chattel paper” | Section 9-102(a)(11). |
| (5) “Consumer goods” | Section 9-102(a)(23). |
| (6) “Document” | Section 9-102(a)(30). |
| (7) “Entrusting” | Section 2-504(d). |
| (8) “General Intangible | Section 9-102(a)(42). |

(9) “Instrument”	Section 9-102(a)(47).
(10) “Merchant”	Section 2-102(27).
(11) “Mortgage”	Section 9-102(a)(55).
(12) “Pursuant to commitment”	Section 9-102(a)(68).
(13) “Sale”	Section 2-102(32).
(14) “Sale on approval”	Section 2-506(a)(1).
(15) “Sale or return”	Section 2-506(a)(2).
(16) “Seller”	Section 2-102(a)(33).

Legislative Note: In a jurisdiction that has not adopted Revised Article 9, the cross-references to Article 9 will have to be changed.

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

[Reporter’s Note – Most definitions are identical to the 1990 Official Text of Article 2A. New definitions relating to electronic commerce are identical to Revised Article 2.]

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

(a) Except as otherwise provided in subsection (b), this Article does not impair or repeal:

(1) [list any certificate of title statutes covering automobiles, trailers, mobile homes, boats, farm tractors, or the like] except as to the rights of a lessee in ordinary course of business under Sections 2A-304(c) and 2A-305(c) which arise before a certificate of title covering the goods is effective in the name of any other purchaser.

(2) certificate of title statute of another jurisdiction (Section 2A–105);

(3) any applicable law which establishes a different rule for consumers; or

(4) any other law of this State to which the transaction is subject, such as laws

dealing with:

- (A) the sale or lease of agricultural products;
- (B) the consignment or transfer by artists of works of art or fine prints;
- (C) distribution agreements, franchises, and other relationships through

which goods are leased;

- (D) tort liability for products which cause injury to person or property;
- (E) the making and disclaimer of warranties; and
- (F) dealers in particular products, such as automobiles, motorized

wheelchairs, agricultural equipment, and hearing aids.

(b) If another law of this State applies to a transaction subject to this Article and requires that a term, waiver, notice, or disclaimer be in a writing, or requires that a writing, term, waiver, notice, or disclaimer be signed, the requirement is satisfied by a record or by an authentication [unless one of the parties to the transaction is a consumer and it is clear that the other law intended the formalism of a writing or a signature to protect that party][, but if one of the parties to the transaction is a consumer the requirement is not satisfied by a record or by an authentication unless the consumer has separately authenticated a term in a record permitting the requirement to be satisfied in that manner].

(c) Except for the rights of a lessee in ordinary course of business under subsection (a)(1), in the event of a conflict between this article, other than Section 2A-105, 2A-304(c), or 2A-305(c), and a law referred to in subsection (a), that law governs.

(d) For purposes of this Article, failure to comply with the laws referred to in subsection (a) has only the effect specified therein.

[Reporter's Note – Subsection (b) comes from the Summer 1999 Revised Article 2A draft. It replicates the equivalent provision in the Revised Article 2.]

[Reporter's Note – Subsection (a)(1) has the added language: “except as to the rights of a lessee in the ordinary course of business under Sections 2A-304(c) and 2A-305(c) whose rights arise before a certificate of title covering the goods is effective in the name of any other purchaser.” This comes from the Summer 1999 Revised Article 2A draft. It replicates the equivalent provision in the Revised Article 2.]

[Reporter's Note – Subsection (a) has bracketed language for discussion. The current provision uses the word “lease”, and the Summer 1999 Revised Article 2A draft uses the word “transaction.” This is a minor change, and although I think transaction is probably the better usage here, the reason the change might be justified is to parallel the language of the new subsection (b).]

[Reporter's Note – Subsection (c) (which is subsection (b) in the current law) has the following introductory phrase added: “ Except for the rights of a lessee in the ordinary course of business under subsection (a)(1).” This comes from the Summer 1999 Revised Article 2A draft, and it conforms to Revised Article 2. This clause is a necessary addition because of the corresponding addition to subsection (a)(1). The rest of subsection (c) remains unchanged.]

[Reporter's Note – Subsection(d) has been redrafted consistent the Summer 1999 Revised Article 2A draft, and it conforms to Revised Article 2. This change clarifies that a failure to comply with the law refers to the laws set out in subsection (a).]

[Reporter's Note – Subsection (a)(3) has been rewritten consistent with the Summer 1999 Revised Article 2A draft, and it conforms to Revised Article 2. This change is a conforming change to Article 2, but is also necessary given the existing language: “consumer protection statute of this State, or final consumer protection decision of a court of this State existing on the effective date of this Article.” This transitional language is no longer necessary, as the resolution between Article 2A and the consumer protection cases and then existing statutes have had a decade for resolution.]

[Reporter's Note – Subsection (a)(4). This list comes from the Summer 1999 Revised Article 2A draft, and is new. It brings this provision in conformity with Revised Article 2.]

[Reporter's Note – Subsection (b) presents three alternatives – either of the bracketed alternatives can be selected, or neither, in which case the sentence would end after “authentication” on line 16 (which was the position of the Summer 1999 draft). Without one of the three alternatives, subsection (a) will preserve writing and signature requirements in laws within its scope, including all consumer protection laws.]

SECTION 2A-105. TERRITORIAL APPLICATION OF ARTICLE TO

GOODS COVERED BY CERTIFICATE OF TITLE.

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

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

(c) Subject to Sections 2A-304(c) and 2A-305(c), with respect to goods covered by a certificate of title under a statute of this State or of another jurisdiction, compliance and the effect of compliance or noncompliance with the certificate-of-title statute are governed by the local law of the jurisdiction whose certificate covers the goods from the time the goods become covered by the certificate until the goods cease to be covered by the certificate.

[Reporter's Note – This section is revised to conform to Revised Article 9.]

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

(a) If the law chosen by the parties to a consumer lease is that of a jurisdiction other than a jurisdiction in which the lessee resides at the time the lease agreement becomes enforceable or within 30 days thereafter or in which the goods are to be used, the choice is not enforceable.

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

[Reporter's Note – This section remains unchanged.]

**SECTION 2A-107. WAIVER OR RENUNCIATION OF CLAIM OR RIGHT
AFTER DEFAULT.**

Any claim or right arising out of an alleged default or breach of warranty may be discharged in whole or in part without consideration by a written waiver or renunciation signed and delivered by the aggrieved party.

[Reporter's Note – There is no change in this section.]

SECTION 2A-108. UNCONSCIONABILITY.

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

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

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

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

lease:

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

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

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

[Reporter's Note – This section remains unchanged except that I took off the brackets around the words “or she” which is currently in the official draft of subsection (d)(2 and replaced the clause with “the lessee”). I did not try to conform this to Article 2, as the question between the two articles has not been whether Article 2A should conform to Article 2, but whether Article 2 should conform to Article 2A. Although we have chosen not to conform Article 2 to Article 2A, there has never been any real problem with Article 2A as it is, so there does not seem to be any pressing reason for conformity except for the sake of conformity. The two provisions have lived happy and separate lives until now – I see no reason for a marriage. We should, of course, discuss this.]

SECTION 2A-109. OPTION TO ACCELERATE AT WILL.

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

[Reporter's Note – I have substituted a similarly substantial version of Summer 1999 revised

draft version of subsection (a) to provide for gender neutrality without the present awkward structure in the existing section. The version I have used is not precisely the revised version; and I have attempted to conform it to the present language except to deal with the gender language issue. This is not a change to conform with Article 2, and it may be needless tinkering. If so, we should stay with the present formulation, which is:

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

PART 2

FORMATION AND CONSTRUCTION OF LEASE CONTRACT

SECTION 2A–201. STATUTE OF FRAUDS.

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

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

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

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

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

(d) A lease contract that does not satisfy the requirements of subsection (a), but which is

valid in other respects, is enforceable:

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

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

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

(e) The lease term under a lease contract referred to in subsection (d) is:

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

(2) if the party against whom enforcement is sought admits in that party's pleading, or in the party's testimony or otherwise under oath a lease term, the term so admitted; or

(3) a reasonable lease term.

(f) An enforceable lease contract under this section is not rendered unenforceable merely because it is not capable of being performed within one year or any other applicable period after its making.

[Reporter's Note – Subsection (e) is new and conforms with Revised Article 2.]

[Reporter's Note – In subsection (d)(2) “in court” has been changed to “under oath” consistent with the change in Revised Article 2.]

[Reporter's Note – In subsection (a)(2), “signed writing” has been changed to “authenticated record”.]

[Reporter's Note – In subsection (e)(1), “signed writing” has been changed to “authenticated record”.]

[Reporter's Note – In subsection (c), “ writing” has been changed to “record”.]

SECTION 2A-202. PAROL OR EXTRINSIC EVIDENCE.

(a) Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a record intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be supplemented:

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

(2) by evidence of consistent additional terms unless the court finds the record to have been intended also as a complete and exclusive statement of the terms of the agreement.

(b) Terms in a record may be explained by evidence of course of performance, course of dealing, or usage of trade without a preliminary determination by the court that the language used is ambiguous.

[Reporter's Note – The title to this section has been shortened from “Final Written Expression: Parol or Extrinsic Evidence” to “ Parol or Extrinsic Evidence”. This is consistent with Revised Article 2.]

[Reporter's Note – Subsection (b) is new, and is added to conform to Revised Article 2. Present Section 2A-202 was drafted to conform to Article Two, and therefore it makes sense to conform this section to Revised Article 2.]

SECTION 2A-203. SEALS INOPERATIVE.

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

instruments does not apply to the lease contract or offer.

[Reporter's Note – In this section “writing” has been changed to “record” to conform to revised Article 2.]

SECTION 2A-204. FORMATION IN GENERAL.

(a) A lease contract may be made in any manner sufficient to show agreement, including offer and acceptance, conduct by both parties which recognizes the existence of a contract, or the interaction of electronic agents.

(b) An agreement sufficient to constitute a lease contract may be found although the moment of its making is undetermined.

(c) Even if one or more terms are left open a lease contract does not fail for indefiniteness if the parties intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy.

(d) Except as otherwise provided in Sections 2A-222 to 2A-223, the following rules apply:

(1) A lease contract may be formed by the interaction of electronic agents. If the interaction resulting from the electronic agents' engaging in operations shows an agreement sufficient to constitute a lease contract under this section, a lease contract is formed.

(2) A lease contract may be formed by the interaction of an electronic agent and an individual acting on the individual's own behalf or for another individual. A lease contract is formed if the individual takes actions that the individual is free to refuse to take or makes a statement that the individual has reason to know will:

(A) cause the electronic agent to complete the transaction or

performance; or

(B) indicate acceptance of an offer, regardless of other expressions or actions by the individual to which the electronic agent cannot react.

(3) In an interaction between individuals, if an offer evokes an electronic record in response, a lease contract is formed, if at all:

(A) if the electronic record operates as an acceptance under Section 2A-206, when the record is received; or

(B) if the offer is accepted under Section 2A-206 by an electronic performance, when the electronic performance is received.

(4) The terms of a contract formed under this section do not include terms provided by the individual not using an electronic agent if the individual had reason to know that the electronic agent could not react to the terms as provided.

[Reporter's Note – Subsections (a) and (c) have been rewritten to conform to the structure and language of Revised Article 2. Subsection (b) remains unchanged. Subsection (d) is new and comes from Revised Article 2.]

SECTION 2A-205. FIRM OFFERS.

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

[Reporter's Note – There is no change in substance, but this section is revised to change “signed writing” to “authenticated record” and “form” has been changed to “form record” to acknowledge nonpaper transactions. A similar change is made in Revised Article 2.]

SECTION 2A-206. OFFER AND ACCEPTANCE.

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

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

[Reporter's Note – The title to the section has been shortened from “Offer and Acceptance in Formation of Lease Contract.” This change is consistent with revised Article 2. The section is otherwise consistent with current law.]

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

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

(b) The express terms of a lease agreement and any course of performance, as well as any course of dealing and usage of trade, must be construed whenever reasonable as consistent with each other; but if that construction is unreasonable, express terms control course of performance, course of performance controls both course of dealing and usage of trade, and course of dealing controls usage of trade.

(c) Subject to the provisions of Section 2A-208 on modification and waiver, course of

performance is relevant to show a waiver or modification of any term inconsistent with the course of performance.

[Reporter's Note – This section remains unchanged.]

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

(a) An agreement modifying a lease contract needs no consideration to be binding.

(b) An agreement in an authenticated record that excludes modification or rescission except by an authenticated record may not be otherwise modified or rescinded, but, except as between merchants, such a requirement on a form record supplied by a merchant must be separately authenticated by the other party.

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

(d) A party who has made a waiver affecting an executory portion of a lease contract may retract the waiver by reasonable notification received by the other party that strict performance will be required of any term waived, unless the retraction would be unjust in view of a material change of position in reliance on the waiver.

[Reporter's Note – The only change in this section is in subsection (b) where “signed writing” is changed to “authenticated record”.]

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

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

interest under a finance lease related to the supply contract, but is subject to the terms of the warranty and of the supply contract and all defenses or claims arising therefrom.

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

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

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

[Reporter's Note – This section remains unchanged.]

SECTION 2A-210. EXPRESS WARRANTIES.

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

(1) Any affirmation of fact or promise made by the lessor to the lessee which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods will conform to the affirmation or promise.

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

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

(b) It is not necessary to the creation of an express warranty that the lessor use formal words, such as "warrant" or "guarantee," or that the lessor have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the lessor's opinion or commendation of the goods does not create a warranty.

[Reporter's Note – This section remains unchanged. The former revised drafts did not provide for equivalent sections to Revised Article 2 for direct warranties for remote purchasers, and there appears no reason to provide for those in this draft. The summer 1999 draft made explicit in the text that advertising can constitute an express warranty under some circumstances. This is undoubtedly true, but always has been the case. I would prefer to handle this in the comments and leave the present section untouched. Is this the correct decision?]

SECTION 2A–211. WARRANTIES AGAINST INTERFERENCE AND AGAINST INFRINGEMENT; LESSEE'S OBLIGATION AGAINST INFRINGEMENT.

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

(1) a claim to or interest in the goods not attributable to the lessee's own act or omission which will interfere with the lessee's enjoyment of its leasehold interest; or

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

(b) A finance lessor warrants that, except for claims by way of infringement or the

like, for the duration of the lease no person holds:

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

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

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

(d) A warranty under this section may be disclaimed or modified only by specific language or by circumstances that give the lessee reason to know that the lessor purports to transfer only such right as the lessor or a third party may have, or that it is leasing subject to any claims of infringement or the like.

[Reporter's Note – This section is based on the Summer 1999 Revised Draft, and it conforms as much as possible to Revised Article 2.]

[Reporter's Note – Subsection (d) is new and sets out the rules disclaimer and modification. Disclaimers and modifications of warranties of quality remain in section 2A-214.]

[Reporter's Notes – Subsections (a) and (b) are new. They are derived from the Summer 1999 Revised Draft. The sections parallel Revised Article 2 draft in that the sections specifically provide for the doctrine of marketable title, but the subsections differ from the current law as well as Revised Article 2 in that the subsections are drafted to reflect the differences between a finance lease and other leases.]

[Reporter's Note – Subsection (c) is an amalgamation of two subsections in the current law which reads:

(2) Except in a finance lease there is in a lease contract by a lessor who is a

merchant regularly dealing in goods of the kind a warranty that the goods are delivered free of the rightful claim of any person by way of infringement or the like.

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

The reformatting into one section comes from the Summer 1999 Revised Draft which parallels Revised Article 2, and is originally derived from existing Article 2. I suggest the change for the purpose of paralleling Article 2, However, the original drafters of Article 2A chose not to do so.]

SECTION 2A–212. IMPLIED WARRANTY OF MERCHANTABILITY.

(a) Except in a finance lease, a warranty that the goods will be merchantable is implied in a lease contract if the lessor is a merchant with respect to goods of that kind.

(b) Goods to be merchantable must be at least such as

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

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

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

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

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

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

(c) Other implied warranties may arise from course of dealing or usage of trade.

[Reporter's Note – There is one minor change in this section. Consistent with Revised Article Two, the word “type” has been changed to “description” in subsection (b)(3)]

SECTION 2A–213. IMPLIED WARRANTY OF FITNESS FOR PARTICULAR PURPOSE.

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

implied warranty that the goods will be fit for that purpose.

[Reporter's Note – This section remains unchanged.]

SECTION 2A–214. DISCLAIMER OR MODIFICATION OF WARRANTIES.

(a) Words or conduct relevant to the creation of an express warranty and words or conduct tending to disclaim or modify an express warranty must be construed wherever reasonable as consistent with each other ; but subject to the provisions of this Article on parol or extrinsic evidence, words or conduct disclaiming or modifying an express warranty are ineffective to the extent that this construction is unreasonable.

(b) Notwithstanding subsection (c), unless the circumstances indicate otherwise all implied warranties are disclaimed by expressions such as “as is” or “with all faults” or similar language or conduct that in common understanding make it clear to the lessee that the lessor assumes no responsibility for the quality or fitness of the goods. In a consumer contract, the requirements of this subsection must be satisfied by conspicuous language in a record.

(c) Subject to subsection (b), to disclaim or modify an implied warranty of merchantability or fitness, or any part of either implied warranty, the following rules apply:

(1) The language must be in a record and be conspicuous;

(2) In other than a consumer lease contract, the language is sufficient if:

(A) in the case of an implied warranty of merchantability , it mentions merchantability; and

(B) in the case of an implied warranty of fitness, it states, for example, that “There are no warranties which extend beyond the description on the face hereof.”

(3) In a consumer lease contract, the language must:

(A) in the case of an implied warranty of merchantability, state “The lessor make no representations about and is not responsible for the quality of the goods except, as otherwise provided in this contract”; and

(B) in the case of an implied warranty of fitness, state “The lessor makes no representations that the goods will be fit for any particular purpose for which you may be buying these goods, except as otherwise provided in the contract.”

(4) Language that is sufficient to disclaim or modify an implied warranty under paragraph (3) is also sufficient to disclaim or modify an implied warranty under paragraph (2).

(d) An implied warranty may also be disclaimed or modified by course of performance, course of dealing, or usage of trade.

(e) If a lessee before entering into the contract has examined the goods or the sample or model as fully as desired or has refused to examine the goods, there is no implied warranty with regard to defects which a reasonable examination ought in the circumstances to have revealed to the lessee.

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

[Reporter’s Note – The title of this subsection has been changed from “Exclusion or Modification of Warranties” to “Disclaimer or Modification of Warranties” to reflect the change of the language in the text. Throughout this section, “disclaimed” has been used in place of “excluded”.

[Reporter’s Note – The subsection in the current Article 2A covering modifications and disclaimers of warranties of infringement has been deleted in this section. This is now covered in Section 2A-211. This is consistent with Revised Article 2.]

[Reporters’s Note – Subsection (f) is new and it conforms with Revised Article 2. Subsections (d) and (e) are from the current law, but are redrafted to conform the to the style of the Summer 1999 Revised Draft and Revised Article 2 draft. Subsections (b) and (c) are derived from Revised Article 2 and provide different standards for consumer and nonconsumer agreements. Note however, that the requirement in subsection (c) that “the language must be in a record and be conspicuous” to disclaim or modify a warranty applies both to consumer and non-consumer contracts. In Revised Article Two, it only applies to consumer contracts. This is an area that the distinction between leases and sales suggests we retain the current law for leases.]

SECTION 2A–215. CUMULATION AND CONFLICT OF WARRANTIES

EXPRESS OR IMPLIED.

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

- (a) Exact or technical specifications displace an inconsistent sample or model or general language of description.
- (b) A sample from an existing bulk displaces inconsistent general language of description.
- (c) Express warranties displace inconsistent implied warranties other than an implied warranty of fitness for a particular purpose.

[Reporter’s Note – This section remains unchanged.]

SECTION 2A–216. THIRD-PARTY BENEFICIARIES OF EXPRESS AND IMPLIED WARRANTIES.

ALTERNATIVE A

A warranty to or for the benefit of a lessee under this Article, whether express or implied, extends to any natural person who is in the family or household of the lessee or who is a guest in the lessee's home if it is reasonable to expect that such person may use, consume, or be affected

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

ALTERNATIVE B

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

ALTERNATIVE C

A warranty to or for the benefit of a lessee under this Article, whether express or implied, extends to any person who may reasonably be expected to use, consume, or be affected by the goods and who is injured by breach of the warranty. The operation of this section may not be excluded, modified, or limited with respect to injury to the person of an individual to whom the warranty extends, but an exclusion, modification, or limitation of the warranty, including any with respect to rights and remedies, effective against the lessee is also effective against the beneficiary

designated under this section.

[Reporter's Note – This section remains unchanged. Proposed Revised Article 2 has made changes to the corresponding section to accommodate proposed section 2-313A and 2-313B. Since no corresponding sections to section 2-313A and 2-313 B are in Article 2A, there is no need for a conforming change.]

SECTION 2A–217. IDENTIFICATION.

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

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

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

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

[Reporter's Note – This section remains unchanged.]

SECTION 2A–218. INSURANCE AND PROCEEDS.

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

(b) If a lessee has an insurable interest only by reason of the lessor's identification of the goods, the lessor, until default or insolvency or notification to the lessee that identification is final,

may substitute other goods for those identified.

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

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

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

[Reporter's Note – This section remains unchanged.]

SECTION 2A–219. RISK OF LOSS.

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

(b) Subject to the provisions of this Article on the effect of default on risk of loss (Section 2A–220), if risk of loss is to pass to the lessee and the time of passage is not stated, the following rules apply:

(1) Except as otherwise provided in this subsection, the risk of loss passes to a lessee upon receipt of the goods. If the lessee does not intend to take possession, risk of loss passes to the lessee when the lessee receives control of the goods

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

(A) If the contract does not require delivery at a particular destination, the

risk of loss passes to the lessee when the goods are duly delivered to the carrier.

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

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

[Reporter's Note – This section is changed to be consistent with the general structure of the Summer 1999 Revised Draft and the particular structure of the November 1999 draft of Revised Article 2. As with proposed Revised Article 2 and the current Article 2A, the structure of risk of loss rules in this draft are in two sections: one where there is no default, and a separate rule when a party is in default. This varies from the proposed structure in the Summer 1999 drafts of Revised Article 2 and Revised Article 2A of a single rule that covered both the default and non-default situations.]

SECTION 2A-220. EFFECT OF DEFAULT ON RISK OF LOSS.

A default under the lease contract by either party affects the risk of loss only in the following cases:

(1) If the lessee rightfully rejects the goods or justifiably revokes acceptance of the goods, the lessor has the risk of loss from the time that the rejection or revocation is effective.

(2) If the lessor has tendered nonconforming goods so that the lessee would have the right to reject the goods or revoke acceptance of the goods, the goods are damaged or lost before the lessee effectively rejects or revokes acceptance, and the risk of loss would have otherwise passed to the lessee under Section 2A-219, the lessor has the risk of loss to the extent the nonconformity of the goods caused the damage or loss.

(3) If conforming goods are identified to the lease contract when the lessee

defaults and the risk of loss has not otherwise passed to the lessee, the lessee has the risk of loss for those goods for a commercially reasonable time after the default.

[Reporter's Note – This section is revised consistent with the Summer 1999 Revised Draft and the November 1999 draft of Revised Article 2.]

SECTION 2A-221. CASUALTY TO IDENTIFIED GOODS.

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

- (1) if the loss is total, the lease contract is terminated; and
- (2) if the loss is partial or the goods have so deteriorated as to no longer conform to the lease contract, the lessee may nevertheless demand inspection and at the lessee's option either treat the lease contract as terminated or, except in a finance lease that is not a consumer lease, accept the goods with due allowance from the rent payable for the balance of the lease term for the deterioration or the deficiency in quantity but without further right against the lessor.

[Reporter's Note – The only change, which is made consistent to a concomitant change in Revised Article 2, is to change the word “avoided” to “terminated”. This preserves pre-termination defaults.]

SECTION 2A-222. LEGAL RECOGNITION OF ELECTRONIC RECORDS AND AUTHENTICATIONS.

(a) A record or authentication may not be denied legal effect or enforceability solely because it is in electronic form.

(b) A contract may not be denied legal effect or enforceability solely because an

electronic record was used in its formation.

(c) This Article does not require a record or authentication to be created, generated, sent, communicated, received, stored, or otherwise processed by electronic means or in electronic form.

(d) In any transaction, a person may establish requirements regarding the type of record or authentication acceptable to it.

[Reporter's Note – This section comes from UETA:

- 1. subsection (a) is from UETA sec. 7(a).*
- 2. Subsection (b) is from UETA sec. 7(b).*
- 3. subsection (c) is from UETA sec.5(a) with a slight language change (UETA uses “signature” and this subsection uses “authentication”).*
- 4. subsection (d) is based on UCITA sec. 107(c) and represents an important policy choice. Were the draft to follow UETA, it would adopt § 5(b)(and perhaps § 5(c)), which preclude the use of electronic means to conduct a transaction unless the parties opt for an electronic environment. Subsection (d) makes electronic contracting the default rule – that is, the parties need not mutually agree to conduct transactions by electronic means in order for one of them to use an electronic agent or electronic record.*
- 4. Subsection (d) is based on UCITA sec. 107(d).]*

SECTION 2A-223. CONTRACT FORMATION; ELECTRONIC RECORD.

(a) Except as otherwise provided in subsection (b), an electronic record is effective when received even if no individual is aware of its receipt.

(b) Receipt of an electronic acknowledgment of an electronic record establishes that the record was received but, in itself, does not establish that the content sent corresponds to the content received.

[Reporter's Note – These provisions are adapted from Sections 15(e) and (f) of UETA.]

PART 3

EFFECT OF LEASE CONTRACT

SECTION 2A-301. ENFORCEABILITY OF LEASE CONTRACT.

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

[Reporter's Note – This section remains unchanged from current law.]

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

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

[Reporter's Note – This section remains unchanged from current law.]

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

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

(b) Except as otherwise provided in subsection (c) and Section 9-407, a term in a lease agreement which (i) prohibits the voluntary or involuntary transfer, including a transfer by sale, sublease, creation or enforcement of a security interest, or attachment, levy, or other judicial process, of an interest of a party under the lease contract or of the lessor's residual interest in the

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

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

(d) Subject to subsection (c) and Section 9-407:

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

(2) if paragraph (1) is not applicable and if a transfer is made that (i) is prohibited under a lease agreement or (ii) materially impairs the prospect of obtaining return performance by, materially changes the duty of, or materially increases the burden or risk imposed on, the other party to the lease contract, unless the party not making the transfer agrees at any time to the transfer in the lease contract or otherwise, then, except as limited by contract, (i) the transferor is liable to the party not making the transfer for damages caused by the transfer to the extent that the damages could not reasonably be prevented by the party not making the transfer and (ii) a court having jurisdiction may grant other appropriate relief, including cancellation of the lease contract

or an injunction against the transfer.

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

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

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

[Reporter's Note – In subsection (g) “writing” has been changed to “record”]

[Reporter's Note – The brackets in subsection (d)(1) are place holders- to insure that the numbering is correct after Part Five is revised.]

[Reporter's Note – Current subsection (3) has been deleted to reconcile Article 2A with Revised Article 9. The following legislative note will be added here:

Legislative Note: Former subsection (3) was stricken to be replaced by the rules of revised Section 9-407. If a jurisdiction adopting this Act has not adopted revised Article 9, the following provision should be incorporated into this section:

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

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

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

(a) Subject to Section 2A–303, a subsequent lessee from a lessor of goods under an existing lease contract obtains, to the extent of the leasehold interest transferred, the leasehold interest in the goods that the lessor had or had power to transfer, and except as provided in subsection (b) and Section 2A–527(d), takes subject to the existing lease contract. A lessor with voidable title has power to transfer a good leasehold interest to a good faith subsequent lessee for value, but only to the extent set forth in the preceding sentence. If goods have been delivered under a transaction of purchase, the lessor has that power even though:

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

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

(c) A subsequent lessee from the lessor of goods that are subject to an existing lease contract and are covered by a certificate of title issued under a statute of this State or of another

jurisdiction takes no greater rights than those provided both by this section and by the certificate-of-title statute.

[Reporter's Note – This section remains unchanged except that subsection (a)(4) now speaks of “criminal fraud” instead of “fraud punishable as larcenous under the criminal law”. This change is consistent with Revised Article 2.]

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

(a) Subject to the provisions of Section 2A-303, a buyer or sublessee from the lessee of goods under an existing lease contract obtains, to the extent of the interest transferred, the leasehold interest in the goods that the lessee had or had power to transfer, and except as provided in subsection (2) and Section 2A-511(d), takes subject to the existing lease contract. A lessee with a voidable leasehold interest has power to transfer a good leasehold interest to a good faith buyer for value or a good faith sublessee for value, but only to the extent set forth in the preceding sentence. When goods have been delivered under a transaction of lease the lessee has that power even though:

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

(b) A buyer in the ordinary course of business or a sublessee in the ordinary course of business from a lessee who is a merchant dealing in goods of that kind to whom the goods were entrusted by the lessor obtains, to the extent of the interest transferred, all of the lessor's and lessee's rights to the goods, and takes free of the existing lease contract.

(c) A buyer or sublessee from the lessee of goods that are subject to an existing lease contract and are covered by a certificate of title issued under a statute of this State or of another

jurisdiction takes no greater rights than those provided both by this section and by the certificate of title statute.

[Reporter's Note – This section remains unchanged except that subsection (a)(3) now speaks of “fraud punishable under the criminal law” instead of “fraud punishable as larcenous under the criminal law”. This change is consistent with Revised Article 2.]

[Reporter's Note – Subsection (b) conforms to the latest draft of Article 2.]

SECTION 2A–306. PRIORITY OF CERTAIN LIENS ARISING BY OPERATION OF LAW.

If a person in the ordinary course of business furnishes services or materials with respect to goods subject to a lease contract, a lien upon those goods in the possession of that person given by statute or rule of law for those materials or services takes priority over any interest of the lessor or lessee under the lease contract or this Article unless the lien is created by statute and the statute provides otherwise or unless the lien is created by rule of law and the rule of law provides otherwise.

[Reporter's Note – This section remains unchanged except for gender neutral language.]

SECTION 2A-307. PRIORITY OF LIENS ARISING BY ATTACHMENT OR LEVY ON GOODS.

(a) Except as otherwise provided in Section 2A-306, a creditor of a lessee takes subject to the lease contract.

(b) Except as otherwise provided in subsection (c) and Sections 2A-306 and 2A-308, a creditor of a lessor takes subject to the lease contract unless the creditor holds a lien that attached to the goods before the lease contract became enforceable.

(c) Except as otherwise provided in Sections 9-317, 9-321, and 9-323, a lessee

takes a leasehold interest subject to a security interest held by a creditor of the lessor.

Reporter's Note – This section has been redrafted to conform with Revised Article 9. The following Legislative Note should be added:

Subsections (b)(2), (b)(3), (c), and (d) of former Section 2A-307 were placed in revised Article 9. Section 9-317 covers rights of third parties against unperfected security interests. Section 9-321 covers lessees in ordinary course of business. Section 9-323 covers rights of third parties as against future advances made under perfected security interests. If a jurisdiction adopting this Act has not adopted revised Article 9, the deleted subsections of former Section 2A-307 set out below should be inserted here:

(b) Except as otherwise provided in subsections (c) and (d) and Sections 2A-306 and 2A-308, a creditor of a lessor takes subject to the lease contract unless:

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

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

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

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

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

SECTION 2A-308. SPECIAL RIGHTS OF CREDITORS.

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

(b) Nothing in this Article impairs the rights of creditors of a lessor if the lease contract (1) becomes enforceable, not in current course of trade but in satisfaction of or as security for a pre-existing claim for money, security, or the like, and (2) is made under circumstances which under any statute or rule of law apart from this Article would constitute the transaction a fraudulent transfer or voidable preference.

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

[Reporter's Note – This section remains unchanged except as necessary to accommodate the change in Section 2-305(b).]

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

(a) In this section:

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

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

(3) a lease is a "purchase money lease" unless the lessee has possession or use of the goods or the right to possession or use of the goods before the lease agreement is enforceable;

(4) a mortgage is a "construction mortgage" to the extent it secures an obligation incurred for the construction of an improvement on land including the acquisition cost of the land, if a recorded record of the mortgage so indicates; and

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

(b) Under this Article a lease may be of goods that are fixtures or may continue in goods that become fixtures, but no lease exists under this Article of ordinary building materials incorporated into an improvement on land.

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

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

(1) the lease is a purchase money lease, the conflicting interest of the encumbrancer or owner arises before the goods become fixtures, and the interest of the lessor is perfected by a fixture filing before the goods become fixtures or within 20 days thereafter; or

(2) the interest of the lessor is perfected by a fixture filing before the interest of the encumbrancer or owner is of record, and the lessor's interest has priority over any conflicting interest of a predecessor in title of the encumbrancer or owner.

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

(1) the fixtures are readily removable factory or office machines, readily removable equipment that is not primarily used or leased for use in the operation of the real property, or

readily removable replacements of domestic appliances that are goods subject to a consumer lease, and before the goods become fixtures the lease contract is enforceable; or

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

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

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

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

(g) In cases not covered by subsections (c) through (f), priority between the interest of a lessor of fixtures, including the lessor's residual interest, and the conflicting interest of an encumbrancer or owner of the real property which is not the lessee is determined by the priority rules governing conflicting interests in real property.

(h) If the interest of a lessor of fixtures, including the lessor's residual interest, has priority over all conflicting interests of all owners and encumbrancers of the real estate, the lessor or the

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

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

[Reporter's Note – A legislative note will indicate that the reference in subsection (a)(2) should be to 9-402(5) in a jurisdiction that has not adopted Revised Article 9.]

[Reporter's Note – The term “real estate” has been changed to “real property”, and “writing” has been changed to “record”.]

[Reporter's Note – Subsection (e)(4) has been redrafted from two sentences to a single sentence to clarify the relationship between the lessee's right to remove the goods and the effect of a termination of the lessee's right to remove the goods. This relationship is not expressed in current Article 2A.]

[Reporter's Note – The language in subsection (g) has been changed from “In cases not within the preceding subsections” to “In cases not covered by subsections (c) through (f)”. This change is a technical clarification which recognizes that the rule stated in subsection (g) does not in fact apply to subsections (a) and (b).]

SECTION 2A–310. LESSOR'S AND LESSEE'S RIGHTS WHEN GOODS

BECOME ACCESSIONS.

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

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

(c) The interest of a lessor or a lessee under a lease contract entered into at the time or after the goods became accessions is superior to all subsequently acquired interests in the whole except as stated in subsection (d) but is subordinate to interests in the whole existing at the time the lease contract was made unless the holders of such interests in the whole have in writing consented to the lease or disclaimed an interest in the goods as part of the whole.

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

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

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

(e) When under subsections (b) or (c) and (d) a lessor or a lessee of accessions holds an interest that is superior to all interests in the whole, the lessor or the lessee may on default, expiration, termination, or cancellation of the lease contract by the other party but subject to the provisions of the lease contract and this Article, or if necessary to enforce the party's other rights and remedies under this Article, remove the goods from the whole, free and clear of all interests in the whole, but the party must reimburse any holder of an interest in the whole who is not the

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

[Reporter's Note – Subsection (e) is revised for gender neutrality, but otherwise unchanged from current law.]

SECTION 2A-311. PRIORITY SUBJECT TO SUBORDINATION.

Nothing in this Article prevents subordination by agreement by any person entitled to priority.

[Reporter's Note – This section remains unchanged.]

PART 4

PERFORMANCE OF LEASE CONTRACT: REPUDIATED, SUBSTITUTED AND EXCUSED

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

(a) A lease contract imposes an obligation on each party that the other's expectation of receiving due performance will not be impaired.

(b) If reasonable grounds for insecurity arise with respect to the performance of either party, the insecure party may demand in writing adequate assurance of due performance. Until the insecure party receives that assurance, if commercially reasonable the insecure party may suspend any performance for which the party has not already received the agreed return.

(c) A repudiation of the lease contract occurs if assurance of due performance adequate under the circumstances of the particular case is not provided to the insecure party within a reasonable time, not to exceed 30 days after receipt of a demand by the other party.

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

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

[Reporter's Note – Minor changes have been made for gender neutrality.]

SECTION 2A–402. ANTICIPATORY REPUDIATION.

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

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

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

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

contract notwithstanding default or to salvage unfinished goods (Section 2A–524).

(b) Repudiation includes language that a reasonable party would interpret to mean that the other party will not or cannot make a performance still due under the contract or voluntary, affirmative conduct that would appear to a reasonable party to make a future performance by the other party impossible.

[Reporter's Note – Subsection (a) remains unchanged. Subsection (b) comes from the latest draft of Revised Article 2.]

SECTION 2A–403. RETRACTION OF ANTICIPATORY REPUDIATION.

(a) Until the repudiating party's next performance is due, the repudiating party can retract the repudiation unless, since the repudiation, the aggrieved party has canceled the lease contract or materially changed the aggrieved party's position or otherwise indicated that the aggrieved party considers the repudiation final.

(b) Retraction may be by any method that clearly indicates to the aggrieved party that the repudiating party intends to perform under the lease contract and includes any assurance demanded under Section 2A–401.

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

[Reporter's Note – This section remains unchanged.]

SECTION 2A–404. SUBSTITUTED PERFORMANCE.

(a) If without fault of the lessee, the lessor and the supplier, the agreed berthing, loading, or unloading facilities fail or the agreed type of carrier becomes unavailable or the agreed manner of delivery otherwise becomes commercially impracticable, but a commercially reasonable

substitute is available, the substitute performance must be tendered and accepted.

(b) If the agreed means or manner of payment fails because of domestic or foreign governmental regulation:

(1) the lessor may withhold or stop delivery or cause the supplier to withhold or stop delivery unless the lessee provides a means or manner of payment that is commercially a substantial equivalent; and

(2) if delivery has already been taken, payment by the means or in the manner provided by the regulation discharges the lessee's obligation unless the regulation is discriminatory, oppressive, or predatory.

[Reporter's Note – This section remains unchanged.]

SECTION 2A-405. EXCUSE BY FAILURE OF PRESUPPOSED CONDITIONS.

(a) Subject to Section 2A-404 and subsection (b), delay in performance or nonperformance by the lessor or supplier is not a default under the lease contract if performance as agreed has been made impracticable by:

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

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

(b) A party claiming excuse under subsection (a) shall seasonably notify the other party that there will be delay or nonperformance. If a finance lessor claims excuse under subsection (a) it shall seasonably notify both the lessor and the lessee that there will be delay or nonperformance. If the claimed excuse affects only a part of the lessor's or supplier's capacity to

perform, the lessor or supplier shall also allocate production and deliveries among its customers in a manner that is fair and reasonable and notify the lessee of the estimated quota made available.

In allocating production and deliveries, the lessor or supplier may include regular customers not them under contract as well as its own requirements for further manufacture.

[Reporter's Note – This section is copied from the Summer 1999 Revised Article 2A draft. There is one substantive change – subsection (a) is changed to cover delays “in performance or nonperformance” rather than “in delivery or nondelivery.” This change reflects an understanding of the broader range of obligations a lessor may have other than the delivery of the goods. The title is also change to conform to Article 2. The primary reason for the adoption of the Revised draft is clarity and avoidance of awkwardness of language in making the section gender neutral.]

SECTION 2A–406. PROCEDURE ON EXCUSED PERFORMANCE.

(a) If the lessee receives notification of a material or indefinite delay or an allocation justified under Section 2A–405, the lessee may by written notification to the lessor as to any goods involved, and with respect to all of the goods if under an installment lease contract the value of the whole lease contract is substantially impaired (Section 2A–510):

(1) terminate the lease contract (Section 2A–505(2)); or

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

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

[Reporter's Note – This section remains unchanged.]

SECTION 2A–406.. IRREVOCABLE PROMISES: FINANCE LEASES.

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

(b) A promise that has become irrevocable and independent under subsection (1):

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

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

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

[Reporter's Note – This section remains unchanged.]

PART 5

DEFAULT

A. IN GENERAL

SECTION 2A–501. DEFAULT: PROCEDURE.

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

(b) If the lessor or the lessee is in default under the lease contract, the party seeking enforcement has rights and remedies as provided in this Article and, except as limited by this Article, as provided in the lease agreement.

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

enforcement may reduce the party's claim to judgment, or otherwise enforce the lease contract by self-help or any available judicial procedure or nonjudicial procedure, including administrative proceeding, arbitration, or the like, in accordance with this Article.

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

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

[Reporter's Note – This section remains unchanged.]

SECTION 2A–502. NOTICE AFTER DEFAULT.

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

[Reporter's Note – This section remains unchanged.]

SECTION 2A–503. MODIFICATION OR IMPAIRMENT OF RIGHTS AND REMEDIES.

(a) Subject to the provisions of subsections (b), (c) and (d) of this section and of Section 2A-504 on liquidation and limitation of damages,

(1) the lease agreement may provide for remedies in addition to or in substitution for those provided in this Article and may limit or alter the measure of damages recoverable under this Article; and

(2) resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.

(b) Where circumstances cause an exclusive or limited remedy to fail of its essential purpose in a contract other than a consumer lease contract, remedy may be had as provided in this Act. However, a lease agreement expressly providing that consequential damages are excluded is enforceable to the extent permitted under subsection (d).

(c) Where circumstances cause an exclusive or limited remedy to fail of its essential purpose in a consumer lease contract, remedy may be had as provided in this Act including the right to recover consequential damages notwithstanding any term purporting to exclude or limit such damages.

(d) Subject to subsection (c), consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.

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

[Reporter's Note – This section is changed to conform with Revised Article 2.]

[Reporter's Note- the bar on the exclusion of consequential damages where a limited remedy fails of its essential purpose in a consumer contract in subsection (c) was previously rejected by the Article 2A drafting committee. This was an area that the earlier drafting committee of Revised Article 2A specifically decided not to conform with proposed Revised Article Two. Other than a dislike of the policy adopted in Revised Article Two, is there any other reason why Revised Article 2A should not conform to Revised Article 2 in this provision?]

SECTION 2A-504. LIQUIDATION OF DAMAGES.

(a) Damages payable by either party for default, or any other act or omission, including indemnity for loss or diminution of anticipated tax benefits or loss or damage to lessor's residual interest, may be liquidated in the lease agreement but only at an amount or by a formula that is reasonable in light of the then anticipated harm caused by the default or other act or omission. Section 2A-503 determines the enforceability of a term that limits but does not liquidate damages.

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

(c) If the lessor justifiably withholds or stops performance because of the lessee's default or insolvency (Section 2A-525 or 2A-526), the lessee is entitled to restitution of any amount by which the sum of the lessor's payments exceeds the amount to which the lessor is entitled by virtue of terms liquidating the lessor's damages in accordance with subsection (a).

(d) A lessee's right to restitution under subsection (c) is subject to offset to the extent the lessor establishes:

(1) a right to recover damages under the provisions of this Article other than subsection (a); and

(2) the amount or value of any benefits received by the lessee directly or indirectly by reason of the lease contract.

[Reporter's Note – Subsection (c) has two minor changes and a major change. The minor changes are; first, the phrase “stops delivery of goods” has been changed to “stops performance”. This change is consistent with Revised Article 2, and reflects the realization that the lessor's obligations may be greater than the delivery of goods. Second, a minor change has been made in this subsection for gender neutrality. The major change is the elimination of the statutory liquidated damages clause that operates in the absence of an express liquidated damages provision. In the current law, this subsection provides that “in the absence of those

terms, 20 percent of the then present value of the total rent the lessee was obligated to pay for the balance of the lease term, or, in the case of a consumer lease, the lesser of such amount or \$500.” The deletion of this section is consistent with the Summer 1999 Revised Draft of Article 2A as well as Revised Article 2.]

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

(a) On cancellation of the lease contract, all obligations that are still executory on both sides are discharged, but any right based on prior default or performance survives, and the canceling party also retains any remedy for default of the whole lease contract or any unperformed balance.

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

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

(d) Rights and remedies for material misrepresentation or fraud include all rights and remedies available under this Article for default.

(e) Neither rescission nor a claim for rescission of the lease contract nor rejection or return of the goods may bar or be deemed inconsistent with a claim for damages or other right or remedy.

[Reporter’s Note – This section remains unchanged.]

SECTION 2A-506. STATUTE OF LIMITATIONS.

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

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

(b) A cause of action for default accrues when the act or omission on which the default or breach of warranty is based is or should have been discovered by the aggrieved party, or when the default occurs, whichever is later. A cause of action for indemnity accrues when the act or omission on which the claim for indemnity is based is or should have been discovered by the indemnified party, whichever is later.

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

(d) This section does not alter the law on tolling of the statute of limitations nor does it apply to causes of action that have accrued before this Article becomes effective.

[Reporter's Note – Subsection (a) has been changed to conform to the Summer 1999 Revised Draft of Article 2A. Current law is changed to provide that in a consumer lease, the four year period cannot be reduced. This change is consistent with Revised Article 2.]

SECTION 2A–507. PROOF OF MARKET RENT: TIME AND PLACE.

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

(b) If evidence of rent for the use of the goods concerned for a lease term identical to the remaining lease term of the original lease agreement and prevailing at the times or places described in this Article is not readily available, the rent prevailing within any reasonable time before or after the time described or at any other place or for a different lease term which in commercial judgment or under usage of trade would serve as a reasonable substitute for the one described may be used, making any proper allowance for the difference, including the cost of transporting the goods to or from the other place.

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

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

[Reporter's Note – This section remains unchanged from the current law except for a gender neutralization in subsection (c).]

B. DEFAULT BY LESSOR

SECTION 2A–508. LESSEE'S REMEDIES.

(a) If the 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, 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-505(1);

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

(3) cover and obtain damages under Section 2A-518;

(4) recover damages for nondelivery under Section 2A-519(a);

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

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

(7) recover identified goods under Section 2A-522;

(8) obtain specific performance under Section 2A-521;

(9) recover incidental and consequential damages under Section 2A-520;

(10) recover liquidated damages under Section 2A-504;

(11) enforce limited remedies under Section 2A-503; or

(12) exercise any other rights or pursue any other remedy provided in the lease contract.

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

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

(d) On rightful rejection or justifiable revocation of acceptance, a lessee has a security interest in goods in the lessee's possession or control for any rent and security that has

been paid and any expenses reasonably incurred in their inspection, receipt, transportation, care, and custody. In that case, the lessee may hold the goods and dispose of them in good faith and in a commercially reasonable manner. The disposition is subject to Section 2A-527(d) and (e).

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

[Reporter's Note – Consistent with Revised Article 2 and with Section 2A-525, as revised in this draft, subsection (a) has been expanded to give a more complete listing of remedies. For the reasons stated in the Reporter's Note to Section 2A-523, a complete restructuring of this section in conformity to Revised Article 2 has not been made.]

SECTION 2A–509. LESSEE'S RIGHTS ON IMPROPER DELIVERY; MANNER AND EFFECT OF REJECTION.

(a) Subject to Sections 2A-510, Section 2A-503 and Section 2A-504, if the goods or the tender of delivery fail in any respect to conform to the contract, the lessee may

- (1) reject the whole; or
- (2) accept the whole; or
- (3) accept any commercial unit or units and reject the rest.

(b) Rejection of goods must be within a reasonable time after their delivery or tender. It is ineffective unless the lessee seasonably notifies the lessor or supplier.

(c) Subject to subsection (f) of Section 2A-517 and to Sections 2A–511 and 2A-512,

(1) after rejection any use by the lessee with respect to any commercial unit is wrongful as against the lessor or supplier; and

- (2) if the lessee has before rejection taken physical possession of goods in

which the lessee does not have a security interest under the provisions of this Article (subsection (e) of Section 2A–508), the lessee is under a duty after rejection to hold them with reasonable care at the lessor’s or supplier’s disposition for a time sufficient to permit the lessor or supplier to remove them; but

(3) the lessee has no further obligations with regard to goods rightfully rejected.

(d) The lessor's or supplier's with respect to goods wrongfully rejected are governed by the provisions of this Article on lessor's remedies in general (Section 2A–523).

[Reporter’s Note – This section is revised to conform with Revised Article 2, except that its provisions are contained in two sections in Article 2.]

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

(a) Under an installment lease contract a lessee may reject any delivery that is nonconforming if the nonconformity substantially impairs the value of that delivery to the lessee and cannot be cured or the nonconformity is a defect in the required documents; but if the nonconformity does not fall within subsection (b) and the lessor or the supplier has a right to cure the defect (Section 2A-513) and gives adequate assurance of cure, the lessee must accept that delivery.

(b) Whenever nonconformity or default with respect to one or more deliveries substantially impairs the value of the installment lease contract as a whole to the lessee there is a default with respect to the whole. But, the aggrieved party reinstates the installment lease contract as a whole if the aggrieved party accepts a nonconforming delivery without seasonably

notifying of cancellation or brings an action with respect only to past deliveries or demands performance as to future deliveries.

[Reporter's Note – This section is revised to conform with Revised Article 2].

SECTION 2A-511. MERCHANT LESSEE'S DUTIES AS TO REJECTED GOODS.

(a) Subject to any security interest of a lessee (Section 2A–508(d)), if a lessor or a supplier has no agent or place of business at the market of rejection, a merchant lessee, after rejection of goods in the lessee's possession or control, shall follow any reasonable instructions received from the lessor or the supplier with respect to the goods. In the absence of those instructions, a merchant lessee shall make reasonable efforts to sell, lease, or otherwise dispose of the goods for the lessor's account if they threaten to decline in value speedily. Instructions are not reasonable if on demand indemnity for expenses is not forthcoming.

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

(c) In complying with this section or Section 2A-512, the lessee is held only to good faith. Good faith conduct hereunder is neither acceptance or conversion nor the basis of an action for damages.

(d) A purchaser who purchases in good faith from a lessee pursuant to this section or Section 2A–512 takes the goods free of any rights of the lessor and the supplier even though the

lessee fails to comply with one or more of the requirements of this Article.

[Reporter's Note – This section remains unchanged from the current law except for a gender neutralization in subsection (b).]

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

(a) Subject to the provisions of this Article on the duties of a merchant lessee (Section 2A-511) and subject to any security interest of a lessee (Section 2A-508(e)):

(1) the lessee, after rejection of goods in the lessee's possession, shall hold them with reasonable care at the lessor's or the supplier's disposition for a reasonable time after the lessee's seasonable notification of rejection;

(2) the lessee may store the rejected goods for the lessor's or the supplier's account or ship them to the lessor or the supplier or dispose of them for the lessor's or the supplier's account with reimbursement in the manner provided in Section 2A-511; but

(3) the lessee has no further obligations with regard to goods rightfully rejected.

(b) Action by the lessee pursuant to subsection (a) is not acceptance or conversion.

[Reporter's Note – Consistent with Revised Article 2, the title has been changed to eliminate the word "Rightful" before "rejection" since the section deals with both effective and rightful rejections.]

[Reporter's Note – The cross-reference to Section 2A-508(e) in subsection (a) is subject to change if Section 2A-508 is changed later.]

[Reporter's Note – The first clause of (a)(2) has been eliminated. The cross-reference to Section 2A-511 picks up the duty of a merchant lessee to follow reasonable instructions, and inclusion of the clause could create confusion by suggesting that its application is limited to merchant lessees.]

SECTION 2A-513. CURE BY LESSOR OR SUPPLIER OF IMPROPER TENDER OR DELIVERY.

(a) Where the lessee rejects goods or a tender of delivery under Section 2A-509 or Section 2A-510 or except in a consumer contract justifiably revokes acceptance under Section 2A-517 and the agreed time for performance has not expired, a lessor or the supplier that is in good faith, upon seasonable notice to the lessee and at the lessor's or supplier's own expense, may cure the default by making a conforming tender of delivery within the agreed time. The lessor or supplier shall compensate the lessee for all of the lessee's reasonable expenses caused by the lessor's or supplier's default and subsequent cure.

(b) Where the lessee rejects goods or a tender of delivery under Section 2A-509 or Section 2A-510 or except in a consumer contract justifiably revokes acceptance under Section 2A-517 and the agreed time for performance has expired, a lessor or supplier that is in good faith may, upon seasonable notice to the lessee and at the lessor's or supplier's own expense, cure the default if the cure is appropriate and timely under the circumstances, by making a tender of conforming goods. The lessor or supplier shall compensate the lessee for all of the lessee's reasonable expenses caused by the lessor's or supplier's default and subsequent cure.

[Reporter's Note – This section has been revised to conform to Revised Article 2. Some of the changes are not in the November 1999 Reporter's Interim Draft of Article 2. These suggested changes represent further refinement of this section and the corresponding section in Article 2 that will be presented to the drafting committee for adoption.]

Reporter's Note – Current Section 2A-513 provides that the lessor or supplier may cure after the time of performance has run if “the lessor or supplier had reasonable grounds to believe” the goods or tender would be acceptable. This standard has created problems because it focuses on the lessor's or supplier's reasonable beliefs to the exclusion of the lessee's rights, expectations and inconveniences. Courts have, of course, filled this gap, but this is an area where it is appropriate for us to clarify. Thus, consistent with Revised Article 2, the proposed new standard is: “if the cure is appropriate and timely under the circumstances”.]

[Reporter's Note – Consistent with Revised Article 2, this draft accepts as a default rule a lessor's or a supplier's right to cure following a revocation of acceptance under section 2A-517.]

The default rule is otherwise in consumer contracts.]

[Reporter's Note – Consistent with Revised Article 2, this draft clarifies that even though the default has been cured the lessee is entitled to compensation for the reasonable expenses caused by the lessor's or supplier's default and subsequent cure. A comment should clarify that such expenses might go beyond incidental damages.]

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

(a) The lessee's failure to state in connection with rejection a particular defect which is ascertainable by reasonable inspection or in connection with revocation of acceptance a known defect precludes the lessee from relying on the unstated defect to justify rejection or revocation of acceptance

(1) where the seller had a right to cure the defect (Section 2A-513) and could have cured it if stated seasonably; or

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

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

[Reporter's Note – the following changes have been made consistent with Revised Article 2: 1. subsection (a) has been revised so that a failure to particularize waives only the right to rely on the unstated defect to justify the remedies of rejection and revocation of acceptance, not other remedies. 2. The addition of a reference to revocation in subsection (a) is necessitated by the expansion of the right to cure to cover revocation in nonconsumer contracts. 3. Subsection (a)(1) has been revised to make it clear that the lessor or supplier must have had both the right and the ability to cure (current law refers only to ability). Subsection (b) has been revised to make clear that the lessee who makes payment upon presentation of the documents to the lessee may waive defects, but a person who is not the lessee (e.g., a letter-of-credit issuer) does not waive the

lessee's right to assert defects in the documents as against the lessor or supplier.]

SECTION 2A-515. ACCEPTANCE OF GOODS.

(a) Acceptance of goods occurs when the lessee

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

(2) fails to make an effective rejection (subsection (b) of Section 2A-509), but such acceptance does not occur until the lessee has had a reasonable opportunity to inspect them;
or

(3) except as otherwise provided in Section 2A-517(f), uses the goods in any manner that is inconsistent with the lessor's or supplier's rights; but if such act is ratified by the seller it is an acceptance.

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

[Reporter's Note – This section is redrafted to conforms with Revised Article 2.]

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

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

(b) A lessee's acceptance of goods precludes rejection of the goods accepted. In the case of a finance lease, if made with knowledge of a nonconformity, acceptance cannot be revoked because of it. In any other case, if made with knowledge of a nonconformity, acceptance cannot be revoked because of it unless the acceptance was on the reasonable assumption that the

nonconformity would be seasonably cured. Acceptance does not of itself impair any other remedy provided by this Article or the lease agreement for nonconformity.

(c) If a tender has been accepted:

(1) within a reasonable time after the lessee discovers or should have discovered any default, the lessee shall notify the lessor and the supplier, if any, however, failure to give timely notice bars the lessee from a remedy only to the extent that the lessor or supplier is prejudiced by the failure;

(2) except in the case of a consumer lease, within a reasonable time after the lessee receives notice of litigation for infringement or the like (Section 2A-211) the lessee shall notify the lessor or be barred from any remedy over for liability established by the litigation; and

(3) the burden is on the lessee to establish any default.

(d) If a lessee is sued for breach of a warranty or other obligation for which another party is answerable over the following apply:

(1) The lessee may give the other party written notice of the litigation. If the notice states that the other party may come in and defend and that if the other party does not do so that party will be bound in any action against that party by the lessee by any determination of fact common to the two litigations, then unless the party notified after seasonable receipt of the notice does come in and defend that party is so bound.

(2) The lessor or the supplier may demand in writing that the lessee turn over control of the litigation including settlement if the claim is one for infringement or the like (Section 2A-211) or else be barred from any remedy over. If the demand states that the lessor or the supplier agrees to bear all expense and to satisfy any adverse judgment, then unless the lessee

after seasonable receipt of the demand does turn over control the lessee is so barred.

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

[Reporter's Note – There are changes in this section consistent with Revised Article 2. First, the reference to rejection is removed from subsection (a). Second, subsection (c)(1) is changes so that the effect of a failure to give timely notice is reduced to a prejudice rule instead of an absolute bar to any recovery as under the current provision. Third, the vouching-in procedure in subsection (d) has been expanded to include indemnity actions and persons other than the seller who are answerable over.]

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

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

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

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

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

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

(d) Revocation of acceptance must occur within a reasonable time after the lessee discovers or should have discovered the ground for it and before any substantial change in

condition of the goods which is not caused by the nonconformity. Revocation is not effective until the lessee notifies the lessor.

(e) A lessee who so revokes has the same rights and duties with regard to the goods involved as if the lessee had rejected them.

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

(1) Any use by the lessee that is unreasonable under the circumstances is wrongful as against the lessor or supplier and is an acceptance only if ratified by the lessor or supplier (subsection (a)(3) of Section 2-515).

(2) Any use of the goods that is reasonable under the circumstances is not wrongful as against the lessor or supplier and is not an acceptance, but in an appropriate case the lessee shall be obligated to the lessor or supplier for the value of the use to the lessee.

[Reporter's Note – Subsection (f), which is new, permits a buyer who rightfully rejects or justifiably revokes acceptance to make reasonable use of the goods and only be liable, where appropriate, for the value of the use. This concept is consistent with Revised Article 2. This was an area that the earlier drafting committee of Revised Article 2A specifically decided not to conform with proposed Revised Article Two. Other than a dislike of the policy adopted in Revised Article Two, is there any other reason why Revised Article 2A should not conform to Revised Article 2 in this provision?]

SECTION 2A–518. COVER; SUBSTITUTE GOODS.

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

(b) Except as otherwise provided with respect to damages liquidated in the lease

agreement (Section 2A–504) or otherwise determined pursuant to agreement of the parties (Sections 1–102(3) and 2A–503), if a lessee's cover is by a lease agreement substantially similar to the original lease agreement and the new lease agreement is made in good faith and in a commercially reasonable manner, the lessee may recover from the lessor as damages (i) the present value, as of the date of the commencement of the term of the new lease agreement, of the rent under the new lease agreement applicable to that period of the new lease term which is comparable to the then remaining term of the original lease agreement minus the present value as of the same date of the total rent for the then remaining lease term of the original lease agreement, and (ii) any incidental or consequential damages, less expenses saved in consequence of the lessor's default.

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

[Reporter's Note – This section remains unchanged from the current law.]

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

(a) Except as otherwise provided with respect to damages liquidated in the lease agreement (Section 2A-504) or otherwise determined pursuant to agreement of the parties (Sections 1–102(3) and 2A-503), if a lessee elects not to cover or a lessee elects to cover and the cover is by lease agreement that for any reason does not qualify for treatment under Section 2A-518(b), or is by purchase or otherwise, the measure of damages for nondelivery or repudiation by

the lessor or for rejection or revocation of acceptance by the lessee is the present value, as of the date of the default, of the then market rent minus the present value as of the same date of the original rent, computed for the remaining lease term of the original lease agreement, together with incidental and consequential damages, less expenses saved in consequence of the lessor's default.

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

(c) Except as otherwise agreed, if the lessee has accepted goods and given notification (Section 2A-516(c)), the measure of damages for non-conforming tender or delivery or other default by a lessor is the loss resulting in the ordinary course of events from the lessor's default as determined in any manner that is reasonable together with incidental and consequential damages, less expenses saved in consequence of the lessor's default.

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

[Reporter's Note – This section remains unchanged. There are two changes in Revised Article 2 that are not adopted here, but should be discussed. First, whether the distinction in Revised Article 2 between anticipatory repudiation and other defaults should be carried over into Article 2A. Second, and this is a larger issue than this section alone, whether the new statutory provisions governing remedial promises have any place in Article 2A.]

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

(a) Incidental damages resulting from a lessor's default include expenses reasonably incurred in inspection, receipt, transportation, and care and custody of goods rightfully rejected or goods the acceptance of which is justifiably revoked, any commercially reasonable charges, expenses or commissions in connection with effecting cover, and any other reasonable expense incident to the default.

(b) Consequential damages resulting from a lessor's default include:

(1) any loss resulting from general or particular requirements and needs of which the lessor at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and

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

[Reporter's Note- this section remains unchanged from the current law.]

SECTION 2A-521. RIGHT TO SPECIFIC PERFORMANCE OR REPLEVIN OR THE LIKE.

(a) Specific performance may be decreed where the goods are unique or in other proper circumstances. In a contract other than a consumer contract, the court may enter a decree for specific performance if the parties have agreed to that remedy. However, even if the parties agree to specific performance, the court may not enter a decree for specific performance if the defaulting party's sole remaining contractual obligation is the payment of money.

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

(c) The lessee has a right of replevin or the like for goods identified to the contract if after reasonable effort the lessee is unable to effect cover for those goods or the circumstances

reasonably indicate that the effort will be unavailing or if the goods have been shipped under reservation and satisfaction of the security interest in them has been made or tendered.

[Reporter's Note – Consistent with the content of the section and Revised Article 2 , the section heading has eliminated the reference to “Lessee” and has been expanded to refer to “. . . replevin or the like.” The assumption is that either the lessor or the lessee can demand specific performance in appropriate circumstances (see next Reporter's Note).]

[Reporter's Note – A comment should indicate that in subsection (a) the phrase “other proper circumstances” is not limited to the goods. The obligation of the parties may be more than the tendering of the goods or the payment of money – there may be unusual terms that neither party can replicate in the marketplace.]

[Reporter's Note – Subsection (a) adds the following sentence to current law: “In a contract other than a consumer contract, the court may enter a decree for specific performance if the parties have agreed to that remedy.” This recognizes that under the general principle of freedom of contract, as well as the development of commercial practices consistent with this principle, parties should be able to arrange for specific performance if they so agree.]

[Reporter's Note – The last sentence of subsection (a) is new. Because we have extended the right of specific performance to lessors as well as lessees, we have opened up the possibility of lessors using this provision to force the payment of money judgments. The specific performance provision should not be read as creating a new right to enforce money judgments.]

[Reporter's Note – The language in subsection (c) “detinue, sequestration, claim and delivery, has been deleted consistent with Article Two.]

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

(a) Subject to subsection (b) and even though the goods have not been shipped, a lessee who has paid a part or all of the rent and security for goods identified to a lease contract (Section 2A-217) on making and keeping good a tender of any unpaid portion of the rent and security due under the lease contract may recover the goods identified from the lessor if:

(1) in the case of goods leased for personal, family, or household purposes, the lessor repudiates or fails to deliver as required by the lease contract; or

(2) in all cases, the seller becomes insolvent within ten days after receipt of the first installment on their price.

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

[Reporter's Note – Subsection (a) has been rewritten consistent with Revised Article 2 to provide a special reclamation rule for consumers.]

C. DEFAULT BY LESSEE

SECTION 2A–523. LESSOR'S REMEDIES.

(a) If the lessee wrongfully rejects or revokes acceptance of goods or fails to make a payment when due or repudiates with respect to a part or the whole, the lessee is in default under the lease contract with respect to any goods involved and the lessor may do one or more of the following:

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

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

(3) proceed under Section 2A-524 with respect to goods still unidentified to the lease contract or unfinished;

(4) obtain specific performance under Section 2A-521 or recover the rent under Section 2A-529;

(5) dispose of the goods and recover damages under Section 2A-527 or

retain the goods and recover damages under Section 2A-528;

(6) recover incidental and consequential damages under Sections 2A-530;

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

(8) recover liquidated damages under Section 2A-504;

(9) enforce limited remedies under Section 2A-503;

(10) exercise any other rights or pursue any other remedies provided in the

lease agreement.

(b) If a buyer becomes insolvent but is not in default of the lease contract under subsections (a) or (d), the lessor may:

(1) refuse to deliver the goods under subsection (a) of Section 2A-525;

(2) take possession of the goods under subsection (b) of Section 2A-525;

or

(3) stop delivery of the goods by any bailee or carrier under subsection (a)

of Section 2A-526.

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

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

(1) if the default substantially impairs the value of the lease contract to the

lessor, the lessor may exercise the rights and pursue the remedies under subsection (a) or (b); or

(2) if the default does not substantially impair the value of the lease

contract to the lessor, the lessor may recover under subsection (b).

[(e) Unless the lease contract provides for liquidated damages enforceable under Section 2A-504 or a limited remedy under Section 2-503 an aggrieved party may not recover that part of a loss resulting from a default that could have been avoided by reasonable measures under the circumstances.]

[Reporter's Note – Subsection (a) is revised along the lines of Revised Article 2 to give a more complete list of remedies. Also in accord with Revised Article 2, subsection (a) now states the lessor's remedies upon the lessee's insolvency.]

This section does not follow the revision of Article 2 in defining a default, for the purpose of doing so in Article 2 is to explicitly provide for contractual as well as statutory defaults, and this is already provided for in subsection (c) of this section. A carefully drawn out scheme of rights for contractual defaults already exists in Article 2A, and there is nothing in the revision of Article 2 to justify reworking that balance.

[Reporter's Note – Subsection (e) is new, and comes from Revised Article 2. It is bracketed for further discussion.]

SECTION 2A–524. LESSOR'S RIGHT TO IDENTIFY GOODS TO LEASE

CONTRACT.

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

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

(2) dispose of goods (Section 2A–527(a)) that demonstrably have been intended for the particular lease contract even though those goods are unfinished.

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

[Reporter's Note – This section remains unchanged from the current law.]

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

(a) If a lessor discovers the lessee to be insolvent, the lessor may refuse to deliver the goods.

(b) After a default by the lessee under the lease contract of the type described in Section 2A-523(1) or 2A-523(3)(a) or, if agreed, after other default by the lessee, the lessor has the right to take possession of the goods. If the lease contract so provides, the lessor may require the lessee to assemble the goods and make them available to the lessor at a place to be designated by the lessor which is reasonably convenient to both parties. Without removal, the lessor may render unusable any goods employed in trade or business, and may dispose of goods on the lessee's premises (Section 2A-527).

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

[Reporter's Note – This section remains unchanged from the current law.]

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

(a) A lessor may stop delivery of goods in the possession of a carrier or other bailee if the

lessor discovers the lessee to be insolvent when the lessee repudiates or fails to make a payment due before delivery, whether for rent, security or otherwise under the lease contract, or for any other reason the lessor has a right to withhold or take possession of the goods.

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

(1) receipt of the goods by the lessee;

(2) acknowledgment to the lessee by any bailee of the goods, except a carrier, that the bailee holds the goods for the lessee; or

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

(c)(1) To stop delivery, a lessor shall so notify as to enable the bailee by reasonable diligence to prevent delivery of the goods.

(2) After notification, the bailee shall hold and deliver the goods according to the directions of the lessor, but the lessor is liable to the bailee for any ensuing charges or damages.

A carrier or other bailee need not stop delivery if the seller does not provide indemnity for charges or damages upon demand of the carrier or bailee.

(3) A carrier who has issued a nonnegotiable bill of lading is not obliged to obey a notification to stop received from a person other than the consignor.

[Reporter's Note – Consistent with Revised Article 2, subsection (a) eliminates the restriction on the right of stoppage in transit to “carload, truckload, planeload or larger shipments” when the buyer fails to pay or repudiates the agreement, but protects the bailee by allowing a demand for indemnity. This change is based on the assumption that the present limitation is incompatible with current shipping capabilities.]

[Reporter's Note – The second sentence of subsection (c)(2) is new and conforms with Revised Article 2.]

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

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

(b) Except as otherwise provided with respect to damages liquidated in the lease agreement (Section 2A-504) or otherwise determined pursuant to agreement of the parties (Sections 1-102(3) and 2A-503), if the disposition is by lease agreement substantially similar to the original lease agreement and the new lease agreement is made in good faith and in a commercially reasonable manner, the lessor may recover from the lessee as damages (i) accrued and unpaid rent as of the date of the commencement of the term of the new lease agreement, (ii) the present value, as of the same date, of the total rent for the then remaining lease term of the original lease agreement minus the present value, as of the same date, of the rent under the new lease agreement applicable to that period of the new lease term which is comparable to the then remaining term of the original lease agreement, and (iii) any incidental and consequential damages allowed under Section 2A-530, less expenses saved in consequence of the lessee's default.

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

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

more of the requirements of this Article.

(e) The lessor is not accountable to the lessee for any profit made on any disposition. A lessee who has rightfully rejected or justifiably revoked acceptance shall account to the lessor for any excess over the amount of the lessee's security interest (Section 2A-508(e)).

[Reporter's Note – This section remains unchanged from the current law.]

SECTION 2A-528. LESSOR'S DAMAGES FOR NONACCEPTANCE, FAILURE TO PAY, REPUDIATION, OR OTHER DEFAULT.

(a) Except as otherwise provided with respect to damages liquidated in the lease agreement (Section 2A-504) or otherwise determined pursuant to agreement of the parties (Sections 1-102(3) and 2A-503), if a lessor elects to retain the goods or a lessor elects to dispose of the goods and the disposition is by lease agreement that for any reason does not qualify for treatment under Section 2A-527(b), or is by sale or otherwise, the lessor may recover from the lessee as damages for a default of the type described in Section 2A-523(a) or 2A-523(c)(1), or, if agreed, for other default of the lessee, (i) accrued and unpaid rent as of the date of default if the lessee has never taken possession of the goods, or, if the lessee has taken possession of the goods, as of the date the lessor repossesses the goods or an earlier date on which the lessee makes a tender of the goods to the lessor, (ii) the present value as of the date determined under clause (i) of the total rent for the then remaining lease term of the original lease agreement minus the present value as of the same date of the market rent at the place where the goods are located computed for the same lease term, and (iii) any incidental or consequential damages allowed under Section 2A-530, less expenses saved in consequence of the lessee's default.

(b) If the measure of damages provided in subsection (a) is inadequate to put a lessor in as

good a position as performance would have, the measure of damages is the present value of the profit, including reasonable overhead, the lessor would have made from full performance by the lessee, together with any incidental or consequential damages allowed under Section 2A-530.

[Reporter's Note – Consistent with Revised Article 2, the last clause of existing subsection (b) (“due allowance for costs reasonably incurred and due credit for payments or proceeds of disposition”) has been deleted.]

[Reporter's Note – Consistent with the revision of section 2A-530, this section now provides for consequential as well as incidental damages in both subsections (a) and (b).]

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

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

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

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

2A-530, less expenses saved in consequence of the lessee's default.

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

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

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

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

[Reporter's Note – Consistent with the revision of section 2A-530, this section now provides for consequential as well as incidental damages in both subsections (a) and (b).]

SECTION 2A-530. LESSOR'S INCIDENTAL AND CONSEQUENTIAL DAMAGES.

(a) Incidental damages to an aggrieved lessor include any commercially reasonable

charges, expenses, or commissions incurred in stopping delivery, in the transportation, care and custody of goods after the lessee's default, in connection with return or disposition of the goods, or otherwise resulting from the default.

(b) Consequential damages resulting from a lessee's default include any loss resulting from general or particular requirements and needs of which the lessee at the time of contracting had reason to know and which could not reasonably be prevented by disposition under Section 2A-527 or otherwise.

(c) Unless otherwise agreed, in a consumer lease contract, a lessor cannot recover consequential damages from a consumer.

[Reporter's Note – This section has been rewritten consistent with Revised Article 2 to provide for consequential damages for lessors.]

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

(a) If a third party so deals with goods that have been identified to a lease contract as to cause actionable injury to a party to the lease contract (a) the lessor has a right of action against the third party, and (b) the lessee also has a right of action against the third party if the lessee:

(1) has a security interest in the goods;

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

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

(b) If at the time of the injury the party plaintiff did not bear the risk of loss as against the other party to the lease contract and there is no arrangement between them for disposition of the

recovery, the party plaintiff's suit or settlement, subject to the party plaintiff's own interest, is as a fiduciary for the other party to the lease contract.

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

[Reporter's Note – This section remains unchanged except for gender neutral language.]

SECTION 2A-532. LESSOR'S RIGHTS TO RESIDUAL INTEREST.

In addition to any other recovery permitted by this Article or other law, the lessor may recover from the lessee an amount that will fully compensate the lessor for any loss of or damage to the lessor's residual interest in the goods caused by the default of the lessee.

[Reporter's Note – This section remains unchanged from the current law.]