

ARTICLE 2A
MAY 1997 DRAFT

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1 **PART 1.**

2 **GENERAL PROVISIONS**

3 **SECTION 2A-101. SHORT TITLE.** This article may be cited as the Uniform
4 Commercial Code - Leases.

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

6 (a) Unless the context otherwise requires, In this article :

7 (1) "Authenticate" means to sign or to execute or adopt a symbol, including a
8 digital signal, and identifier, ~~or other symbol, or to do an act that encrypts a record or~~
9 ~~an electronic message in whole or part, with present intent to adopt, sign for~~
10 ~~authenticate]~~ ~~[otherwise conform]~~ ~~[establish the authenticity of, or signify a party's~~
11 ~~acceptance and adoption of,]~~ of a record or term that contains the authentication or to
12 which a record containing the authentication refers.

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

22 Drafting Comment

23 The Buyer in ordinary course definition will be deleted when the Article 9 revisions are
24 made. The only reason for having the definition on Article 2A is that it was thought that
25 "ownership rights" in the present 1-201 definition might not cover rights of a lessee. The

1 definition has not been conformed to the present Article 9 definition since the definition will
2 disappear when revised Article 9 is adopted.

3 (3) "Cancellation" means an act by either party which ends a lease contract
4 because of a default by the other party.

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

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

13 [(6) "Consumer lease" means a lease that a lessor regularly engaged in the
14 business of leasing or selling makes to a lessee who is an individual and who, at the
15 time of contracting, intends to use the leased goods primarily for a personal, family, or
16 household use. The term does not include an individual who leases goods, that at the
17 time of contracting, are intended by the individual to be used primarily for professional
18 or commercial purposes.]

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

[6a) "Consumer lease" means a lease between a lessor regularly engaged in
the business of leasing or selling and a consumer.]

Drafting Comment

Revised Article 2 defines "consumer goods" and does not include a dollar cap in the definition. Some states have not included a dollar cap in present 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.

Revised Article 2, January, 97 draft, also has a definition of consumer' "'Consumer' means an individual who buys or contracts to buy goods, that at the time of contracting, are intended by the buyer primarily for personal family or household use." I don't believe we use the term "consumer" anywhere in Article 2A, except as a part of the phrase "consumer lease", so I don't think we need the separate definition. I don't know whether Article 2 needs it.

We have suggested to Article 2 that the use only a single definition as does 2A. However, they have not seen fit to collapse their two definitions into one. Should we give up and adopt the Article 2 style?

(7) "Delivery" means the transfer of physical possession or control of goods.

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

Comment

This definition follows the most recent draft of 2B .

(9) "Electronic message" means a record that, for purposes of communication to another person, is stored, generated, or transmitted for purposes of communication to another party or an electronic agent by electronic, optical, or similar means. The term includes electronic data interchange, electronic or voice mail, facsimile, telex, telecopying, scanning and similar communications.

1 (10) "Electronic transaction" means a transaction ~~in which the parties~~
2 ~~contemplate that a contract will be~~ formed by electronic messages in which the
3 messages of one or both parties will not be reviewed by an individual as a routine step
4 in forming the contract.

5
6 (10) "Finance lease" means a lease with respect to which:

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

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

11 (C) one of the following occurs:

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

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

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

1 which the lessor acquired the goods or the right to possession and use of the
2 goods; or

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

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

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

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

17 Drafting Comment

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

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

28 Also, the Stephen Whelan letter from the ABA group also urges the White amendment.
29 However, at the February meeting, the committee voted 4-2 to delete the language.
30

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

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

9 Drafting Comment

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

11 Drafting Comment

12 Definition of "installment lease" is moved to 2A-726, following Article 2.

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

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

22 (15) "Lease contract" means the total legal obligation resulting from the lease
23 agreement as affected by this article and other applicable ~~rules of~~ law. The term
24 includes a sublease contract unless the context clearly indicates otherwise.

Drafting Comment

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

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

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

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

Drafting Comment

Definition (18) will be moved to Article 1 when that Article is revised to conform to the Article 9 rules..

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

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

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

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

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

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

16 (23) "Record", ~~as a noun~~, means information that is inscribed on a tangible
17 medium or that is stored in an electronic or other medium and is retrievable in
18 perceivable form.

19 ~~———— (25) "Standard form" means a record prepared by one party in advance for~~
20 ~~general and routine repeated use which substantially consists of standard terms and is~~
21 ~~used in a transaction without negotiation or customization of, or changes in, the~~
22 ~~substantial majority of the standard terms. Negotiation or customization of price,~~
23 ~~quantity, method of payment, time of delivery, or method of delivery does not preclude~~
24 ~~a record from being a standard form.~~

1 (26) "~~Standard terms~~" means a terms prepared in advance for general and
2 ~~repeated use by one party.~~

3 (27) "Sublease" means a lease of goods whose right to possession and use
4 ~~was~~ is acquired by the lessor as a lessee under an existing lease.

5 (28) "Supplier" means a person from which a lessor buys or leases goods to
6 be leased under a finance lease.

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

9 (30) "Termination" means an act by a party, ~~pursuant~~ under a to a power
10 created by agreement or law, which puts an end to a lease contract for a reason other
11 than default by the other party.

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

13 "Account". Section 9-103(a).

14 "Between merchants". Section 2-102(2).

15 "Buyer". Section 2-102(3).

16 "Chattel paper". Section 9-102(a)(3).

17 "Consumer goods". Section 9-106(a).

18 "Document". Section 9-102(a)(12).

19 "Entrusting". Section 2-404(d).

20 "General intangibles". Section 9-103(b).

21 "Good faith". Section 2-102(a)(19).

22 "Instrument". Section 9-102(a)(20).

23 "Merchant". Section 2-102(21).

24 "Mortgage". Section 9-102(a)(22).

1 "Pursuant to commitment". Section 9-102(a)(27).

2 "Receipt". Section 2-102(23).

3 "Sale". Section 2-102(27).

4 "Sale on approval". Section 2-406(a)(2)

5 "Sale or return". Section 2-406(a)(1)

6 "Seller". Section 2-103(1)(d).

7 Drafting Comment

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

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

11
12 **SECTION 2A-103. SCOPE.**

13 (a) This article applies to any transaction regardless of form ~~that~~ which creates a
14 lease.

15 (b) If a transaction involves both information and goods ~~that are not copies of the~~
16 ~~information or documentation pertaining to the information~~, this article applies to the aspects of
17 ~~the transaction and their performance and rights in~~ which involve the goods and their
18 performance and rights in the goods other than the copies of and packaging or documentation
19 pertaining to the information. ~~but article 2B applies to the aspects of the transaction involving~~
20 ~~the information and copies or documentation of the information.~~ However, this article applies to
21 a lease of a computer program that was not developed specifically for a particular transaction if
22 that program is embedded in goods other than a copy of the program or an information
23 processing machine unless the program is copied in the ordinary course of using the goods and
24 is not the subject of a separate license with the lessee.

(2-103, page 8)

Drafting Comment--January, 1997

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

Notes

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

Subsection (b) deals with transactions in which both goods and information licensed under 2B are involved. See 2B-103 on the scope of Article 2B. Presumably, Article 2B governs all disputes over "licenses of information and software contracts" and "related" support and maintenance agreements. 2B-103(a). Article 2A, however, lay apply to transactions excluded from 2B under 2B-103(d). Under 2B-103(d) "a sale or lease of a copy of a computer program that was not developed specifically for a particular transaction " is excluded by 2B-103(d)(3) if the program is "embedded in goods". Therefore all aspects of such a transaction would be governed by Article 2A if the underlying transaction is a lease of the goods in which the computer program is embedded.

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

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

(1) ~~certificate of title statute of this State~~: [list any certificate of title statutes covering automobiles, trailers, mobile homes, boats, farm tractors, and the like]; except as to the rights of a lessee in the ordinary course of business under [the equivalent of Section 2-504(d)] whose rights arise before a certificate of title covering the goods is effective in the name of the [competing?] [buyer][party].

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

(3) any applicable consumer protection statute or final consumer protection

~~decision of a court of this State existing on the effective date of this article or consumer protection statute of this State; or~~

~~[(4) List any other statute law of this State to which Article 2A is subject.]~~

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

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

(c) With respect to this Act, failure to comply with ~~an applicable law~~ a statute or decision referred to in subsection (a) has only the effect specified therein.

(2-104, page 10)

Drafting Comment - May, 1997

The latest version of 2-104 raises a number of issues for 2A. First, 2-104(a)(1) overrides certificate of title legislation as to rights of buyers in ordinary course under 2-504(d) if their rights arose before "a certificate of title covering the goods is effective in the name of the buyer." The "buyer here is probably meant to be a competing buyer. If the last reference to "buyer" is to the protected buyer in ordinary course, I don't understand the subsection. 2-504(d) is the entrusting provision of Article 2. Perhaps we should include a similar rule in Article 2A, but 2A presently is subject to both in state and other state certificate of title laws with no exception for lessee in ordinary course situations. I'm not clear regarding the practice in long term auto leasing: are certificates of title ever issued in the names of the lessees?

1 What do you think of the specific listing which is now in (a)(4)? Look at the listing in 2-
2 104 (page 10) . I have omitted items, such as blood products, which I thought could not be
3 leased.

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

6 Subject to Sections 2A-401(c) and 2A-402(c), with respect to goods covered by a
7 certificate of title issued under a statute of this State or of another jurisdiction, compliance and
8 the effect of compliance or noncompliance with a certificate-of-title statute are governed by the
9 law, including the conflict-of-laws rules, of the jurisdiction issuing the certificate until the earlier
10 of the time the certificate ceases to be effective under the law of that jurisdiction or the time
11 the goods subsequently become covered by another certificate of title from another jurisdiction.

12 Drafting Comment-May. 1997

13 2A-105 is conformed to the new rules of Article 9. See 9-303 in the February, 1997
14 draft.

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

18 A choice-of-law term in a consumer lease contract is not enforceable if the law chosen
19 by the parties to a consumer lease is that of a jurisdiction other than a jurisdiction one in which
20 the lessee resides at the time the lease agreement becomes enforceable or within 30 days
21 thereafter or in which the goods are to be used; or the choice is not enforceable.

22 [(b) The parties may choose an exclusive judicial form. However, in a consumer lease
23 the choice is not enforceable if the chosen jurisdiction would not otherwise have jurisdiction

1 over the consumer and the choice unfairly disadvantages the consumer. A choice of form in a
2 term of an agreement is not exclusive unless the agreement expressly so provides.]

3 Drafting Comment

4 The ELA memorandum, page 10, asks that this section specifically state that choice of
5 law/forum selection clauses are valid in commercial leases. Choice of law is dealt with in 1-105,
6 and probably should not be separately addressed in Article 2A. Since Article 2B presently does
7 state specifically that, except in consumer transactions, the parties may choose the forum,
8 perhaps we should also. Notice the 2B weakening of the limitation of the effectiveness of forum
9 selection clauses in consumer transactions.

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

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

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

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

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

(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 which 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.

(2-105, page 12)

Drafting Comment

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

The final version of 2A will contain a comment modelled on a U3C comment of unconscionable inducement.

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

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

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

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

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

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

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

8 Drafting Comment

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

11 **PART 2**

12 **FORMATION. TERMS, AND READJUSTMENT OF LEASE CONTRACT**

13 **[SECTION 2A-201. FORMAL REQUIREMENTS; STATUTE OF FRAUDS; SEALED**
14 **INSTRUMENTS.**

15 (a) Except as otherwise provided in this section, a lease contract ~~[an agreement for~~
16 ~~the lease of goods which is otherwise valid as a contract]~~ is not enforceable by way of action or
17 defense unless:

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

20 (2) there is a record, authenticated by the party against which enforcement is
21 sought or by ~~his~~ the party's agent, sufficient to indicate that a lease contract has been
22 made between the parties and to describe the goods leased and the duration of the
23 lease.

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

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

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

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

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

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

20 ~~_____ [(3) to the extent that performance has been tendered by one party and~~
21 ~~accepted by the other party;]~~

22 ~~_____ [(4) to the extent of an agreement enforceable under this section by which the~~
23 ~~parties waive the requirements of this section as to future transactions;]~~

1 ~~——— [(e) By an agreement that is enforceable under this section, the parties may waive the~~
2 ~~requirements of this section as to future transactions]~~

3 ~~——— (f) A contract enforceable under this section is not unenforceable merely because it is~~
4 ~~not capable of being performed within one year after its making.~~

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

6 (1) if there is a record authenticated by the party against ~~whom~~ which
7 enforcement is sought or by that party's authorized agent specifying the duration of the
8 lease, the period so specified;

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

12 (3) a reasonable duration.

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

16 **[SECTION 2-201. FORMAL REQUIREMENTS; STATUTE OF FRAUDS; SEALED**
17 **INSTRUMENTS.**

18 (a) Except as otherwise provided in this section, a claim for default under a lease
19 contract in which the total payments are \$20,000 or more is not enforceable by way of action or
20 defense against a person that denies that an agreement was made unless there is a record
21 authenticated by the person against which the claim is asserted as the record of that person
22 and which is sufficient to indicate that a contract was made. A record is no/t insufficient merely
23 because it omits or incorrectly states a term agreed upon, including a quantity term. If the
24 record contains a quantity term, the claim is not enforceable beyond that quantity. However, a

1 court may not dismiss a claim under this subsection until the aggrieved party has had a
2 reasonable opportunity to test the other party's denial that an agreement was made.

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

7 (c) A claim for breach of an otherwise valid lease contract which is barred under
8 subsection (a) is enforceable if:

9 (1) the goods are to be specially manufactured or processed for the lessee, and
10 the lessor substantially manufacturers or processes the goods in performance of a contract
11 believed in good faith to exist, and the lessor cannot relet or sell the goods at a reasonable
12 price;

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

15 (3) reliance by one party on representations or an agreement estops the other
16 party from raising the lack of a sufficient authenticated record as a defense; or

17 (4) the party against whom enforcement is sought admits in pleading or
18 testimony in court or otherwise under oath that a lease contract was made.

19 (d) A claim for breach of a lease contract enforceable under this section is not
20 enforceable on the ground that it is not capable of being performed within one year or any other
21 applicable period after its making.

22 (e) Affixing a seal to a record evidencing a lease contract or offer does not make the
23 record a sealed instrument. The law with respect to sealed instruments does not ap/ply to the
24 lease contract or offer.]

(2-201, page 16)

Drafting Comment - May 1997

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

To what extent should article 2a follow new 2-201. Among the issues are:

- 1) Should the dollar threshold be raised?
- 2) Should a party pleading the statute be forced to deny that a contract was made
- 3) Should a court be required to give a party a reasonable opportunity to "test a denial" that an agreement was made before dismissal of a suit?
- 4) Should estoppel principles be stated in the statute?
- 5) Should the slight changes in 2-201(c)(1) and (2) be adopted?
- 6) Should the admission which makes the contract enforceable be extended to an admission under oath not made in the pleading or testimony.

**SECTION 2A-202. ~~FINAL WRITTEN EXPRESSION: PAROL OR~~
EXTRINSIC EVIDENCE.**

(a) Terms on which ~~the confirmatory memoranda~~ records of the parties agree, or which are otherwise set forth in a record intended by the parties as a final expression of their agreement with respect to the included terms, may not be contradicted by evidence of a previous agreement or contemporaneous oral agreement. However, the terms may be explained by any relevant evidence and, ~~in addition, terms~~ may be supplemented by evidence of:

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

(2) noncontradictory additional terms that if agreed upon by the parties would not certainly have been included in the record, unless the court finds that the record was intended as a complete and exclusive statement of the terms of the agreement.

~~(b) In determining whether the parties intended a record to be final or complete and exclusive with respect to some or all of the terms, the following rules apply:~~

1 ~~————— (1) The court shall consider all evidence relevant to intention of the parties to~~
2 ~~integrate the record, including evidence of a previous agreement or representation or of~~
3 ~~a contemporaneous oral agreement or representation.~~

4 ~~————— (2) Except in a consumer contract, a contractual term indicating that the~~
5 ~~record completely embodies the agreement of the parties is presumed to state the~~
6 ~~intention of the parties on the issue.~~

7 (2-202, page 19)

8 Drafting comment

9 The above draft follows exactly the May 16 draft of Article 2.

10 **~~SECTION 2A-203. SEAL INOPERATIVE.~~** ~~The affixing of a seal to a writing evidencing~~
11 ~~a lease contract or an offer to enter into a lease contract does not render the writing a sealed~~
12 ~~instrument. The law with respect to sealed instruments does not apply to the lease contract or~~
13 ~~offer.~~

14 Drafting Comment - January, 1997

15 This section, following Article 2, is a part of 2-201.

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

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

20 (b) If the parties so intend, an agreement sufficient to make a lease contract may be
21 found even if the time when the agreement was made it cannot be determined, ~~or~~ one or more
22 terms are left open or to be agreed upon, or the records of the parties do not otherwise
23 establish a contract.

1 (c) Even if one or more terms are left open, a lease contract does not fail for
2 indefiniteness if there is a reasonably certain basis for an appropriate remedy.

3 (2-203, page 22)

4 Drafting Comment - May, 1997

5
6 The above draft includes changes made in the March and May article 2 drafts.

7 See 2-203(d) in the May 16 Article 2 draft. That is, apparently, a small remnant of the form
8 contract material in article 2. It is not included in the above version of 2A-203. The Article 1
9 committee, in its coordination mode, suggests that the article 2 committee again consider
10 whether to retain 2-203(d).

11 **SECTION 2A-204. FIRM OFFERS.**

12 An offer by a merchant to lease goods to or from another person made in an
13 authenticated record that by its terms gives assurance the offer will be held open is not
14 revocable for lack of consideration during the time stated. If a time is not stated, the offer is
15 irrevocable for a reasonable time not exceeding 90 days. A term of assurance in a record
16 supplied by the offeree is ineffective unless the term is conspicuous.

17 (2-204, page 23)

18 **SECTION 2A-205. OFFER AND ACCEPTANCE IN FORMATION OF**
19 **LEASE CONTRACT.**

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

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

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

4 (d) In an electronic transaction:

5 (1) a contract is formed by the interaction of two electronic agents if the interaction
6 results in both agents engaging in further actions that signify a contract, such as by engaging in
7 performing the agreement, ordering or instructing performance, accepting performance, or
8 making a record of the existence of a contract.

9 (2) a contract is formed by the interaction of an electronic agent and an individual
10 who has reason to know that the individual is dealing with an electronic agent and performs
11 actions it should know will cause the agent to perform or to permit further use, or that are
12 clearly indicating as constituting acceptance regardless of other contemporaneous expressions
13 of the individual to which the agent cannot react; and

14 (3) the terms of the contract include terms of which the parties have previously
15 agreed, terms which the electronic agents could take into account, and, to the extent not
16 covered by the foregoing, terms provided by this article or other law.

17 (2-205, page 24, 2B-307(e),(f))

18 **SECTION 2A-206. CONSUMER CONTRACTS; RECORDS.**

19 (a) In a consumer contract, if a consumer agrees to a record by authentication or
20 affirmative conduct, any non-negotiated term that a reasonable consumer in a transaction of
21 this type would not reasonably expect to be in the record is excluded from the contract, unless
22 the consumer had knowledge of the term before agreeing to the record.

(b) Before excluding a term under subsection (a), the court, on motion of a party or its own motion, after affording the parties a reasonable and expeditious opportunity to present evidence on whether the term should be included or excluded from the contract, shall decide the question as a matter of law.

(c) This section shall not operate to exclude an otherwise effective term disclaiming or modifying an implied warranty.

(2-206, page 27)

Drafting Comment - May 1997

In the February meeting, the 2A committee decided to look examine the latest article 2 draft dealing with consumer contracting through use of forms.

Also note the latest version of 2-207 (page 30 of the May article 2 draft), the battle of the forms section. Do we still regard that section as unnecessary in article 2A?

SECTION 2A-207. ATTRIBUTION PROCEDURE.

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

(b) The commercially reasonable of an attribution procedure is a question of law to be determined by the court in light of the purposes of the procedure and the commercial circumstances at the time of the agreement, including the nature of the transaction, volume of similar transactions engaged in by either or both of the parties, availability of alternatives offered to but rejected by the party, cost of alternative procedures, and procedures in general use for similar types of transactions. An attribution procedure may require the use of algorithms

1 or other codes, identifying words or numbers, encryption, callback procedures, key escrow, or
2 any security devices that are reasonable under the circumstances.

3 (c) Except as otherwise provided in Section 2-212, if a loss occurs because a party
4 complies with a procedure that was not commercially reasonable, the party that proposed or
5 required use of the procedure bears the loss unless it disclosed the nature of the risk to the
6 other party or offered commercially reasonable alternatives that the party rejected.

7 (2B-110)

8 **SECTION 2A-208. ATTRIBUTION OF ELECTRONIC RECORD, MESSAGE, OR**
9 **PERFORMANCE.**

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

12 (1) it was send by that party, its agent, or its electronic agent;

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

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

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

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

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

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

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

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

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

9 (1) If the sender complied with the attribution procedure and the error would have
10 been detected had the receiving party also complied with the attribution procedure, the sender
11 is not bound if the error pertains to a material element of the message or performance,

12 (2) If the sender would not be bound under subsection (c)(1) but receives notice
13 that the message or performance was received and the notice describes the content that
14 contains the error, the sender has a duty of reasonable care to discover and report the error to
15 the receiving party. In the event of a failure to exercise reasonable care, the sender is liable for
16 losses incurred by the other which would have been prevented by the sender's exercise of
17 reasonable care and would not have been prevented by the exercise of reasonable care by the
18 receiving party.

19 (d) Except as otherwise provided in subsection (a)(1) and (c), if a loss occurs because
20 a party complies with a procedure for attribution that was not commercially reasonable, the
21 party that required use of the procedure bears the loss unless it disclosed the nature of the risk
22 to the other party or offered commercially reasonable alternatives that the party rejected. The

1 party's liability under this section is limited to losses that could not have been prevented by the
2 exercise of reasonable care by the other party.

3 (2B-111)

4 **SECTION 2A-209. PROOF OF AUTHENTICATION.**

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

8 (b) A record or message is authenticated as a matter of law if a party complied with an
9 attribution procedure for authentication. Otherwise, authentication may be proven in any
10 manner including by showing that a procedure existed by which a party necessarily must have
11 executed or adopted a symbol in order to proceed further in the use or processing of the
12 information.

13 (2B-114)

14 **SECTION 2A-210. ELECTRONIC TRANSACTIONS AND MESSAGES: TIMING OF**
15 **CONTRACT FORMATION.**

16 (a) If an electronic message initiated by a party or an electronic agent evokes an
17 electronic message in response and the messages reflect or can be attributed with the intent to
18 be bound, a contract ~~exists~~ is formed when:

19 (1) the response is received, if the response consists of furnishing the
20 requested information or notice of access to the information and the originating
21 message did not prohibit that form of response; or

22 (2) the sender of the originating message receives an electronic message
23 signifying acceptance.

1 ~~(b) In an electronic transaction, a contract is formed although no individual~~
2 ~~representing either party was aware of or reviewed the initial message, response, reply,~~
3 ~~information, or action signifying acceptance.~~

4 (b) Subject to Section 2A-208, An electronic message is effective when received even
5 if no individual is aware of its receipt.

6 (Based on 2B-204)

7 **SECTION 2A-211. ACKNOWLEDGEMENT OF ELECTRONIC MESSAGE.**

8 (a) If the originator of an electronic message requests or has agreed with the
9 addressee of the message that receipt of the message be acknowledged, the following rules
10 apply:

11 (1) If the originator indicates in the message or otherwise that the message was
12 conditional on receipt of an acknowledgement, the message does not bind the originator until
13 acknowledgement is received.

14 (2) If the originator requested acknowledgement but did not state that the message
15 was conditional on acknowledgment and acknowledgement has not been received within a
16 reasonable time after the message was sent, on notice to the other party, the originator may
17 either retract the message or specify a further reasonable time within which acknowledgement
18 must be received or the message will be treated as not having binding effect.

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

22 (b) If the originator timely receives acknowledgment of receipt, the acknowledgment
23 creates a presumption that the message was received by the addressee but does not itself

1 imply that the content of the message sent corresponds to the content of the message
2 received.
3 (2B-205)
4

5 **PART 3**

6 **CONSTRUCTION OF LEASE CONTRACT**

7 **SECTION 2A-301. COURSE OF PERFORMANCE OR PRACTICAL** 8 **CONSTRUCTION.**

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

13 (b) Express terms of a lease agreement, course of performance, course of dealing,
14 and usage of trade must be construed whenever reasonable as consistent with each other.
15 However, if that construction is unreasonable:

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

18 (2) ~~course of performance controls~~ prevails over course of dealing and usage
19 of trade; and

20 (3) course of dealing ~~controls~~ prevails over usage of trade.

21 (c) Subject to Section 2A-302, course of performance is relevant to show a waiver or
22 modification of a term inconsistent with the course of performance.

23 (2-209, page 37)

Drafting Comment

This section will probably be moved to Article 1.

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

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

(b) The agreement modifying a contract under subsection (a) may be binding even if the requirements of the statute of frauds are not satisfied.

(c) Except in a consumer lease contract, a lease agreement that contains a term prohibiting modification or rescission except by an authenticated record may not be otherwise modified or rescinded. However, a party whose language or conduct is inconsistent with ~~a the~~ term ~~requiring a signed record to modify or rescind the contract~~ may not assert the term if the language or conduct induced the other party to change its position reasonably and in good faith.

(d) Except as otherwise provided in subsection (c), a contractual term that is not part of the agreed performance may be waived. Language or a course of performance between the parties is relevant to show a waiver of any term inconsistent with that language or course of performance. The waiver of an executory portion of a contract may be retracted by reasonable notification received by the other party that strict performance is required of any term waived unless the waiver induced the other party to change its position reasonably and in good faith.

(2-210, page 38)

Drafting Comment-May, 1997

Since a statute of frauds has been included in Article 2, the section on modification and waiver has also been amended to add a reference to the statute of frauds. Presently, 2-210(b) reads : "If the agreement modifying the contract or the contract as modified are within Section 2-201, the requirements of the statute of frauds must be satisfied." The present Article 2A section makes no reference to the statute of frauds. I believe it is better not to refer to the

1 statute of frauds in the modification section, and leave those issues to the statute of frauds
2 section (2A-201). However, perhaps Article 2A should conform to whatever Article 2 does.

3 At the October meeting, the Committee expressed displeasure with the failure of
4 revised 2-210 to retain the rule that a waiver can be retracted unless retraction would be unjust
5 because of a material change of position by the other party. The Article 2 draft still refers
6 merely to "change of position reasonably and in good faith." There is no reference to the
7 materially of the change of position. Such we return to the present Code language under which
8 a waiver can be retracted "unless the retraction would be unjust in view of a material change of
9 position in reliance on the waiver:?"

10 Note the new limitation on waiver in subsection (d). Only terms that are not part of the
11 agreed performance may be waived. Is a requirement that payment be made on the first of the
12 month a "part of the agreed performance"? The formulation loses the idea of the Restatement
13 that the inability to waive applies only to a material part of the agreed exchange.
14 Even the Restatement limitation, however, may be inconsistent with the idea that modifications
15 are effective without consideration. It is probably better not to include the limiting language in
16 the statute.

17
18 **SECTION 2A-303. LESSEE UNDER FINANCE LEASE AS**
19 **BENEFICIARY OF SUPPLY CONTRACT.**

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

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

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

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

13 **SECTION 2A-304. IDENTIFICATION.**

14 Identification of goods as goods to which a lease contract refers may be made at any
15 time and in any manner expressly agreed to by the parties. In the absence of express
16 agreement, identification occurs when:

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

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

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

1 (2-502, page 78)

2 **SECTION 2A-305. INSURANCE AND PROCEEDS.**

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

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

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

11 (d) This section does not impair any insurable interest recognized under any other
12 statute or rule of law.

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

16 (2-502, page 78)

17 **SECTION 2A-306. RISK OF LOSS.**

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

20 (b) If under the lease ~~agreement~~ contract risk of loss will pass to the lessee but the
21 agreement does not specify when the risk passes, ~~then~~ except as otherwise provided in
22 subsections (c) through (e), risk of loss passes to the lessee upon receipt of the goods. If the
23 lessee does not intend to take possession, risk of loss passes to the lessee when it receives
24 control of the goods.

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

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

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

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

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

13 (2-612, page 101)

14 Drafting Comment - January, 1997

15 At the October, 1966, Committee meeting, the Committee asked that subsection (b)
16 contain some language referring to the failure of the agreement to specify when risk passes if
17 under the agreement risk is to pass to the lessee.

18 **SECTION 2A-307. CASUALTY TO IDENTIFIED GOODS.**

19 If the parties to a lease contract assume the continued existence and eventual delivery
20 to the lessee of goods identified when the lease contract is made and the goods suffer casualty
21 without fault of the lessee, the lessor, or the supplier before delivery, or if the goods suffer
22 casualty before risk of loss passes to the lessee ~~pursuant to~~ under the lease agreement or
23 Section 2A-306, and no commercially reasonable substitute is available, the following rules
24 apply:

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

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

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

(2-714, page 131)

Drafting Comment - May, 1997

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

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

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

2A-308. TERMINATION; SURVIVAL OF OBLIGATIONS.

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

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

/ (1) a right based on a previous default or performance of the contract ~~or under an indemnity;~~

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

3 (3) an obligation to return or dispose of goods; ~~which obligation must be~~
4 ~~promptly performed.~~

5 (4) a choice of law or forum;

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

8 (6) a term limiting the time for commencing an action or for providing notice;

9 and

10 (6) an indemnity provision;

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

12 and

13 (8) other rights, remedies, or limitations if in the circumstances such survival
14 is necessary to achieve the purposes of the parties.

15 (2-310, page 49).

16 Drafting Comment - May 1997

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

22 The changes in this draft, other than (b)(8), come from decisions of the article 1
23 drafting committee serving as a coordination committee. Subsection (b)(8) was added by
24 decision of the 2A drafting committee in February. The article 2 drafting committee did not
25 adopt the provision.

26 **SECTION 2-309. TERMINATION; NOTIFICATION**

1 ~~—— (a) A party may not terminate a lease contract, except on the happening of an~~
2 ~~agreement event unless the other party receives reasonable notification of the termination.~~

3 ~~—— (b) An agreement dispensing with notification is invalid if its operation is~~
4 ~~unconscionable. However, an agreement specifying standards for the nature and timing of~~
5 ~~notification is enforceable if the standards are not manifestly unreasonable.~~

6 (2-311, page 50)

7 Drafting Comment - May, 1997

8 Present Article 2A did not pick up the provision from present Article 2. At the
9 February, 1997, meeting the 2A committee voted not to include this section in 2A.

10 **PART 4**

11 **EFFECT OF LEASE CONTRACT**

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

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

16 **SECTION 2A-402. TITLE TO AND POSSESSION OF GOODS.**

17 Except as otherwise provided in this article, this article applies whether the lessor or a
18 third party has title to the goods, or the lessor, the lessee, or a third party has possession of the
19 goods, ~~notwithstanding and despite~~ any statute or rule of law that possession or the absence of
20 possession is fraudulent.

21 (2-501, page 76)

22 **SECTION 2A-403. ALIENABILITY OF PARTY'S INTEREST UNDER LEASE** 23 **CONTRACT OR OF LESSOR'S RESIDUAL INTEREST IN GOODS; DELEGATION** 24 **OF PERFORMANCE; TRANSFER OF RIGHTS.**

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

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

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

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

1 (e) A term of a lease agreement which prohibits a transfer of a right to damages for
2 default with respect to the whole lease contract or of a right to payment arising out of the
3 transferor's due performance of the transferor's entire obligation, or which makes such a
4 transfer an event of default, is not enforceable. Such a transfer is not a transfer that materially
5 impairs the prospect of obtaining return performance by, materially changes the duty of, or
6 materially increases the burden or risk imposed on, the other party to the lease contract within
7 the meaning of subsection (e).

8 (f) Subject to subsections (c) and (d):

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

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

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

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

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

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

10 (2-503, page 80)

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

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

17 (b) A lessor with voidable rights or title acquired in a transaction of purchase from a
18 transferor that has relinquished possession or control has power to transfer a good leasehold
19 interest to a good-faith, subsequent lessee for value until the ~~seller~~ transferor regains
20 possession or control, but only to the extent provided in subsection (a).

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

- 22 (1) the transferor was deceived as to the identity of the lessor;
23 (2) the delivery was in exchange for a check later dishonored;
24 (3) it was agreed that the transaction was to be a cash sale; or

1 (4) the delivery was procured through fraud punishable under the
2 criminal law.

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

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

12 (2-504, page 82)

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

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

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

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

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

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

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

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

(e) 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.

(2-504, page 82)

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

If a person in the ordinary course of its 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 has 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 the lien is created by rule of law and the rule of law provides otherwise.

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

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

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

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

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

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

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

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

19 Drafting Comment - January, 1997

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

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

1 (a) Except as otherwise provided in subsections (b) and (c), the rights of creditors of
2 the lessor with respect to goods identified to a lease contract and retained by the lessor are
3 subject to the lessee's rights under Sections 2A-708, 2A-722(d), and 2A-737 if the lessee's
4 rights vest before a creditor's claim in rem attaches to the goods.

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

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

16 (d) A creditor of a seller may treat a sale or an identification of goods to a contract for
17 sale as void or voidable if, as against the creditor, retention of possession by the seller is
18 fraudulent or void or voidable under any statute or rule of law. However, it is not fraudulent for
19 a seller to retain possession of the goods pursuant to a lease contract entered into by the seller
20 as lessee and the buyer as lessor in connection with the sale or identification of the goods if the
21 buyer bought for value and in good faith. (2-505, page 84)

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

24 (a) In this section:

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

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

5 (2) ~~a "fixture filing" is the~~ means a filing, in the office where a mortgage on
6 the real estate would be filed or recorded, of a financing statement covering goods that
7 are or are to become fixtures and conforming to the requirements of ~~subsection (a) of~~
8 Section ~~9-402~~ 9-502(a);

9 (3) ~~a lease is a~~ "purchase money lease" means a lease in which ~~unless the~~
10 lessee does not have ~~has~~ possession or use of the goods or the right to possession or
11 use of the goods [before][until] the lease agreement is enforceable;

12 (b) A mortgage is a construction mortgage to the extent that it secures an obligation
13 incurred for the construction of an improvement on land including the acquisition cost of
14 the land, if the recorded record so indicates; and

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

17 (c) ~~Under this Article~~ A lease under this article may be of goods that are fixtures or
18 may continue in goods that become fixtures, but there may be no lease ~~exists~~ under this article
19 of ordinary building materials incorporated into an improvement on land.

20 (d) This article does not prevent creation of a lease of fixtures ~~pursuant to~~ under real
21 estate law.

22 (e) The perfected interest of a lessor of fixtures has priority over a conflicting interest
23 of an encumbrancer or owner of the real estate if:

1 (1) except as otherwise provided in subsection (g), the lease is a purchase
2 money lease, the interest of the encumbrancer or owner arises before the goods
3 become fixtures, the interest of the lessor is perfected by a fixture filing before the
4 goods become fixtures or within ~~ten~~ 10 days thereafter, and the lessee has an interest
5 of record in the real estate or is in possession of the real estate; or

6 (2) the interest of the lessor is perfected by a fixture filing before the interest
7 of the encumbrancer or owner is of record, the lessor's interest has priority over any
8 conflicting interest of a predecessor in title of the encumbrancer or owner, and the
9 lessee has an interest of record in the real estate or is in possession of the real estate.

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

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

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

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

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

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

8 (h) In cases not within ~~the preceding~~ subsections (c) through (g), priority between the
9 interest of a lessor of fixtures, including the lessor's residual interest, and the conflicting interest
10 of an encumbrancer or owner of the real estate who is not the lessee is determined by the
11 priority rules governing conflicting interests in real estate.

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

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

5
6 **SECTION 2A-410. LESSOR'S AND LESSEE'S RIGHTS WHEN GOODS BECOME**
7 **ACCESSIONS.**

8 (a) ~~Goods are "Accessions"~~ mean goods that when they [are [installed in or affixed to
9 other goods][physically united with other goods in a manner such that the identity of the original
10 goods is lost].

11 (b) Except as provided in subsection (d), the interest of a lessor or a lessee under a
12 lease contract entered into before the goods ~~became an~~ became an accession is superior to all interests in
13 the whole ~~except as stated in subsection (d)~~.

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

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

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

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

4 (e) ~~When~~ If under ~~subsections (b) or (c) and (d)~~ this section a lessor or a lessee holds
5 an interest in accessions ~~that~~ which has priority over the claims of all persons that have
6 interests in the whole, the lessor or ~~the~~ lessee may ~~(a)~~ on default, expiration, termination, or
7 cancellation of the lease contract by the other party but subject to the provisions of the lease
8 contract and this article or, ~~(b)~~ if necessary to enforce ~~his [or her]~~ other rights ~~and remedies~~
9 under this article, remove the goods from the whole. ~~but he [or she] must~~ However, the lessor
10 or lessee shall reimburse any holder of an interest in the whole which is not the lessee ~~and that~~
11 which has not otherwise agreed for the cost of repair of any physical injury but not for any
12 diminution in value of the whole caused by the absence of the goods removed or by any
13 necessity for replacing them. A person entitled to reimbursement may refuse permission to
14 remove the goods until the party seeking removal gives adequate security for the performance
15 of this obligation.

16 Drafting Note - May, 1997

17 The April 14, 1997 draft of article 9 has completely rewriting and substantially changed
18 the substance of its accessions section (9-332). The new draft treats all parts of the whole as
19 separate accessions when a new part subject to a separate security interest is added. If, for
20 example, SP-1 has a security interest in a tractor and SP-2 has a security interest in a new
21 engine added to the tractor, both SP-1 and SP-2 now have an accession interest. Carrying out
22 that line of thought, the accessions section states that other provisions of article 9 determine
23 priorities between the two parties. The new section also provides that a security interest in an
24 accession loses to a security interest in the whole that is perfected by compliance with a
25 certificate of title law.

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

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

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

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

6 Nothing in this article prevents subordination by agreement by any person entitled to
7 priority.

8 **PART 5**

9 **WARRANTIES**

10 **SECTION 2A-501. DEFINITIONS.**

11 In this part:

12 (1) "Damage" means all loss resulting in the ordinary course from a breach of
13 warranty,
14 including injury to a person or property.

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

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

18 (4) "Remote lessee" means a lessee from a lessor in the distributive chain other than
19 the lessor or seller against which a claim for breach of warranty is asserted.

20 [(5) "Lessor" includes an auctioneer or liquidator that fails to disclose that it is acting on
21 behalf of a principal.]

22 Drafting Note

23 Does 2A need new (5)?

24 (2-401, page 55)

1 **SECTION 2A-502. IMPLIED WARRANTIES AGAINST INTERFERENCE**
2 **AND AGAINST INFRINGEMENT; LESSEE'S OBLIGATION AGAINST**
3 **INFRINGEMENT.**

4 (a) Except in a finance lease and subject to subsection (d), ~~a lease contract contains~~
5 ~~a warranty by a lessor~~ warrants that for the duration of the lease no person holds a:

6 (1) claim to or interest in the goods which will interfere with the lessee's enjoyment
7 of its leasehold interest, or

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

10 (b) Except as otherwise provided in subsection (d), ~~in a finance lease contract there~~
11 ~~is an implied warranty by the~~ a finance lessor warrants that for the duration of the lease no
12 person holds a:

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

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

17 (c) Except in a finance lease, there is in a lease contract by a lessor that is a merchant
18 regularly dealing in goods of the kind an implied warranty that the goods ~~are~~ will be delivered
19 free of the rightful claim of a third party by way of infringement or the like. However, a lessee
20 that furnishes specifications to the lessor shall hold the lessor harmless against any claim of
21 infringement or the like that arises out of compliance with the specifications.

22 (d) A warranty under subsections (a) through (c) may be disclaimed or modified only
23 by express language or by circumstances giving the lessee reason to know that the lessor
24 purports to transfer only such right as the lessor or a third party may have. Language in a

1 record is sufficient to disclaim warranties under this section if it is conspicuous and states
2 "There is no warranty against third-party claims that may interfere with lessee's enjoyment of
3 his leasehold interest or against infringement in this lease", or words of similar import.

4 (e) A lessor's warranty under this section, made to an immediate lessee, extends to
5 any remote lessee that may be reasonably expected to lease the goods and ~~that~~ which suffers
6 damage from breach of the warranty. The rights and remedies of a remote lessee against the
7 lessor for breach of the warranty are determined by the enforceable terms of the ~~contract~~
8 agreement between the lessor and the immediate lessee and this article. (2-402, page 55)

9 Drafting Comment

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

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

17 **SECTION 2-503. EXPRESS WARRANTIES TO IMMEDIATE LESSEE**

18 (a) In this section, "representation" means a description, demonstration or depiction of
19 the goods, an affirmation of fact that relates to the goods, or a sample or model of the goods.

20 (b) If a lessor makes a representation or promise relating to the goods to an immediate
21 lessee, the representation or the promise becomes part of the agreement if the immediate
22 lessee knows of [and believes] the representation or promise, unless a reasonable person in
23 the position of the immediate lessee would believe otherwise or would believe that the
24 representation or promise was merely of the value of the goods or purported to be merely the
25 seller's opinion or commendation of the goods. An obligation may be created under this section
26 even though the lessor does not use formal words such as "warranty" or "guaranty."

(c) If a representation or a promise becomes part of the agreement, the lessor has an obligation to the immediate lessee that the goods will conform to the representation, or, if a sample is involved, that the whole of the goods will conform to the sample, or that the promise will be performed. The obligation is breached if the goods do not conform to any representation at the time of the tender of delivery or if the promise was not performed when due.

(d) A lessor's obligation to the immediate lessee under this section may be created by representations and promises made in a medium for communication to the public, including advertising.

(2-403, page 58)

Drafting Comment

At the October, 1996 meeting, the Drafting Committee voted not to include in 2A-304 the specific references in 2-313 to warranty by remote lessors because of doubts that there are in fact any remote lessors who make express warranties on which remote lessees rely.

In the May 1997 draft, the Article 2 Section dealing with warranties to remote transferees (2-404, page 61) most of the operative language refers only to buyers. If Article 2 does not make clear that **sellers** have the same liability to remote lessees as they do to remote buyers, Article 2A should contain a section so stating. However, the logical place for clear statement of seller's liability to remote lessees in is Article 2.

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

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

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

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

(2) in the case of fungible goods, be of fair, average quality within the

description;

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

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

(c) Subject to 2A-506, implied warranties other than those described in this section may arise from course of dealing or usage of trade. (2-405, page 66)

SECTION 2A-505. IMPLIED WARRANTY OF FITNESS FOR PARTICULAR PURPOSE.

Except in a finance lease and subject to Section 2A-506, if a lessor at the time of contracting has reason to know 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 an implied warranty that the goods are fit for that purpose. (2-406, page 69)

SECTION 2A-506. ~~EXCLUSION~~ DISCLAIMER OR MODIFICATION OF WARRANTIES.

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

article

1 (b) Subject to subsection (e), an implied warranty is disclaimed or modified by
2 language or an expression that, under the circumstances, makes it clear that the implied
3 warranty has been disclaimed or modified. An implied warranty may also be disclaimed or
4 modified by course of performance, course of dealing, or usage of trade.

5 (c) Subject to subsection (e), language in a record is sufficient to disclaim or modify an
6 implied warranty if the language is conspicuous and:

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

9 (2) in the case of the implied warranty of fitness, states that "the
10 goods are not fit for any particular purpose" or words of similar import;

11 (3) unless the circumstances indicate otherwise, states that the
12 goods are sold "as is" or "with all faults" or words of similar import.

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

16 (e) In a consumer lease contract, language is sufficient to disclaim or modify an implied
17 warranty if:

18 (1) the language complies with any applicable requirements of federal law that
19 specify how implied warranties may be disclaimed or modified or how disclaimers or
20 modifications of implied warranties are communicated to consumer lessees;

21 (2) the lessee makes in good faith an express warranty of quality in lieu of an
22 implied warranty and the form and content of the language disclaiming implied warranties
23 complies with subsection (c); or

1 (3) conspicuous language is in a record which the consumer lessee has
2 separately authenticated [expressly agreed] states:

3 Alternative A

4 "Except as expressly provided in this contract, the lessor makes no promise as to the
5 merchantability, suitability, or fitness for purpose of the goods. This means that there is no
6 promise that the goods will be fit for use for any particular purpose or even that it will be fit for
7 the normal purpose for which such goods are used."

8 Alternative B

9 "Unless we say otherwise in this contract, we make no promises about these goals. They may
10 not work. They may not do what you want them to. If they don't, it's your problem.

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

13 ~~—— (b) Except in a consumer lease, if language in an agreement is intended [construed] to~~
14 ~~disclaim or modify an implied warranty, the following rules apply:~~

15 ~~—— (1) All implied warranties are disclaimed or modified by language [or~~
16 ~~expressions] that under the circumstances call the lessee's attention to the disclaimer~~
17 ~~or modification of the warranties and states that the implied warranties have been~~
18 ~~disclaimed or modified.~~

1 ~~_____ (2) [Subject to Section 2A-206,] conspicuous language contained in a record~~
2 ~~that negates or modifies an implied warranty is sufficient to satisfy paragraph (1) in the~~
3 ~~following cases:~~

4 ~~_____ (A) A disclaimer or modification of the implied warranty of~~
5 ~~merchantability is sufficient if the language mentions merchantability or states~~
6 ~~"These goods may not be fit for their ordinary purpose", or language is of~~
7 ~~similar import.~~

8 ~~_____ (B) A disclaimer or modification of the implied warranty of fitness is~~
9 ~~sufficient if the language states that "There are no warranties that these~~
10 ~~goods will conform to the purposes for which they are leased made known to~~
11 ~~the lessor", or words is of similar import.~~

12 ~~_____ (C) In the case of used goods, expressions Language like "as is" or~~
13 ~~"with all faults" are is sufficient to disclaim or modify an implied warranty.~~

14 ~~_____ (3) If the lessee, whether or not a consumer lessee, before entering into the~~
15 ~~lease contract has examined the goods, sample, or model as fully as desired or refuses~~
16 ~~has declined to examine the goods them, there is no implied warranty with regard to~~
17 ~~conditions that an examination in the circumstances would have revealed.~~

18 ~~_____ (4) An implied warranty may be disclaimed or modified by course of~~
19 ~~performance, course of dealing, or usage of trade.~~

20 ~~_____ (c) In addition to the requirements of Section 2A-207, Language in a consumer lease~~
21 ~~purporting to disclaim or modify the implied warranty of merchantability or the implied warranty~~
22 ~~of fitness for particular purpose is ineffective unless the buyer has expressly agreed to it. _____~~

23 ~~_____ (d) Remedies for breach of warranty may be limited in accordance with this article with~~
24 ~~respect to liquidation or limitation of damages and contractual modification of remedy.~~

1 (2-407, page 69)

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

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

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

8 (2) A sample or model ~~from an existing bulk~~ prevails over inconsistent general
9 language of description.

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

12 (2-408, page 72)

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

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

23 (b) This section and section 2A-502 do not displace:

1 (1) the rights and remedies of a third party beneficiary ~~and or~~ assignee under
2 the law of contracts or of persons to ~~whom~~ which goods are transferred by operation of
3 law.

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

6 (c) The operation of this section may not be excluded, modified, or limited unless the
7 lessor has a substantial interest based on the nature of the goods in having a warranty extend
8 only to the immediate lessee. ~~, but a disclaimer or modification of a warranty or the limitation of~~
9 ~~rights and remedies effective against the lessor is also effective against the remote lessee or~~
10 ~~transferee.~~

11 Drafting Note

12 At the February, 1997, meeting, the 2A committee voted to delete references to remote
13 lessees in this section.
14 (2-409, page 73)

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

16 PART 6

17 PERFORMANCE OF LEASE CONTRACT: REPUDIATED, 18 SUBSTITUTED, AND EXCUSED

19 SECTION 2A-601. ~~INSECURITY:~~ RIGHT TO ADEQUATE ASSURANCE OF 20 PERFORMANCE.

21 (a) A lease contract imposes an obligation on each party not to impair the other party's
22 expectation of receiving due performance. If reasonable grounds for insecurity arise with
23 respect to the performance of either party, the other party may demand in a record adequate
24 assurance of due performance and, until that assurance is received, if commercially

1 reasonable, may suspend any performance for which the agreed return has not already been
2 received .

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

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

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

10 (2-711, page 128)

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

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

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

20 (2) in either case under paragraph (1), suspend its own performance or, if a
21 lessor, proceed in accordance with Section 2A-718..

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

1 (2-712, page 129)

2 Drafting Comment - January, 1997

3 The final text will contain a comment noting that a failure to give assurances under
4 2A-402 is a repudiation giving the other party the rights given by this section. Note the added
5 language in 2A-601 which also makes the point.

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

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

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

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

15 (2-713, page 131)

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

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

23 (b) If an agreed means or manner of payment fails because of domestic or foreign
24 governmental regulation, the lessor may withhold or stop delivery or cause the supplier to
25 withhold or stop delivery until the lessee provides a means or manner of payment ~~that~~ which is

1 commercially a substantial equivalent. If delivery has already been made, payment by the
2 means or in the manner provided by the regulation discharges the lessee's obligation unless the
3 regulation is discriminatory, oppressive, or predatory.

4 (2-715, page 133)

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

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

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

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

13 (b) A party claiming excuse under subsection (a) shall seasonably notify the other
14 party that there will be delay in performance. If the claimed excuse affects only a part of the
15 lessor's or supplier's capacity to perform, the lessor or supplier shall also allocate production
16 and deliveries among its customers in a manner that is fair and reasonable and notify the
17 lessee of the estimated quota made available. However, the lessor or supplier may include
18 regular customers not then under contract as well as its own requirements for further
19 manufacture.

20 ~~—— (b) If the claimed excuse affects only a part of the lessor's or supplier's capacity of the~~
21 ~~lessor or supplier to perform, the lessor or supplier shall also allocate production and deliveries~~
22 ~~among its customers in a manner that is fair and reasonable. but at its option However, the~~
23 ~~lessor or seller may include regular customers not then under contract for sale or lease as well~~

1 as its own requirements for further manufacture. The lessor or supplier may so allocate in any
2 manner that is fair and reasonable.

3 ~~—— (c) A lessor seasonably shall notify the lessee, and in the case of a finance lease the~~
4 ~~supplier seasonably shall notify the lessor and the lessee, if known, that there will be delay or~~
5 ~~nondelivery and, if allocation is required under subsection (b), of the estimated quota made~~
6 ~~available for the lessee.~~

7 (2-716, page 133)

8 Drafting Comment - May, 1997

9 This is the latest article 2 version of 2-716.

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

11 (a) If ~~the a~~ lessee receives notification of a material or indefinite delay in performance
12 or an allocation permitted under Section 2A-307 or 2A-605 as to any delivery concerned, or of
13 there is a breach of the whole contract under section 2A-726(c), the lessee, by notification in a
14 record ~~to the lessor as to any goods concerned, and with respect to all of the goods if under an~~
15 ~~installment lease contract the value of the whole lease contract is substantially impaired~~, may:

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

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

1 (b) If, after receipt of a notification from ~~the~~ a lessor under Section 2A-307 or 2A-605,
2 the lessee fails to terminate or modify the lease contract within a reasonable time not exceeding
3 30 days, the contract lapses with respect to any performance affected.

4 (c) This section may be varied by agreement only to the extent that the parties have
5 assumed a different obligation under Section 2A-605.

6 (2-717, page 135)

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

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

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

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

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

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

19 **PART 7**

20 **DEFAULT**

21 **[A. ~~IN~~ GENERAL]**

22 **SECTION 2A-701. SUBJECT TO GENERAL LIMITATIONS.**

23 The remedies of the lessee and lessor ~~and other protected persons~~ under this article
24 are subject to the general limitations and principles stated in sections 2A-702 through 2A-715

(2-801, page 136)

SECTION 2A-702. DEFAULT: PROCEDURE.

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

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

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

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

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

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

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

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

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

(4) the defaulting party acted in good faith.

1 (d) The cumulative effect of individual, unsubstantial defaults may substantially impair
2 the value of the whole contract to the other party. (2-701, page 106, 2-802, page 137)

3 Drafting Comment - May, 1997

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

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

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

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

12 (2) A buyer is in breach if it wrongfully rejects a tender of delivery, wrongfully
13 revokes acceptance, repudiates the contract, or fails to make a requirement payment or to
14 perform an obligation."

15 It seems unnecessary to fine the things mentioned in subsection (b) as breaches (or
16 defaults).
17

18 **SECTION 2A-702A. WAIVER OF LESSEE'S OBJECTIONS OF DEFAULT**

19 **PARTICULARIZATION OF NONCONFORMITY.**

20 (a) Except as otherwise provided in this section, a party that knows that the other
21 party's performance constitutes a default but accepts that performance and fails within a
22 reasonable time to object is precluded from relying on the default to cancel the contract.
23 However, acceptance of that performance and failure to object do not preclude a claim for
24 damages unless the party in breach has changed its position reasonably and in good faith in
25 reliance of the aggrieved party's inaction.

26 (b) ~~A~~ Failure to object to a nonconforming performance under subsection (a) does not
27 foreclose objection to the same or a similar default in future performances of like kind unless
28 the party foreclosed expressly so states. A statement waiving future performance may be
29 retracted by seasonable notification received by the other party that strict performance will be

1 required unless the waiver has induced the other /party to change its position reasonably and in
2 good faith.

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

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

8 (2) between merchants, the lessor or the supplier after rejection ~~or revocation~~
9 ~~of acceptance~~ has made a request in a record for a full and final statement in a record
10 of all nonconformities on which the lessee proposes to rely. (2-702, page 107)

11 Drafting Comment - May, 1997

12 Section 2A-702A was 2A-730 in the previous draft. The section has been moved here
13 because it now applies to lessors as well as lessees. Present 2A-514, which is based on
14 present 2-605 deals only with lessee's failure to state defects on rejection. Is 2A-702A
15 inconsistent with 2A-703 which states that a lessor or lessee in default is not entitled to notice of
16 default? Should the section be combined with 2A-703?

17 **SECTION 2A-703. NOTICE AFTER DEFAULT.**

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

21 **SECTION 2A-704. REMEDIES IN GENERAL.**

22 (a) ~~Subject to~~ In accordance with Section 1-106, the remedies provided in this article
23 must be liberally administered with the purpose of placing the aggrieved party in as good a
24 position as if the other party had fully performed.

1 (b) ~~Except as otherwise provided in this part 8;~~ Unless the lease contract provides for
2 liquidated damages in section 2A-710 or a limited remedy enforceable under 2A-711, an
3 aggrieved party may not recover that part of a loss resulting from a default that could have been
4 avoided by reasonable measures under the circumstances. The burden of establishing a failure
5 to take reasonable measures under the circumstances is on the defaulting party.

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

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

13 (2-803, page 137)

14 **SECTION 2A-705. MEASUREMENT OF DAMAGES IN GENERAL.**

15 ~~——— To the extent that [a default is not material or] the remedies in this part fail to put the~~
16 ~~aggrieved party in as good a position as if the other party had fully performed, the aggrieved~~
17 ~~party may:~~ If there is a default , the aggrieved party may ~~[(1)]~~ recover compensation as
18 determined by sections 2A-716 through 2A-737 or recover compensation for the loss resulting
19 in the ordinary course from the default as determined in any reasonable manner, together with
20 incidental damages and consequential damages, less expenses and costs avoided as a result
21 of the default. (2-804, page 145)

22 Drafting Comment

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

4 **SECTION 2A-706. INCIDENTAL DAMAGES.**

5 Incidental damages resulting from a default under a lease contract include
6 compensation [for][or] any commercially reasonable charges, expenses, or commissions
7 ~~[incurred after the default]~~ with respect to:

8 (1) inspection, receipt, transportation, care, and custody of identified goods which are
9 the subject of the lease contract; ~~property after the other party's default;~~

10 (2) stopping delivery or shipment;

11 (3) effecting cover, return, or resale of the goods; ~~and~~

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

13 (5) otherwise dealing with the goods or effectuating other remedies. (2-805, page 146)

14 **SECTION 2A-707. CONSEQUENTIAL DAMAGES.**

15 Consequential damages ~~to a lessee, lessor, or other protected person for default~~
16 ~~include~~ (1) compensation for are all losses resulting from a default ~~which include compensation~~
17 for:

18 (1) any loss, including loss to property other than the goods sold, the defaulting party
19 at the time of contracting had reason to know would probably result from the aggrieved party's
20 general or particular requirements and needs and which ~~(2)~~ could not have been avoided by
21 by reasonable measures under the circumstances; and

22 (2) [bodily] injury to[person][an individual] proximately resulting from any breach of
23 warranty.

1 ~~—— (3) except for injury to the person, the party in breach establishes are not~~
2 ~~unreasonably disproportionate to the risk assumed by the party in breach under the contract.~~

3 ~~(2) subject to 2A-509, injury to person or property proximately resulting from any~~
4 ~~breach of warranty.~~

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

9 (2-806, page 147)

10 Drafting Comment - May, 1997

11 "Injury to person" is not technically accurate, since person includes organizations.
12 "Bodily injury" or "bodily injury to an individual" is intended. Is it worth the change?

13 **SECTION 2A-708. SPECIFIC PERFORMANCE**

14 (a) A court may enter a decree for specific performance if the parties have expressly
15 agreed to that remedy, ~~or the goods or the~~ agreed performance of the defaulting party ~~is~~ are
16 unique, or in other proper circumstances. ~~However, if specific performance is expressly agreed~~
17 ~~to, a decree for the rent may not be entered unless the conditions of Section 2A-722 are~~
18 ~~satisfied.~~ Even if the parties expressly agree to specific performance, a court shall not enter a
19 decree for specific performance where the breaching party's sole remaining contractual
20 obligation is the payment of money.

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

23 ~~—— (c) A lessee has a right of replevin, detinue, sequestration, claim and delivery, or the~~
24 ~~like to recover goods identified to the lease contract if, after reasonable efforts, the lessee is~~

1 ~~unable to effect cover for the goods or the circumstances indicate that an effort to obtain cover~~
2 ~~would be unavailing.~~ (2-807, page 151)

3 Drafting Comment

4 Article 2 has now adopted the rule that if the only remaining performance is the
5 payment of money, specific performance is not available. Should 2A adopt the same rule?
6 That rule probably would not prohibit specific performance actions for rent in most cases since
7 lessees are likely to have obligations other than payment. Should we continue our earlier rule
8 that specific performance actions for rent are not available unless the conditions of section 2A-
9 722 are satisfied. If we did that, specific performance actions would be available if the lessee
10 does not return the goods, the goods have been damaged after risk of loss had passed to the
11 lessee, or the lessor is unable to resell or relet. Perhaps we should have a flat rule that an
12 obligation to pay money cannot be enforced by a decree for specific performance.

13 Following Article 2, subsection (c) has been moved to 2A-736 which covers lessee's
14 right to get the goods from lessor.

15 **SECTION 2A-709. CANCELLATION; EFFECT OF CANCELLATION, RESCISSION,**
16 **OR FRAUD ON RIGHTS AND REMEDIES.**

17 (a) ~~[Except as provided in section (section on waiver)] If a party defaults under a lease~~
18 ~~contract, the~~ An aggrieved party may cancel the a contract if the conditions of Section 2A-716
19 or 2A-724 are satisfied or the agreement so provides unless there is a waiver of the breach
20 under section 2A-302 or a right to cure the breach under section 2A-729.

21 [(b) Cancellation is not effective until the canceling party sends notice of cancellation to
22 the other party.]

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

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

1 (e) The ~~following~~ obligations surviving cancellation include:

2 (1) ~~any~~ a right based on previous default;

3 (2) ~~any limitation on the scope, manner, method, or location of the exercise of~~
4 ~~rights in goods;~~ any term that the contract provides [as surviving][survive] cancellation;

5 (3) any term limiting ~~limitation on~~ disclosure of information;

6 (4) a remedy for default on the whole contract or any unperformed balance[;

7 [(5) ~~an~~ any obligation to return goods, ~~if one exists~~, which obligation must be
8 promptly performed;]

9 and

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

12 (f) Unless a contrary intention clearly appears, language of cancellation, rescission, or
13 avoidance of the lease contract, ~~or words of similar language import~~ is not a renunciation or
14 discharge of any claim in damages for an antecedent default. (2-808, page 153)

15 Drafting Comment - May, 1997

16 Subsection (a) does not follow exactly Article 2. Article 2 provides that there is a right to
17 cancel if there is a breach under 2-701 or 2-710 (right to reject). It is probably better to refer
18 to the basic remedies sections for lessor and lessee which include a reference to the right to
19 cancel. Therefore, 2A refers to those sections, 2A-716 and 2A-724 rather than to the rejection
20 sections.

21 Subsection (e)(6) is an attempt to follow the direction of the 2A Drafting Committee that
22 it be made clear that the specific listing is not exclusive. There is probably a better way to make
23 the point. Possibly a comment would be sufficient. The Article 2 drafting committee has not
24 chosen to adopt (e)(6). Subsection (e)(5) does not appear in Article 2, but it may be desirable
25 in the lease context.

26 **SECTION 2A-710. LIQUIDATION OF DAMAGES; DEPOSITS.**

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

7 (b) If a lessor justifiably withholds or stops performance because of the lessee's
8 default or insolvency, the lessee is entitled to restitution of the amount by which the sum of
9 payments exceeds ~~(1)~~ the amount to which the lessor is entitled under a term liquidating
10 damages in accordance with subsection (a).

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

14 (c) A lessee's right to restitution under subsection (b) is subject to offset to the extent
15 that the lessor establishes a right to recover damages under the provisions of this article other
16 than subsection (a) and the amount or value of any benefits received by the lessee directly or
17 indirectly by reason of the lease contract. (2-809, page 156)

18 Drafting Comment - May, 1997

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

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

1 **2A-711. CONTRACTUAL MODIFICATION OF REMEDY.**

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

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

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

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

17 _____
18 **[SECTION 2A-711. CONTRACTUAL MODIFICATION OF REMEDY.**

19 (a) Subject to Section 2A-710 [and except as otherwise provided in this article], the
20 following rules apply to contractual modification of a remedy:

21 (1) A lease agreement may add to, limit, or substitute for the remedies
22 provided in this article, such as by limiting or altering the measure of damages
23 recoverable under this article. for default or limiting the lessee's remedies to return of
24 the goods and repayment by the lessor of any amounts paid by the lessee under the

1 lease contract or to repair and replacement of nonconforming goods or parts by the
2 lessor or supplier.

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

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

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

11 (1) In a lease contract other than a consumer lease contract, the aggrieved
12 party may resort to all remedies provided in this article, but an agreement expressly
13 providing that incidental or consequential damages, including those resulting from the
14 failure to provide the limited remedy, are excluded is enforceable to the extent
15 permitted under subsection (c).

16 (2) In a consumer lease contract, an aggrieved party may reject the goods or
17 r evoke acceptance and, to the extent of the failure, may resort to all remedies provided
18 in this article, including the right to recover consequential or incidental damages
19 despite any term purporting to exclude or limit such remedies. notwithstanding the
20 terms of the ——— agreement.

21 (c) Subject to subsection (b), consequential damages and incidental damages may be
22 limited or excluded by agreement, unless the limitation or exclusion is unconscionable.
23 Limitation of consequential damages for injury to the person in the case of consumer goods
24 [consumer lease] is presumed to be unconscionable]. _ (2-810, page 157)

At the February, 1997, the 2A drafting committee voted to reinstate the original Article 2A section on modification of remedy. That is done here. The original section is underlined. The present draft Article 2 provision is included for comparison.

SECTION 2A-712. REMEDIES FOR MISREPRESENTATION OR FRAUD.

Remedies for material misrepresentation or fraud include all remedies available under this article for nonfraudulent default. Rescission or a claim for rescission of a lease contract and rejection or return of the goods do not bar a claim for damages or other consistent remedy. (2-811, page 162)

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

SECTION 2A-713. PROOF OF MARKET RENT: ~~TIME AND PLACE~~.

(a) Damages based on market rent are determined according to the rent for the use of the goods concerned for a lease term identical to the remaining ~~lease term~~ period of the original lease agreement and prevailing at the times specified in Sections 2A-722 and 2A-735.

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

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

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

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

5 (d) If the prevailing rent or value of any goods regularly leased in any established
6 market is in dispute, reports in official publications or trade journals or in newspapers,
7 periodicals, or other means of communication in general circulation and published as the
8 reports of that market are admissible in evidence. The circumstances of the preparation of the
9 such a report may be shown to affect the weight of the evidence but not its admissibility. (2-
10 812, page 163)

11 **SECTION 2A-714. LIABILITY OF THIRD PARTIES FOR INJURY TO GOODS**
12 **~~STANDING TO MAINTAIN ACTION AGAINST THIRD PARTY FOR INJURY TO~~**
13 **~~GOODS.~~**

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

- 17 (1) has a security interest in the goods;
18 (2) has an insurable interest in the goods; or
19 (3) bears the risk of loss under the lease contract or has since the injury
20 assumed that risk as against the lessor and the goods have been converted or
21 destroyed.

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

1 the recovery, any recovery or settlement is, subject to the plaintiff's interest as fiduciary for the
2 other party to the lease contract.

3 (c) Either party with the consent of the other may maintain an action for the benefit of
4 an interested party. (2-813, page 163)

5 Drafting Comment - January, 1997

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

9 **SECTION 2A-715. STATUTE OF LIMITATIONS.**

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

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

19 ~~———(c) If a breach of warranty occurs, and the lessor or supplier, after delivery, attempts to~~
20 ~~conform goods to the contract and fails, the period of limitation is tolled during the time of the~~
21 ~~attempt.~~

22 (c) If an action commenced within the applicable period of limitation is terminated but a
23 remedy by another action for the same default or breach of warranty or indemnity is available,
24 the other action may be commenced after the expiration of the time limitation and within six

1 months after the termination of the first action unless the termination resulted from voluntary
2 discontinuance or from dismissal for failure to prosecute.

3 (e) This section does not alter the law on tolling of the statute of limitations and does
4 not apply to a right of action that accrued before this article took effect. (2-814, page 164)

5 Drafting Comment

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

8 **[B. LESSOR'S REMEDIES]**

9 **SECTION 2A-716. LESSOR'S REMEDIES IN GENERAL.**

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

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

17 (2) stop delivery of the goods by any carrier or bailee pursuant to Section 2A-
18 719(b);

19 (3) proceed under Section 2A-718 with respect to ~~respecting~~ goods not still
20 unidentified to the lease contract;

21 (4) obtain specific performance under 2A-708 or recover the rent under
22 Section 2A-722;

1 (5) dispose of the goods and recover damages under 2A-720 or retain the
2 goods and recover damages under 2A-721, ~~or in a proper case recover rent~~;

3 (6) recover incidental and consequential damages under Sections 2A-706
4 and 2A-707;

5 (7) cancel the lease contract under Section 2A-709; or

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

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

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

15 (1) if the default substantially impairs the value of the lease contract to the
16 lessor, the lessor may exercise the rights and pursue the remedies ~~provided in~~ under
17 subsection (a) or (b); or

18 (2) if the default does not substantially impair the value of the lease contract
19 to the lessor, the lessor may recover ~~as provided in~~ under subsection (b). (2-815,
20 page 167)

21 Drafting Comment-May, 1997

22 The expanded listing of rights on default follows the expanded listing in Article
23 2, but does not follow the sequence of Article 2 exactly.

24 **SECTION 2A-717. LESSOR'S RIGHT TO POSSESSION OF GOODS.**

1 (a) ~~After~~ Upon a default by the lessee under ~~the a~~ lease contract of the type described
2 in Section 2A-716(a) or (c)(1) or, if agreed, ~~after~~ upon other default by the lessee, the lessor
3 ~~may has the right to~~ take possession of the goods. If the lease agreement so provides, the
4 lessor may require the lessee to assemble the goods and make them available to the lessor at
5 a place to be designated by the lessor which is reasonably convenient to both parties. Without
6 removal, the lessor may render unusable any goods employed in trade or business and may
7 dispose of goods on the lessee's premises.

8 (b) A lessor may proceed under subsection (b) without judicial process if it can be
9 done without breach of the peace, or the lessor may proceed by action. (2-816, page 169)

10 Drafting Comment

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

13 **SECTION 2A-718. LESSOR'S RIGHT TO IDENTIFY GOODS TO LEASE CONTRACT**

14 **~~NOTWITHSTANDING~~ DESPITE DEFAULT OR TO SALVAGE UNFINISHED GOODS.**

15 (a) ~~After~~ Upon default by the lessee under the lease contract of the type described in
16 Section 2A-716(a) or (c)(1) or, if agreed, after other default by the lessee, the lessor may:

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

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

22 (b) If goods are unfinished at the time of default, an aggrieved lessor or the supplier, in
23 the exercise of reasonable commercial judgment to minimize loss and for the purpose of
24 effective realization, may complete the manufacture and wholly identify the goods to the lease

1 contract, cease manufacture and lease, sell, or otherwise dispose of the goods for scrap or
2 salvage value, or proceed in any other reasonable manner. (2-817, page 173)

3 **SECTION 2A-719. LESSOR'S REFUSAL TO DELIVER BECAUSE OF LESSEE'S**
4 **INSOLVENCY; STOPPAGE IN TRANSIT OR OTHERWISE.**

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

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

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

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

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

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

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

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

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

document as the person from which the goods have been received for shipment or storage. (2-818, page 174)

Drafting Comment - May, 1997

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

SECTION 2A-720. LESSOR'S RIGHTS TO DISPOSE OF GOODS.

(a) ~~After~~ Upon a default by a lessee under the lease contract of the type described in Section 2A-716(a) or (c)(1), or ~~after~~ upon the lessor's refusal to deliver or takes possession of goods under Section 2A-717 or 2A-719, or, if agreed, ~~after~~ upon 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 or otherwise determined ~~pursuant to~~ by agreement of the parties, 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 compensation for:

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

(2) the present value, as of the same date, of the total rent for the then remaining lease ~~term~~ period 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~~ part of the new lease ~~term~~ period which is comparable to the then remaining ~~term~~ period of the original lease agreement; and

1 (3) any incidental damages allowed under Section 2A-706, less expenses
2 avoided as a result of the lessee's default.

3 (c) If the lessor's disposition is by a lease agreement that for any reason does not
4 qualify for treatment under subsection (b), or is by sale or otherwise, the lessor may recover
5 from the lessee as if the lessor had elected not to dispose of the goods, and Section 2A-721
6 governs.

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

11 (e) A lessor is not accountable to the lessee for any profit made on any disposition.
12 A lessee that has rightfully rejected or justifiably revoked acceptance shall account to the
13 lessor for any excess over the amount of the lessee's security interest. (2-819, page 176)

14 **SECTION 2A-721. LESSOR'S DAMAGES FOR NONACCEPTANCE,**
15 **FAILURE TO PAY, OR REPUDIATION.**

16 (a) Except as otherwise provided with respect to damages liquidated in the lease
17 agreement under Section 2A-710 or otherwise determined ~~pursuant to~~ by agreement of the
18 parties pursuant to Sections 1-102(3) and 2A-711, if a lessor elects to retain the goods or ~~a~~
19 ~~lessor~~ elects to dispose of the goods and the disposition is by lease agreement that for any
20 reason does not qualify for treatment under Section 2A-720(b) or is by sale or otherwise, the
21 lessor may recover from the lessee as damages for a default of the type described in Section
22 2A-716(a) or 2A-716(c)(1), or if agreed for other default of the lessee,

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

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

9 (3) any incidental or consequential damages allowed under Section 2A-706 or
10 Section 2A-707, less expenses saved in consequence of the lessee's default.

11 ~~(2) If the measure of damages provided in subsection (1) is inadequate to put~~
12 ~~a lessor in as good a position as performance would have, the measure of damages is the~~

13 (b) A lessor may recover damages measured by other than the market p/rice, together
14 with incidental and consequential damages, including

15 (1) the present value of the lost profits, including reasonable overhead, resulting
16 from the default of the lessee determined in any reasonable manner; and ~~the lessor would have~~
17 ~~made from full performance by the lessee, together with any incidental damages allowed under~~
18 ~~Section 2A-706, due allowance for costs reasonably incurred and due credit for payments or~~
19 ~~proceeds of disposition.~~

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

23 **Following is the version of 2A-721 which appeared in the January, 1997, 2A Draft.**

1 ~~[(a) Except as otherwise provided with respect to damages liquidated in the lease~~
2 ~~agreement or otherwise determined pursuant to agreement of the parties, if a lessor elects to~~
3 ~~retain the goods or a lessor elects to dispose of the goods and the disposition is by lease~~
4 ~~agreement that for any reason does not qualify for treatment under Section 2A-720(b), or is by~~
5 ~~sale or otherwise, the lessor may recover from the lessee as damages for a default of the type~~
6 ~~described in Section 2A-716(a) or (c)(1), or, if agreed, for other default of the lessee,~~
7 ~~compensation for:~~

8 ~~—— (1) accrued and unpaid rent as of the date specified in subsection (b) if the lessee has~~
9 ~~never taken possession of the goods, or, if the lessee has taken possession of the goods, as of~~
10 ~~the date the lessor repossesses the goods or an earlier date on which the lessee makes a~~
11 ~~tender of the goods to the lessor;~~

12 ~~—— (2) the present value as of the date determined under paragraph (1) of the total rent for~~
13 ~~the then remaining lease term of the original lease agreement minus the present value as of the~~
14 ~~same date of the market rent at the place where the goods are located computed for the same~~
15 ~~lease term; and~~

16 ~~—— (3) any incidental or consequential damages allowed under Sections 2A-706 and Section~~
17 ~~2A-707, less expenses avoided as a result of the lessee's default.~~

18 ~~—— (b) Market rent under subsection (a)(1) is to be determined as of the times specified~~
19 ~~according to the following rules:~~

20 ~~—— (1) If the case comes to trial after the agreed time for performance acceptance of the~~
21 ~~goods by the lessee, the following rules apply:~~

22 ~~—— (A) If the default is other than by repudiation the market rent is determined as of the~~
23 ~~time the lessor learned of the default.~~

1 ~~—————(B) If the default is by repudiation, market rent is determined as of the time for~~
2 ~~acceptance of the goods by the lessee.~~

3 ~~(2) If the case comes to trial before the agreed time for performance for acceptance of~~
4 ~~the goods by the lessee, the time for determining market rent is the time when a commercially~~
5 ~~reasonable period of time after the lessor learned of the repudiation has expired. —~~

6 ~~—————(c) A lessor may recover damages measured by other than the market rent~~
7 ~~including:~~

8 ~~—————(1) the present value of the profit, including reasonable overhead, the lessor,~~
9 ~~determined in any reasonable manner, together with any incidental and consequential~~
10 ~~damages, and a~~

11 ~~—————(2) reasonable expenditures made in preparing for or performing the contract~~
12 ~~if, after the breach the lessor is unable to obtain reimbursement by salvage, real, or~~
13 ~~other reasonable measures. (2-821, page 180)~~

14 Drafting Comment-May. 1997

15 At the February, 1997, meeting, the Article 2A committee voted to return to the present
16 language for 2A-711 (present 2A-528). At that time, the January, 1997, draft of Article 2,
17 in cases of repudiation measured damages at a different time depending on whether the action
18 came to trial before or after the time for performance under the contract. Duplicating that set of
19 rules in 2A resulted in a complex section.

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

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

25 Subsection(b) is modified to follow subsection (b) of draft 2-821. The change of substance is
26 the right to lost profit damages is not limited to cases in which a contract-market remedy is
27 inadequate to put the lessor in as good a position as performance would have done. Rather,
28 the limitation is in 2A-704(c). Under that section, a court may deny or limit a remedy if it would
29 put the lessor in a substantially better position that if the other party had fully performed.

1 **SECTION 2A-722. LESSOR'S ACTION FOR THE RENT.**

2 (a) Upon a default by the lessee under the lease contract of the type described in
3 Section 2A-716(a) or (c)(1) or if agreed upon another default by the lessee, if the lessor
4 complies with subsection (b), the lessor may recover from the lessee as damages:

5 (1) for goods accepted by the lessee and not repossessed by or tendered to
6 the lessor,

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

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

14 (A) accrued and unpaid rent as of the date of entry of judgment in
15 favor of the lessor;

16 (B) the present value as of the same date of the rent for the then
17 remaining lease term of the lease agreement; and

18 (C) any incidental or consequential damages allowed under
19 Section 2A-706 or Section 2A-707, less expenses avoided as a result of the
20 lessee's default.

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

1 (c) A lessor may dispose of the goods at any time before collection of the judgment for
2 damages obtained pursuant to subsection (a). If the disposition is before the end of the
3 remaining ~~lease term period~~ of the lease agreement, the lessor's recovery against the lessee
4 for damages is governed by Section 2A-720 or Section 2A-721, and the lessor shall ~~cause~~
5 provide an appropriate credit ~~to be provided~~ against a judgment for damages to the extent that
6 the amount of the judgment exceeds the recovery available under Section 2A-720 or 2A-721.

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

10 (e) ~~After~~ Upon default by the lessee under the lease contract of the type described in
11 Section 2A-716(a) or (c)(1) or if agreed ~~after~~ upon other default by the lessee, a lessor that is
12 ~~held not entitled to rent under this section must nevertheless be awarded~~ is still entitled to
13 damages for nonacceptance under Section 2A-720 or 2A-721. (2-822, page 184)

14 **SECTION 2A-723. LESSOR'S RIGHTS TO RESIDUAL INTEREST.**

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

18 **[C. LESSEE'S REMEDIES]**

19 **SECTION 2A-724. LESSEE'S REMEDIES IN GENERAL; LESSEE'S** 20 **SECURITY INTEREST IN REJECTED GOODS.**

21 (a) If a lessor fails to deliver the goods in conformity to the lease contract or repudiates
22 the contract, or a lessee rightfully rejects the goods or justifiably revokes acceptance of the
23 goods, with respect to any goods involved and with respect to all of the goods if under an
24 installment lease contract the value of the whole lease contract is substantially impaired, the

1 lessor is in default under the lease contract, and the lessee may do one or more of the
2 following:

3 (1) cancel the lease contract under Section 2A-709;

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

6 (3) cover and obtain damages as to all goods affected, whether or not they
7 have been identified to the lease contract ~~as provided in~~ under Sections 2A-734,
8 2A-706, and 2A-707;

9 (4) recover damages for nondelivery ~~as provided in~~ under Sections 2A-735,
10 2A-706 and 2A-707;

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

13 (6) enforce a security interest under subsection (e).

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

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

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

18 (2) in a proper case, obtain specific performance or replevy the goods under
19 Section 2A-708.

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

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

1 (e) On rightful rejection or justifiable revocation of acceptance, a lessee has a security
2 interest in goods in the lessee's possession or control for any rent and security that has been
3 paid and any expenses reasonably incurred in their inspection, receipt, transportation, care, and
4 custody. In that case, the lessee may hold the goods and dispose of them in good faith and in a
5 commercially reasonable manner. The disposition is subject to Section 2A-720(d) and (e).

6 (f) Subject to Section 2A-607, a lessee, on so notifying the lessor, may deduct all or
7 any part of the damages resulting from any default under the lease contract from any part of the
8 rent still due under the same contract. (2-823, page 186)

9 Drafting Comment - May, 1997

10 The reference to 2A-720(d) in subsection (f) gives transferees after a lessee's sale or
11 lease to satisfy its security interest the same protection as transferees from a lessor under 2A-
12 720.

13 **SECTION 2A-725. LESSEE'S RIGHTS ON ~~IMPROPER~~ NONCONFORMING**

14 **DELIVERY; RIGHTFUL REJECTION.**

15 (a) Subject to Sections 2A-726, 2A-710 and 2A-711, if the goods or the tender or
16 delivery fail in any respect to conform to the lease contract, a lessee may:

17 (1) reject the whole;

18 (2) accept the whole; or

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

20 (b) A rejection under subsection (a) is not effective unless the lessee notifies the lessor
21 within a reasonable time after tender or delivery (2-703, page 111)

22 **SECTION 2A-726. INSTALLMENT LEASE CONTRACT: ~~REJECTION~~**

23 **~~AND DEFAULT.~~**

24 (a) In this section, "installment lease contract" means a lease contract in which the
25 terms require or the circumstances permit the delivery of goods in separate lots to be

1 separately accepted, even if the lease agreement requires payment other than in installments
2 or ~~contains a term~~ states "Each delivery is a separate lease" or ~~its equivalent~~ or words of similar
3 import.

4 (b) A lessee may reject any nonconforming installment of delivery of goods in an
5 installment lease if the nonconformity substantially impairs the value of that installment to the
6 buyer.. [However, if a nonconforming tender by the lessor [is not a breach of] [does not
7 substantially impair the value of] the whole contract and the lessor or the supplier gives
8 adequate assurance of its cure, the lessee shall accept that installment].

9 (c) If a nonconformity or default with respect to one or more installments in an
10 installment contract is ~~a breach of~~ substantial impairment of the value of the whole contract,
11 the aggrieved party may cancel the contract, However, the power to cancel the contract for
12 default is waived, or a canceled contract is reinstated, if the aggrieved party accepts a
13 nonconforming installment without seasonably giving notice of cancellation, brings an action
14 with respect only to past installments, or demands performance as to future installments. (2-
15 710, page 126)

16 Drafting Comment - May, 1997

17 The bracketing of the last sentence of subsection (b) follows the April draft of Article 2.
18 The comments to Article 2 suggest that the sentence is no longer necessary now that the act
19 defines substantial impairment. (See new subsections (c) and (d) of 2A-702).

20 **SECTION 2A-727. MERCHANT LESSEE'S DUTIES; LESSEE'S OPTIONS**

21 **AS TO SALVAGE.**

22 (a) Subject to a lessee's security interest under Section 2A-724(e), if the lessor or
23 supplier does not have an agent or place of business at the market where the goods were
24 rejected or acceptance was revoked, a merchant lessee, ~~after~~ upon an effective rightful
25 rejection or justifiable revocation of acceptance, shall follow any reasonable instructions

1 received from the lessor or supplier with respect to goods in the lessee's possession or control
2 and, in the absence of such instructions, shall make a reasonable effort to sell, lease, or
3 otherwise dispose of the goods for the lessor's account if they threaten to decline speedily in
4 value. Instructions are not reasonable if on demand indemnity for expenses is not forthcoming.

5 (b) A merchant lessee that sells goods under subsection (a) is entitled to
6 reimbursement from the lessor or supplier, or out of the proceeds, for the reasonable expenses
7 of caring for and disposing of them. If the expenses do not include a disposition commission,
8 the lessee is entitled to a commission usual in the trade or, if there is none, to a reasonable
9 sum not exceeding 10 percent of the gross proceeds.

10 (c) Subject to subsection (a), if unless a lessor or supplier ~~does not~~ gives instructions
11 within a reasonable time after notification of a rightful rejection or justifiable revocation of
12 acceptance, ~~a merchant lessee, or a non-merchant in any case,~~ may store the rejected goods
13 for the account of the lessor or supplier, reship them to the lessor or supplier, or resell them for
14 the account of the lessor or supplier, with reimbursement as provided in subsection (b).

15 (d) In complying with this section or Section 2A-728, the lessee shall act in good faith.
16 Conduct in good faith under this section does not constitute acceptance or conversion and may
17 not be the basis of a claim for damages.

18 (e) A purchaser that purchases in good faith from a lessee ~~pursuant to~~ under this
19 section or Section 2A-728 takes the goods free of any rights of the lessor and the supplier,
20 even if the lessee fails to comply with the requirements of this article. (2-705, page 115)

21 Drafting Comment - May, 1997

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

SECTION 2A-728. LESSEE'S DUTIES AS TO RIGHTFULLY REJECTED GOODS.

(a) Subject to Section 2A-727, ~~a lessee that, before~~ after an effective rightful rejection or justifiable revocation of acceptance, a lessee that takes physical possession or control ~~delivery~~ of goods other than those in which there is a security interest under Section 2A-724(e)), ~~after a rightful rejection or justifiable revocation of acceptance,~~ shall hold the goods with reasonable care at the disposal of the lessor or supplier for a sufficient time to permit the lessor or supplier to remove them. However, the lessee has no further obligation with regard to the goods.

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

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

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

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

~~_____ (c) A lessee in possession that wrongfully rejects but does not accept goods is subject to subsection (b)(1) and the duty of care in subsection (a). (2-704, page 113)~~

Drafting Comment

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

4 At the February meeting, the drafting committee voted to reject subsection (b) of 2-
5 704. It is, therefore, stricken above. The committee thought that whether use of rejected
6 goods is inconsistent with the attempted rejection or is consistent with rejection as necessary
7 mitigation of damages should be left to common law development, rather than codified. In
8 leasing transactions, treated use as mitigation rather than as acceptance under the lease
9 creates difficult fact issues regarded the obligations of the parties and the rent to be paid.

10 **SECTION 2A-729. CURE.**

11 (a) If a lessee effectively and rightfully rejects goods or a tender of delivery under
12 Section 2A-725 or justifiably revokes an acceptance under Section 2A-733 and the agreed time
13 for performance has not expired, the lessor or supplier, upon seasonable notice to the buyer
14 and at its own expense, may cure any default by making a conforming tender of delivery within
15 the agreed time and by compensating the lessee for all of the lessee's reasonable and
16 necessary expenses caused by the nonconforming tender and subsequent cure.

17 (b) If ~~the~~ a lessee effectively and rightfully rejects goods or a tender of delivery under
18 Section 2A-725 or justifiably revokes acceptance under 2A-733 and ~~if~~ the agreed time for
19 performance has expired, the lessor or supplier, upon seasonable notice to the lessee and at its
20 own expense, may cure a default by making a tender of conforming goods and by
21 compensation the lessee for all of the lessee's reasonable and necessary expenses caused by
22 the nonconforming tender and subsequent cure, if the cure is [appropriate and] timely under the
23 circumstances and the buyer has no reasonable grounds to refuse the cure. within a
24 reasonable time if

25 ~~———— Alternative A~~

26 ~~such tender does not substantially impair the value of the contract to the buyer.~~

27 ~~———— Alternative B~~

~~the lessor or supplier had reasonable grounds to believe that a nonconforming tender would be acceptable to or be accepted by the lessee.~~

~~_____ (c) If the lessee has justifiably revoked acceptance under 2A-733(a)(2) and if the time for performance has expired, the lessor or supplier, upon reasonable notice to the lessee and at its own expense, may cure any default by making a tender of conforming goods within a reasonable time if~~

~~_____ Alternative A~~

~~such retender does not substantially impair the value of the contract to the buyer.~~

~~_____ Alternative B~~

~~the seller establishes that the lessee will not be harmed if it accepted the tender. (2-709, p/age 121)~~

SECTION 2A-731. ACCEPTANCE OF GOODS.

(a) Goods are accepted if ~~a~~ the lessee:

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

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

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

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

(b) Acceptance of a part of a commercial unit is acceptance of the entire unit. (2-706, page 116)

**SECTION 2A-732. 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 shall pay rent in accordance with the lease contract for any goods accepted.

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

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

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

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

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

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

3 (1) The lessee may give notice of the litigation to the other party in a record,
4 and the person notified may then give similar notice of the litigation to any other person
5 ~~who~~ that is answerable over. If the notice invites the person notified to intervene in the
6 litigation and states that failure to do so will bind the person notified in any action later
7 brought by the lessor as to any determination of fact common to the two actions, the
8 person notified is so bound, unless, after seasonable receipt of the notice, the person
9 notified intervenes in the litigation and defends.

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

16 (f) Subsections (c), ~~through (d), and (e) apply to~~ govern an obligation of a lessee to
17 hold the lessor or the supplier harmless against infringement or the like. (2-707, page 118)

18 **SECTION 2A-733. REVOCATION OF ACCEPTANCE OF GOODS.**

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

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

(2) without discovery of the nonconformity if acceptance was reasonably induced 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) To be effective, a lessee's acceptance must be revoked 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 their own defects. The revocation is not effective until the lessee notifies the lessor of it.

(e) A lessee that justifiably revokes acceptance has the same rights and duties with regard to the goods involved under Sections 2A- 727—~~through~~ and 2A-728 as if they had been rejected. (2-708, page 120)

Drafting Comment - May, 1997

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

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

(a) ~~After~~ Upon a default by a lessor under the lease contract of the type described in Section 2A-724(a), or if agreed ~~after~~ upon other default by the lessor, the lessee may cover by making in good faith and without unreasonable delay any purchase or lease of, or contract to purchase or lease, comparable goods to substitute for those due from the lessor.

1 (b) Except as otherwise provided with respect to damages liquidated in the lease
2 agreement or determined pursuant to by agreement of the parties, if a lessee's cover is by a
3 lease contract substantially similar to the original lease contract and the new lease contract is
4 made in good faith and in a commercially reasonable manner, a lessee that covers in the
5 manner required by subsection (a);

6 (1) may recover damages measured by the present value, as of the date of
7 the commencement of the ~~term period~~ of the new lease contract, of the rent under the
8 new lease contract applicable to that ~~period part~~ of the new lease ~~term period~~ which is
9 comparable to the then remaining ~~term period~~ of the original lease contract minus the
10 present value as of the same date of the total rent for the then remaining lease ~~term~~
11 ~~period~~ of the original lease contract together with any incidental or consequential
12 damages, less expenses avoided as a result of the lessor's default ;~~and~~

13 ~~(2) may not recover damages under 2A-735.~~

14 (c) If a lessee's cover is by a lease agreement that for any reason does not qualify for
15 treatment under subsection (b), or is by purchase or otherwise, the lessee may recover from
16 the lessor as if the lessee had elected not to cover, and Section 2A-826 governs.

17 ~~(c) A lessee that fails to cover in a manner required under subsection (a) is not barred~~
18 ~~from any other available remedy.~~

19 (2-825, page 190)

20 Draft Comment - May, 1997

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

1 **§ 2A-735. LESSEE'S DAMAGES FOR NON-DELIVERY, REPUDIATION, DEFAULT,**
2 **AND BREACH OF WARRANTY IN REGARD TO ACCEPTED GOODS.**

3 (a) Except as otherwise provided with respect to damages liquidated in the lease
4 agreement or otherwise determined ~~pursuant to~~ by agreement of the parties (Sections 1-102(3)
5 and 2A-711), if a lessee elects not to cover or a lessee elects to cover and the cover is by lease
6 agreement that for any reason does not qualify for treatment under Section 2A-734, or is by
7 purchase or otherwise, the measure of damages for non-delivery or repudiation by the lessor or
8 for rejection or revocation of acceptance by the lessee is the present value, as of the date of the
9 default, of the then market rent minus the present value as of the same date of the original rent,
10 computed for the remaining ~~lease term~~ period of the original lease agreement, together with
11 incidental and consequential damages, less expenses saved in consequence of the lessor's
12 default.

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

15 (3) Except as otherwise agreed, if the lessee has accepted goods and given
16 notification (Section 2A-732), the measure of damages for non-conforming tender or delivery or
17 other default by a lessor is the loss resulting in the ordinary course of events from the lessor's
18 default as determined in any manner that is reasonable together with incidental and
19 consequential damages, less expenses saved in consequence of the lessor's default.

20 (4) Except as otherwise agreed, the measure of damages for breach of
21 warranty is the present value at the time and place of acceptance of the difference between the
22 value of the use of the goods accepted and the value if they had been as warranted for the
23 lease ~~term,~~ period unless special circumstances show proximate damages of a different

1 amount, together with incidental and consequential damages, less expenses saved in
2 consequence of the lessor's default or breach of warranty.

3 ~~SECTION 2A-735. LESSEE'S DAMAGES FOR NONDELIVERY, REPUDIATION,~~
4 ~~DEFAULT, AND BREACH OF WARRANTY IN REGARD TO ACCEPTED GOODS.~~

5 ~~(a) Except as otherwise provided with respect to damages liquidated in the lease~~
6 ~~agreement or otherwise determined pursuant to agreement of the parties, if a lessee elects not~~
7 ~~to cover or a lessee elects to cover and the cover is by lease agreement that for any reason~~
8 ~~does not qualify for treatment under Section 2A-734(b), or is by purchase or otherwise, the~~
9 ~~measure of damages for nondelivery or repudiation by the lessor or for rejection or revocation~~
10 ~~of acceptance by the lessee is the present value, as of the date specified in subsection (b) and~~
11 ~~at the place specified in subsection (c), of the then market rent, minus the present value as of~~
12 ~~the same date of the original rent, computed for the remaining lease term of the original lease~~
13 ~~agreement, together with incidental and consequential damages, less expenses saved in~~
14 ~~consequence of the lessor's default.~~

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

16 ~~(1) If the case comes to trial after the agreed time for performance, market~~
17 ~~rent is determined at the time of the breach or when the lessee learned of the breach,~~
18 ~~whichever is later. the following rules apply:~~

19 ~~(A) If the default is other than by repudiation market rent is~~
20 ~~determined as of the time the lessee learned of the default.~~

21 ~~(B) If the default is by repudiation, market rent is determined as of~~
22 ~~the time for performance.~~

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

4 ~~————— (c) Market rent is determined as of the place for tender, or however, in cases of~~
5 ~~rejection after arrival or revocation of acceptance, as of it is determined at the place of arrival.~~

6 (2-826, page 191)

7 Drafting Comment-May, 1997

8 At the February, 1997, meeting the 2A committee voted to return to present 2A-519.
9 That has been done above.

10 **SECTION 2A-736. LESSEE'S DAMAGES FOR DEFAULT REGARDING**

11 **ACCEPTED GOODS.**

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

16 (b) Except as otherwise agreed, ~~the~~ a measure of damages for breach of a warranty of
17 quality is the present value at the time and place of acceptance of the difference between the
18 value of the use of the goods accepted and the value if they had been as warranted for the
19 lease term period, unless special circumstances show proximate damages of a different
20 amount

21 (c) A lessee may also recover incidental and consequential damages.

22 (2-827, page 194)

23 **SECTION 2A-737. PREPAYING LESSEE'S RIGHT TO GOODS IF PART OF RENT**
24 **HAS BEEN PAID.**

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

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

10 (c) If the requirements of subsection (a) or (b) are satisfied, the lesser's right vests
11 upon identification of the goods to the lease contract even if the lessor has not then repudiated
12 the contract or failed to deliver as required by the contract. (2-824, page 187)

13 Drafting Comment - May, 1997

14 My notes indicate that a comment to this section should make it clear that this section
15 gives no rights to the lessee against a supplier.