

MAINE STATE LEGISLATURE

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R.O.S.

L.D. 1802

(Filing No. S-695)

STATE OF MAINE
SENATE
115TH LEGISLATURE
SECOND REGULAR SESSION

COMMITTEE AMENDMENT "A" to S.P. 680, L.D. 1802, Bill, "An Act to Adopt a New Article for the Uniform Commercial Code"

Amend the bill by inserting before section 1 the following:

'Sec. 1. 9-A MRSA §3-404-A is enacted to read:

§3-404-A. Interlocking leases

1. A lessor who enters into a consumer lease for the purpose of enabling a consumer to obtain the use and possession of goods from a seller who is a merchant with respect to the goods is subject to all claims and defenses of the consumer against the seller with respect to the leased goods if:

A. The lessor was a person having a legal relationship with the seller and the relationship was not remote or was a factor in entering into the lease;

B. The seller guaranteed the lease or otherwise assumed the risk of loss by the lessor upon the lease; or

C. The lessor directly supplied the seller with a form used by the lessee to evidence or secure the lease.

2. The lessor's liability under this section may not exceed the amount that would be due to the lessor if the lease were terminated on the date the lessor receives notice of a claim or defense of the lessee against the seller.'

Further amend the bill by striking out all of section 2 and inserting in its place the following:

COMMITTEE AMENDMENT "A" to S.P. 680, L.D. 1802

'Sec. 2. 11 MRSA §1-201, sub-§(37), as amended by PL 1977, c. 526, §3, is further amended to read:

(37) Security interest. "Security interest" means an interest in personal property or fixtures which that secures payment or performance of an obligation. The retention or reservation of title by a seller of goods notwithstanding shipment or delivery to the buyer (section 2-401) is limited in effect to a reservation of a "security interest." The term also includes any interest of a buyer of accounts or chattel paper, which is subject to Article 9. The special property interest of a buyer of goods on identification of such goods to a contract for sale under section 2-401 is not a "security interest", but a buyer may also acquire a "security interest" by complying with Article 9. Unless a lease or consignment is intended as security, reservation of title thereunder is not a "security interest" but a consignment is in any event subject to the provisions on consignment sales (section 2-326). ~~Whether a lease is intended as security is to be determined by the facts of each case; however, (a) the inclusion of an option to purchase does not of itself make the lease one intended for security, and (b) an agreement that upon compliance with the terms of the lease the lessee shall become or has the option to become the owner of the property for no additional consideration or for a nominal consideration does make the lease one intended for security.~~

Whether a transaction creates a lease or security interest is determined by the fact of each case.

(a) A transaction creates a security interest if the consideration the lessee is to pay the lessor for the right to possession and use of the goods is an obligation for the term of the lease not subject to termination by the lessee, and

(i) The original term of the lease is equal to or greater than the remaining economic life of the goods;

(ii) The lessee is bound to renew the lease for the remaining economic life of the goods or is bound to become the owner of the goods;

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

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

(b) A transaction does not create a security interest merely because it provides that:

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

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

(iii) The lessee has an option to renew the lease or to become the owner of the goods;

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

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

(c) For purposes of this subsection:

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

COMMITTEE AMENDMENT

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

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

Further amend the bill in section 3 by inserting at the end of that part designated "~~S2-1101~~," the following:

'UNIFORM COMMENT

Rationale for Codification:

There are several reasons for codifying the law with respect to leases of goods. An analysis of the case law as it applies to leases of goods suggests at least three significant issues to be resolved by codification. First, what is a lease? It is necessary to define lease to determine whether a transaction creates a lease or a security interest disguised as a lease. If the transaction creates a security interest disguised as a lease, the lessor will be required to file a financing statement or take other action to perfect its interest in the goods against third parties. There is no such requirement with respect to leases. Yet the distinction between a lease and a security interest disguised as a lease is not clear. Second, will the lessor be deemed to have made warranties to the lessee? If the transaction is a sale the express and implied warranties of Article 2 of the Uniform Commercial Code apply. However, the warranty law with respect to leases is uncertain. Third, what remedies are available to the lessor upon the lessee's default? If the transaction is a security interest disguised as a lease, the answer is stated in Part 5 of the Article on Secured Transactions (Article 9). There is no clear answer with respect to leases.

There are reasons to codify the law with respect to leases of goods in addition to those suggested by a review of the reported cases. The answer to this important question should not be limited to the issues raised in these cases. Is it not also

proper to determine the remedies available to the lessee upon the lessor's default? It is, but that issue is not reached through a review of the reported cases. This is only one of the many issues presented in structuring, negotiating and documenting a lease of goods.

Statutory Analogue:

After it was decided to proceed with the codification project, the drafting committee of the National Conference of Commissioners on Uniform State Laws looked for a statutory analogue, gradually narrowing the focus to the Article on Sales (Article 2) and the Article on Secured Transactions (Article 9). A review of the literature with respect to the sale of goods reveals that Article 2 is predicated upon certain assumptions: Parties to the sales transaction frequently are without counsel; the agreement of the parties often is oral or evidenced by scant writings; obligations between the parties are bilateral; applicable law is influenced by the need to preserve freedom of contract. A review of the literature with respect to personal property security law reveals that Article 9 is predicated upon very different assumptions: Parties to a secured transaction regularly are represented by counsel; the agreement of the parties frequently is reduced to a writing, extensive in scope; the obligations between the parties are essentially unilateral; and applicable law seriously limits freedom of contract.

The lease is closer in spirit and form to the sale of goods than to the creation of a security interest. While parties to a lease are sometimes represented by counsel and their agreement is often reduced to a writing, the obligations of the parties are bilateral and the common law of leasing is dominated by the need to preserve freedom of contract. Thus the drafting committee concluded that Article 2 was the appropriate statutory analogue.

Issues:

The drafting committee then identified and resolved several issues critical to codification:

Scope: The scope of the Article was limited to leases (Section 2A-102 [Section 2-1102]). There was no need to include leases intended as security, i.e., security interests disguised as leases, as they are adequately treated in Article 9. Further, even if leases intended as security were included, the need to preserve the distinction would remain, as policy suggests treatment significantly different from that accorded leases.

Definition of Lease: Lease was defined to exclude leases intended as security (Section 2A-103(1)(j) [Section 2-1103(1)(j)]). Given the litigation to date a revised definition of security interest was suggested for inclusion in the Act. (Section 1-201(37)). This revision sharpens the distinction between leases and security interests disguised as leases.

Filing: The lessor was not required to file a financing statement against the lessee or take any other action to protect the lessor's interest in the goods (Section 2A-301 [Section 2-1301]). The refined definition of security interest will more clearly signal the need to file to potential lessors of goods. Those lessors who are concerned will file a protective financing statement (Section 9-408).

Warranties: All of the express and implied warranties of the Article on Sales (Article 2) were included (Sections 2A-210 through 2A-216 [Sections 2-1210 to 2-1216]), revised to reflect differences in lease transactions. The lease of goods is sufficiently similar to the sale of goods to justify this decision. Further, many courts have reached the same decision.

Certificate of Title Laws: Many leasing transactions involve goods subject to certificate of title statutes. To avoid conflict with those statutes, this Article is subject to them (Section 2A-104(1)(b) [2-1104(1)(a)] Section 2A-104(1)(a) [Section 2-1104(1)(a)]).

Consumer Leases: Many leasing transactions involve parties subject to consumer protection statutes or decisions. To avoid conflict with those statutes laws this Article is subject to them to the extent provided in (Section 2A-104(1)(a) and (d) [2-1104(1)(a)] Section 2A-104(1)(c) and (2) [Section 2-1104(1)(c) and Section 2-1104(2)]). Further, certain consumer protections have been incorporated in the Article.

Finance Leases: Certain leasing transactions substitute the seller supplier of the goods for the lessor as the party responsible to the lessee with respect to warranties and the like. The definition of finance lease (Section 2A-103(1)(g) [2-1103(1)(g)]) was developed to describe these transactions. Various sections of the Article implement the substitution of the seller supplier for the lessor, including Sections 2A-209 and 2A-407 [Sections 2-1209 and 2-1407]. No attempt was made to fashion a special rule where the finance lessor is an affiliate of the seller supplier of goods; this is to be developed by the courts, case by case.

2 **Sale and Leaseback:** Sale and leaseback transactions are
4 becoming increasingly common. A number of state statutes treat
6 transactions where possession is retained by the seller as
8 fraudulent per se or prima facie fraudulent. That position is
10 not balanced in accord with modern practice and thus is changed
12 by the Article "if the buyer bought for value and in good faith"
14 (Section 2A-308(3) [2-1308(3)]).

16 **Remedies:** The Article has not only provided for lessor's
18 remedies upon default by the lessee (Sections 2A-523 through
20 2A-531 [Sections 2-1523 to 2-1531]), but also for lessee's
22 remedies upon default by the lessor (Sections 2A-508 through
24 2A-522 [Sections 2-1508 to 2-1522]). This is a significant
26 departure from Article 9, which provides remedies only for the
28 secured party upon default by the debtor. This difference is
30 compelled by the bilateral nature of the obligations between the
32 parties to a lease.

34 **Damages:** Many leasing transactions are predicated on the
36 parties' ability to stipulate an appropriate measure of damages
38 in the event of default. The rule with respect to sales of goods
40 (Section 2-718) is not sufficiently flexible to accommodate this
42 practice. Consistent with the common law emphasis upon freedom
44 to contract, the Article has created a revised rule that allows
46 greater flexibility with respect to leases of goods (Section
48 2A-504(1) [2-1504(1)]).

History:

40 This Article is a revision of the Uniform Personal Property
42 Leasing Act, which was approved by the National Conference of
44 Commissioners on Uniform State Laws in August, 1985. However, it
46 was believed that the subject matter of the Uniform Personal
48 Property Leasing Act would be better treated as an article of
this Act. Thus, although the Conference promulgated the Uniform
Personal Property Leasing Act as a Uniform Law, activity was
modest held in abeyance to allow time to restate the Uniform
Personal Property Leasing Act as Article 2A.

40 In August, 1986 the Conference approved and recommended this
42 Article (including conforming amendments to Article 1 and Article
44 9) for promulgation as an amendment to this Act. In December,
46 1986 the Council of the American Law Institute approved and
48 recommended this Article (including conforming amendments to
Article 1 and Article 9), with official comments, for
promulgation as an amendment to this Act. In March, 1987 the
Permanent Editorial Board for the Uniform Commercial Code

2 approved and recommended this Article (including conforming
4 amendments to Article 1 and Article 9), with official comments,
6 for promulgation as an amendment to this Act. In May, 1987 the
8 American Law Institute approved and recommended this Article
10 (including conforming amendments to Article 1 and Article 9),
12 with official comments, for promulgation as an amendment to this
14 Act. In August, 1987 the Conference confirmed its approval of
16 the final text of this Article.

18 Upon its initial promulgation, Article 2A was rapidly
20 enacted in several states, was introduced in a number of other
22 states, and underwent bar association, law revision commission
24 and legislative study in still further states. In that process
26 debate emerged, principally sparked by the study of Article 2A by
28 the California Bar Association, California's non-uniform
30 amendments to Article 2A, and articles appearing in a symposium
32 on Article 2A published after its promulgation in the Alabama Law
34 Review. The debate chiefly centered on whether Article 2A had
36 struck the proper balance or was clear enough concerning the
38 ability of a lessor to grant a security interest in its leasehold
40 interest and in the residual, priority between a secured party
42 and the lessee, and the lessor's remedy structure under Article
44 2A.

46 This debate over issues on which reasonable minds could and
48 did differ began to affect the enactment effort for Article 2A in
a deleterious manner. Consequently, the Standby Committee for
Article 2A, composed predominantly of the former members of the
drafting committee, reviewed the legislative actions and studies
in the various states, and opened a dialogue with the principal
proponents of the non-uniform amendments. Negotiations were
conducted in conjunction with, and were facilitated by, a study
of the uniform Article and the non-uniform Amendments by the New
York Law Revision Commission. Ultimately, a consensus was
reached, which has been approved by the membership of the
Conference, the Permanent Editorial Board, and the Council of the
Institute. Rapid and uniform enactment of Article 2A is expected
as a result of the completed amendments. The Article 2A
experience reaffirms the essential viability of the procedures of
the Conference and the Institute for creating and updating
uniform state law in the commercial law area.

Relationship of Article 2A to Other Articles:

40 The Article on Sales provided a useful point of reference
42 for codifying the law of leases. Many of the provisions of that
44 Article were carried over, changed to reflect differences in
46 style, leasing terminology or leasing practices. Thus, the
48

official comments to those sections of Article 2 whose provisions were carried over are incorporated by reference in Article 2A, as well; further, any case law interpreting those provisions should be viewed as persuasive but not binding on a court when deciding a similar issue with respect to leases. Any change in the sequence that has been made when carrying over a provision from Article 2 should be viewed as a matter of style, not substance. This is not to suggest that in other instances Article 2A did not also incorporate substantially revised provisions of Article 2, Article 9 or otherwise where the revision was driven by a concern over the substance; but for the lack of a mandate, the drafting committee would might well have made the same or a similar change in the statutory analogue. Those sections in Article 2A include Sections 2A-104, 2A-105, 2A-106, 2A-108(2) and (4), 2A-109(2), 2A-208, 2A-214(2) and (3)(a), 2A-216, 2A-303, 2A-306, 2A-503, 2A-504(3)(b), 2A-506(2), and 2A-515 [Sections 2-1104, 2-1105, 2-1106, 2-1108(2) and (4), 2-1109(2), 2-1208, 2-1214(2) and (3)(a), 2-1216, 2-1303, 2-1306, 2-1503, 2-1504(3)(b), 2-1506(2), and 2-1515]. For lack of relevance or significance not all of the provisions of Article 2 were incorporated in Article 2A.

This codification was greatly influenced by the fundamental tenet of the common law as it has developed with respect to leases of goods: freedom of the parties to contract. Note that, like all other Articles of this Act, the principles of construction and interpretation contained in Article 1 are applicable throughout Article 2A (Section 2A-103(4) [2-1103(4)]). These principles include the ability of the parties to vary the effect of the provisions of Article 2A, subject to certain limitations including those that relate to the obligations of good faith, diligence, reasonableness and care (Section 1-102(3)). Consistent with those principles no negative inference is to be drawn by the episodic use of the phrase "unless otherwise agreed" in certain provisions of Article 2A. Section 1-102(4). Indeed, the contrary is true, as the general rule in the Act, including this Article, is that the effect of the Act's provisions may be varied by agreement. Section 1-102(3). This conclusion follows even where the statutory analogue contains the phrase and the correlative provision in Article 2A does not.

Further amend the bill in section 3 by inserting at the end of that part designated "~~S2-1102~~," the following:

UNIFORM COMMENT

Uniform Statutory Source: Section 9-102(1). Throughout this Article, unless otherwise stated, references to "Section" are to other sections of this Act.

Changes: Substantially revised.

Purposes: This Article governs transactions as diverse as the lease of a hand tool to an individual for a few hours and the leveraged lease of a complex line of industrial equipment to a multi-national organization for a number of years.

To achieve that end it was necessary to provide that this Article applies to any transaction, regardless of form, that creates a lease. Since lease is defined as a transfer of an interest in goods (Section 2A-103(1)(j) [Section 2-1103(1)(j)]) and goods is defined to include fixtures (Section 2A-103(1)(h) [Section 2-1103(1)(h)]), application is limited to the extent the transaction relates to goods, including fixtures. Further, since the definition of lease does not include a sale (Section 2-106(1)) or retention or creation of a security interest (Section 1-201(37)), application is further limited; sales and security interests are governed by other Articles of this Act.

Finally, in recognition of the diversity of the transactions to be governed, the sophistication of many of the parties to these transactions, and the common law tradition as it applies to the bailment for hire or lease, freedom of contract has been preserved. DeKoven, Proceedings After Default by the Lessee Under a True Lease of Equipment, in 1C P. Coogan, W. Hogan, D. Vagts, Secured Transactions Under the Uniform Commercial Code, 29B.02[2] (1986). Thus, despite the extensive regulatory scheme established by this Article, the parties to a lease will be able to create private rules to govern their transaction. Sections 2A-103(4) [Section 2-1103(4)] and 1-102(3). However, there are special rules in this Article governing consumer leases, as well as other state and federal statutes, that may further limit freedom of contract with respect to consumer leases.

A court may apply this Article by analogy to any transaction, regardless of form, that creates a lease of personal property other than goods, taking into account the expressed intentions of the parties to the transaction and any differences between a lease of goods and a lease of other property. Such application has precedent as the provisions of the Article on Sales (Article 2) have been applied by analogy to leases of goods. E.g., Hawkland, The Impact of the Uniform Commercial Code on Equipment Leasing, 1972 Ill. L.F. 446; Murray, Under the Spreading Analogy of Article 2 of the Uniform Commercial Code, 39

2 Fordham L. Rev. 447 (1971). Whether such application would be
3 appropriate for other bailments of personal property, gratuitous
4 or for hire, should be determined by the facts of each case. See
5 Mieske v. Bartell Drug Co., 92 Wash. 2d 40, 46-48, 593 P.2d 1308,
6 1312 (1979).

7 Further, parties to a transaction creating a lease of
8 personal property other than goods, or a bailment of personal
9 property may provide by agreement that this Article applies.
10 Upholding the parties' choice is consistent with the spirit of
11 this Article.

12 **Cross References:**

13 Sections 1-102(3), 1-201(37), Article 2, esp. Section 2-106(1),
14 and Sections 2A-103(1)(h) [Section 2-1103(1)(h)], 2A-103(1)(j)
15 [Section 2-1103(1)(j)] and 2A-103(4) [Section 2-1103(4)].

16 **Definitional Cross Reference:**

17 "Lease". Section 2A-103(1)(j) [Section 2-1103(1)(j)].

18 Further amend the bill in section 3 in that part designated
19 "~~§2-1103.~~" in subsection (1) in paragraph (h) in the 2nd line
20 (page 5, line 50 in L.D.) by inserting after the following:
21 "contract" the following: "including mobile homes"

22 Further amend the bill in section 3 by inserting at the end
23 of that part designated "~~§2-1103.~~" the following:

24 **UNIFORM COMMENT**

25 (a) "Buyer in ordinary course of business". Section
26 1-201(9).

27 (b) "Cancellation". Section 2-106(4). The effect of a
28 cancellation is provided in Section 2A-505(1) [2-1505(1)].

29 (c) "Commercial unit". Section 2-105(6).

30 (d) "Conforming". Section 2-106(2).

31 (e) "Consumer lease". New. This Article includes a subset
32 of rules that applies only to consumer leases. Sections 2A-106,
33 2A-108(2), 2A-108(4), 2A-109(2), 2A-221, 2A-309, 2A-406, 2A-407,
34 2A-504(3)(b), and 2A-516(3)(b) [Sections 2-1106, 2-1108(2),
35 2-1108(4), 2-1109(2), 2-1221, 2-1309, 2-1406, 2-1407,
36 2-1504(3)(b) and 2-1516(3)(b)].

2 For a transaction to qualify as a consumer lease it must
3 first qualify as a lease. Section 2A-103(1)(j) [2-1103(1)(j)].
4 Note that this Article regulates the transactional elements of a
5 lease, including a consumer lease; consumer protection statutes
6 ~~present and future~~ and existing consumer protection
7 decisions are unaffected by this Article. ~~Section 2A-104(1)(a)~~
8 ~~and (d) Section 2A-104(1)(c) and (2) [Section 2-1104(1)(c) and~~
9 ~~(2)].~~ Of course, Article 2A as state law also is subject to
10 federal consumer protection law.

11 This definition is modeled after the definition of consumer
12 lease in the Consumer Leasing Act, 15 U.S.C. § 1667 (1982), and
13 in the Unif. Consumer Credit Code § 1.301(14), 7A U.L.A. 43
14 (1974). However, this definition of consumer lease differs from
15 its models in several respects: the lessor can be a person
16 regularly engaged either in the business of leasing or of selling
17 goods, the lease need not be for a term exceeding four months, a
18 lease primarily for an agricultural purpose is not covered, and
19 ~~the limitation of \$25,000 is not subject to adjustment as the~~
20 ~~Consumer Price Index changes whether there should be a limitation~~
21 by dollar amount and its amount is left up to the individual
22 states.

23 This definition focuses on the parties as well as the
24 transaction. If a lease is within this definition, the lessor
25 must be regularly engaged in the business of leasing or selling,
26 and the lessee must be an individual not an organization; note
27 that a lease to two or more individuals having a common interest
28 through marriage or the like ~~should not be considered is not~~
29 excluded as a lease to an organization under Section 1-201(28).
30 The lessee must take the interest primarily for a personal,
31 family or household purpose. Further if required by the enacting
32 state, total payments under the lease contract, excluding
33 payments for options to renew or buy, cannot exceed \$25,000 the
34 figure designated.

35 (f) "Fault". Section 1-201(16).

36 (g) "Finance Lease". New. This Article includes a subset
37 of rules that applies only to finance leases. Sections 2A-209,
38 2A-211(2), 2A-212(1), 2A-213, 2A-219(1), 2A-220(1)(a), 2A-221,
39 2A-405(c), 2A-407, 2A-516(2) and 2A-517(1)(a) and (2) [Sections
40 2-1209, 2-1211(2), 2-1212(1), 2-1213, 2-1219(1), 2-1220(1)(a),
41 2-1221, 2-1405(c), 2-1407, 2-1516(2) and 2-1517(1)(a) and (2)].

42 For a transaction to qualify as a finance lease it must
43 first qualify as a lease. Section 2A-103(1)(j) [2-1103(1)(j)].

Unless the lessor is comfortable that the transaction will qualify as a finance lease, the lease agreement should include provisions giving the lessor the benefits created by the subset of rules applicable to the transaction that qualifies as a finance lease under this Article.

A finance lease is the product of a three party transaction. The supplier manufactures or supplies the goods pursuant to the lessee's specification, perhaps even pursuant to a purchase order, sales agreement or lease agreement between the supplier and the lessee. After the prospective finance lease is negotiated, a purchase order, sales agreement, or lease agreement is entered into by the lessor (as buyer or prime lessee) or an existing order, agreement or lease is assigned by the lessee to the lessor, and the lessor and the lessee then enter into a lease or sublease of the goods. Due to the limited function usually performed by the lessor, the lessee looks almost entirely to the supplier for representations, covenants and warranties. If a manufacturer's warranty carries through, the lessee may also look to that. Yet, this definition does not restrict the lessor's function solely to the supply of funds; if the lessor undertakes or performs other functions, express warranties, covenants and the common law will protect the lessee.

This definition focuses on the transaction, not the status of the parties; to avoid confusion it is important to note that in other contexts, e.g., tax and accounting, the term finance lease has been used to connote different types of lease transactions, including leases that are disguised secured transactions. M. Rice, Equipment Financing, 62-71 (1981). A lessor who is a merchant with respect to goods of the kind subject to the lease may be a lessor under a finance lease. Many leases that are leases back to the seller of goods (Section 2A-308(3) [Section 2-1308(3)]) will be finance leases. This conclusion is easily demonstrated by a hypothetical. Assume that B has bought goods from C pursuant to a sales contract. After delivery to and acceptance of the goods by B, B negotiates to sell the goods to A and simultaneously to lease the goods back from A, on terms and conditions that, we assume, will qualify the transaction as a lease. Section 2A-103(1)(j) [Section 2-1103(1)(j)]. In documenting the sale and lease back, B assigns the original sales contract between B, as buyer, and C, as seller, to A. A review of these facts leads to the conclusion that the lease from A to B qualifies as a finance lease, as all three conditions of the definition are satisfied. Subparagraph (i) is satisfied as A, the lessor, had nothing to do with the selection, manufacture, or supply of the equipment. Subparagraph (ii) is satisfied as A, the lessor, bought the equipment at the

same time that A leased the equipment to B, which certainly is in connection with the lease. Finally, subparagraph (iii) (A) is satisfied as A entered into the sales contract with B at the same time that A leased the equipment back to B. B, the lessee, will have received a copy of the sales contract in a timely fashion.

Subsection [subparagraph] (i) requires the lessor to remain outside the selection, manufacture and supply of the goods; that is the rationale for releasing the lessor from most of its traditional liability. The lessor is not prohibited from possession, maintenance or operation of the goods, as policy does not require such prohibition. To insure the lessee's reliance on the supplier, and not on the lessor, subsection [subparagraph] (ii) requires that the goods (where the lessor is the buyer of the goods) or that the right to possession and use of the goods (where the lessor is the prime lessee and the sublessor of the goods) be acquired in connection with the lease (or sublease) to qualify as a finance lease. The scope of the phrase "in connection with" is to be developed by the courts, case by case. Finally, as the lessee generally relies almost entirely upon the supplier for representations, and covenants, and upon the supplier or a manufacturer, or both, for warranties with respect to the goods, subsection [subparagraph] (iii) requires that one of the following occur: (A) the lessee receive a copy of the supply contract on or before signing the lease contract or that; (B) the lessee's approval of the supply contract is a condition to the effectiveness of the lease contract; (C) the lessee receive a statement describing the promises and warranties and any limitations relevant to the lessee before signing the lease contract; or (D) before signing the lease contract and except in a consumer lease, the lessee receive a writing identifying the supplier (unless the supplier was selected and required by the lessee) and the rights of the lessee under Section 2A-209 [Section 2-1209], and advising the lessee a statement of promises and warranties is available from the supplier. Thus, even where oral supply orders or computer placed supply orders are compelled by custom and usage the transaction may still qualify as a finance lease if the lessee approves the supply contract before the lease contract is effective and such approval was a condition to the effectiveness of the lease contract. Moreover, where the lessor does not want the lessee to see the entire supply contract, including price information, the lessee may be provided with a separate statement of the terms of the supply contract relevant to the lessee; promises between the supplier and the lessor that do not affect the lessee need not be included. The statement can be a restatement of those terms or a copy of portions of the supply contract with the relevant terms clearly designated. Any implied warranties need not be designated, but a

disclaimer or modification of remedy must be designated. A copy of any manufacturer's warranty is sufficient if that is the warranty provided. However, a copy of any Regulation M disclosure given pursuant to 12 C.F.R. § 213.4(g) concerning warranties in itself is not sufficient since those disclosures need only briefly identify express warranties and need not include any disclaimer of warranty.

If a transaction does not qualify as a finance lease, the parties may achieve the same result by agreement; no negative implications are to be drawn if the transaction does not qualify. Further, absent the application of special rules (fraud, duress, and the like), a lease that qualifies as a finance lease and is assigned by the lessor or the lessee to a third party does not lose its status as a finance lease under this Article. Finally, this Article creates no special rule where the lessor is an affiliate of the supplier; whether the transaction qualifies as a finance lease will be determined by the facts of each case.

(h) "Goods". Section 9-105(1)(h). See Section 2A-103(3) [Section 2-1103(3)] for reference to the definition of "Accounts Account", "Chattel paper", "Documents Document", "General intangibles" and "Instruments Instrument". See Section 2A-217 [Section 2-1217] for determination of the time and manner of identification.

(i) "Installment lease contract". Section 2-612(1).

(j) "Lease". New. There are several reasons to codify the law with respect to leases of goods. An analysis of the case law as it applies to leases of goods suggests at least several significant issues to be resolved by codification. First and foremost is the definition of a lease. It is necessary to define lease to determine whether a transaction creates a lease or a security interest disguised as a lease. If the transaction creates a security interest disguised as a lease, the transaction will be governed by the Article on Secured Transactions (Article 9) and the lessor will be required to file a financing statement or take other action to perfect its interest in the goods against third parties. There is no such requirement with respect to leases under the common law and, except with respect to leases of fixtures (Section 2A-309 [Section 2-1309]), this Article imposes no such requirement. Yet the distinction between a lease and a security interest disguised as a lease is not clear from the case law at the time of the promulgation of this Article. DeKoven, Leases of Equipment: Puritan Leasing Company v. August, A Dangerous Decision, 12 U.S.F. L. Rev. 257 (1978).

At common law a lease of personal property is a bailment for hire. While there are several definitions of bailment for hire, all require a thing to be let and a price for the letting. Thus, in modern terms and as provided in this definition, a lease is created when the lessee agrees to furnish consideration for the right to the possession and use of goods over a specified period of time. Mooney, Personal Property Leasing: A Challenge, 36 Bus. Law. 1605, 1607 (1981). Further, a lease is neither a sale (Section 2-106(1)) nor a retention or creation of a security interest (Section 1-201(37)). Due to extensive litigation to distinguish true leases from security interests, an amendment to Section 1-201(37) has been promulgated with this Article to create a sharper distinction.

This section as well as Section 1-201(37) must be examined to determine whether the transaction in question creates a lease or a security interest. The following hypotheticals indicate the perimeters of the issue. Assume that A has purchased a number of copying machines, new, for \$1,000 each; the machines have an estimated useful economic life of three years. A advertises that the machines are available to rent for a minimum of one month and that the monthly rental is \$100.00. A intends to enter into leases where A provides all maintenance, without charge to the lessee. Further, the lessee will rent the machine, month to month, with no obligation to renew. At the end of the lease term the lessee will be obligated to return the machine to A's place of business. This transaction qualifies as a lease under the first half of the definition, for the transaction includes a transfer by A to a prospective lessee of possession and use of the machine for a stated term, month to month. The machines are goods (Section 2A-103(1)(h) [Section 2-1103(1)(h)]). The lessee is obligated to pay consideration in return, \$100.00 for each month of the term.

However, the second half of the definition provides that a sale or a security interest is not a lease. Since there is no passing of title, there is no sale. Sections 2A-103(3) [Section 2-1103(3)] and 2-106(1). Under pre-Act security law this transaction would have created a bailment for hire or a true lease and not a conditional sale. Da Rocha v. Macomber, 330 Mass. 611, 614-15, 116 N.E.2d 139, 142 (1953). Under Section 1-201(37), as amended with the promulgation of this Article, the same result would follow. While the lessee is obligated to pay rent for the one month term of the lease, one of the other four conditions of the second paragraph of Section 1-201(37) must be met and none is. The term of the lease is one month and the economic life of the machine is 36 months; thus, subparagraph

[paragraph] (a) of Section 1-201(37) is not now satisfied. Considering the amount of the monthly rent, absent economic duress or coercion, the lessee is not bound either to renew the lease for the remaining economic life of the goods or to become the owner. If the lessee did lease the machine for 36 months, the lessee would have paid the lessor \$3,600 for a machine that could have been purchased for \$1,000; thus, subparagraph [paragraph] (b) of Section 1-201(37) is not satisfied. Finally, there are no options; thus, subparagraphs [paragraphs] (c) and (d) of Section 1-201(37) are not satisfied. This transaction creates a lease, not a security interest. However, with each renewal of the lease the facts and circumstances at the time of each renewal must be examined to determine if that conclusion remains accurate, as it is possible that a transaction that first creates a lease, later creates a security interest.

Assume that the facts are changed and that A requires each lessee to lease the goods for 36 months, with no right to terminate. Under pre-Act security law this transaction would have created a conditional sale, and not a bailment for hire or true lease. *Hervey v. Rhode Island Locomotive Works*, 93 U.S. 664, 672-73 (1876). Under this subsection [paragraph], and Section 1-201(37), as amended with the inclusion of this Article in the Act, the same result would follow. The lessee's obligation for the term is not subject to termination by the lessee and the term is equal to the economic life of the machine.

Between these extremes there are many transactions that can be created. Some of the transactions have not been properly categorized by the courts in applying the 1978 and earlier Official Texts of Section 1-201(37). This subsection [paragraph], together with Section 1-201(37), as amended with the promulgation of this Article, draws a brighter line, which should create a clearer signal to the professional lessor and lessee.

(k) "Lease agreement". This definition is derived from the first sentence of Section 1-201(3). Because the definition of lease is broad enough to cover future transfers, lease agreement includes an agreement contemplating a current or subsequent transfer. Thus it was not necessary to make an express reference to an agreement for the future lease of goods (Section 2-106(1)). This concept is also incorporated in the definition of lease contract. Note that the definition of lease does not include transactions in ordinary building materials that are incorporated into an improvement on land. Section 2A-309(2) [Section 2-1309(2)].

The provisions of this Article, if applicable, determine whether a lease agreement has legal consequences; otherwise the law of bailments and other applicable law determine the same. Sections 2A-103(4) [Section 2-1103(4)] and 1-103.

(l) "Lease contract". This definition is derived from the definition of contract in Section 1-201(11). Note that a lease contract may be for the future lease of goods, since this notion is included in the definition of lease.

(m) "Leasehold interest". New.

(n) "Lessee". New.

(o) "Lessee in ordinary course of business". Section 1-201(9).

(p) "Lessor". New.

(q) "Lessor's residual interest". New.

(r) "Lien". New. This term is used in Section 2A-307 [Section 2-1307] (Priority of Liens Arising by Attachment or Levy on, Security Interests in, and Other Claims to Goods).

(s) "Lot". Section 2-105(5).

(t) "Merchant lessee". New. This term is used in Section 2A-511 [Section 2-1511] (Merchant Lessee's Duties as to Rightfully Rejected Goods). A person may satisfy the requirement of dealing in goods of the kind subject to the lease as lessor, lessee, seller, or buyer.

(u) "Present value". New. Authorities agree that present value should be used to determine fairly the damages payable by the lessor or the lessee on default. E.g., *Taylor v. Commercial Credit Equip. Corp.*, 170 Ga. App. 322, 316 S.E.2d 788 (Ct. App. 1984). Present value is defined to mean an amount that represents the discounted value as of a date certain of one or more sums payable in the future. This is a function of the economic principle that a dollar today is more valuable to the holder than a dollar payable in two years. While there is no question as to the principle, reasonable people would differ as to the rate of discount to apply in determining the value of that future dollar today. To minimize litigation, this Article allows the parties to specify the discount or interest rate, if the rate was not manifestly unreasonable at the time the transaction was entered into. In all other cases, the interest rate will be a

commercially reasonable rate that takes into account the facts and circumstances of each case, as of the time the transaction was entered into.

(v) "Purchase". Section 1-201(32). This definition omits the reference to lien contained in the definition of purchase in Article 1 (Section 1-201(32)). This should not be construed to exclude consensual liens from the definition of purchase in this Article; the exclusion was mandated by the scope of the definition of lien in Section 2A-103(1)(r) [Section 2-1103(1)(r)]. Further, the definition of purchaser in this Article adds a reference to lease; as purchase is defined in Section 1-201(32) to include any other voluntary transaction creating an interest in property, this addition is not substantive.

(w) "Sublease". New.

(x) "Supplier". New.

(y) "Supply contract". New.

(z) "Termination". Section 2-106(3). The effect of a termination is provided in Section 2A-505(2) [Section 2-1505(2)].

1991 MAINE COMMENT

Sec. 2-1103(1)(h) includes mobile homes within the definition of "goods".

Further amend the bill in section 3 in that part designated "~~§2-1104.~~" in subsection (1) by striking out all of paragraph (c) (page 9, lines 30 to 32 in L.D.) and inserting in its place the following:

'(c) Consumer protection statute of this State, or final consumer protection decision of a court of this State existing on the effective date of this article. Consumer protection statutes include, but are not limited to, the Maine Unfair Trade Practices Act, Title 5, chapter 10; the Maine Consumer Credit Code, Title 9-A; consumer loan and lease agreements laws, Title 10, chapter 202; used car information laws, Title 10, chapter 217; and warranties on new motor vehicles, Title 10, chapter 203-A.'

Further amend the bill in section 3 by inserting at the end of that part designated "~~§2-1104.~~" the following:

UNIFORM COMMENT

Uniform Statutory Source: Sections 9-203(4) and 9-302(3)(b) and (c).

Changes: Substantially revised.

Purposes:

1. This Article creates a comprehensive scheme for the regulation of transactions that create leases. Section 2A-102 [Section 2-1102]. Thus, the Article supersedes all prior legislation dealing with leases, except to the extent set forth in this Section.

2. Subsection (1) states the general rule that a lease, although governed by the scheme of this Article, is also may be governed by certain other applicable statutes laws. This may occur in the case of a consumer lease. Section 2A-103(1)(e) [Section 2-1103(1)(e)]. Those laws may be state statutes existing prior to enactment of Article 2A or passed afterward. In this case, it is desirable for this Article to specify which statute controls. Or the law may be a pre-existing consumer protection decision. This Article preserves such decisions. Or the law may be a statute of the United States. Such a law controls without any statement in this Article under applicable principles of preemption.

An illustration of a statute of the United States that governs consumer leases is the Consumer Leasing Act, 15 U.S.C. §§ 1667-1667(e) (1982) and its implementing regulation, Regulation M, 12 C.F.R. § 213 (1986); the statute mandates disclosures of certain lease terms, delimits the liability of a lessee in leasing personal property, and regulates the advertising of lease terms. An illustration of a state statute that governs consumer leases and which if adopted in the enacting state prevails over this Article is the Unif. Consumer Credit Code, which includes many provisions similar to those of the Consumer Leasing Act, e.g. Unif. Consumer Credit Code §§ 3.202, 3.209, 3.401, 7A U.L.A. 108-09, 115, 125 (1974), as well as provisions in addition to those of the Consumer Leasing Act, e.g., Unif. Consumer Credit Code §§ 5.109-.111, 7A U.L.A. 171-76 (1974) (the right to cure a default). Such statutes may define consumer lease so as to govern transactions within and without the definition of consumer lease under this Article.

3. Under subsection (2), subject to certain limited exclusions, in case of conflict ~~the provisions of such a statute prevail~~ or a decision described in subsection (1) prevails over

the-provisions-of this Article. For example, a provision like Unif. Consumer Credit Code § 5.112, 7A U.L.A. 176 (1974), limiting self-help repossession, prevails over Section 2A-525(3) [Section 2-1525(3)]. A consumer protection decision rendered after the effective date of this Article may supplement its provisions. For example, in relation to Article 9 a court might conclude that an acceleration clause may not be enforced against an individual debtor after late payments have been accepted unless a prior notice of default is given. To the extent the decision establishes a general principle applicable to transactions other than secured transactions, it may supplement Section 2A-502 [Section 2-1502].

4. Consumer protection in lease transactions is primarily left to other law. However, several provisions of this Article do contain special rules that may not be varied by agreement in the case of a consumer lease. E.g., Sections 2A-106, 2A-108, and 2A-109(2) [Sections 2-1106, 2-1108 and 2-1109(2)]. Were that not so, the ability of the parties to govern their relationship by agreement together with the position of the lessor in a consumer lease too often could result in a one-sided lease agreement.

5. In construing this provision the reference to statute should be deemed to include applicable regulations. A consumer protection decision is "final" on the effective date of this Article if it is not subject to appeal on that date or, if subject to appeal, is not later reversed on appeal. Of course, such a decision can be overruled by a later decision or superseded by a later statute.

Cross References:

Sections 2A-103(1)(e), 2A-106, 2A-108, 2A-109(2) and 2A-525(3) [Sections 2-1103(1)(e), 2-1106, 2-1108, 2-1109(2) and 2-1525(3)].

Definitional Cross Reference:

"Lease". Section 2A-103(1)(j) [Section 2-1103(1)(j)].

1991 MAINE COMMENTS

Sec. 2-1104 specifies that "consumer protection statute of this State" includes, but is not limited to, the Maine Unfair Trade Practices Act, Title 5, chapter 10; the Maine Consumer Credit Code, Title 9-A; consumer loan and lease agreement laws, Title 10, chapter 202; used car information laws, Title 10,

chapter 217; and warranties on new motor vehicles, Title 10, chapter 203-A.'

Further amend the bill in section 3 in that part designated "~~§2-1105.~~" in paragraph (a) in the first line (page 10, line 2 in L.D.) by striking out the following: "(a)" and inserting in its place the following: '(1)' and in paragraph (b) in the first line (page 10, line 4 in L.D.) by striking out the following: "(b)" and inserting in its place the following: '(2)'

Further amend the bill in section 3 by inserting at the end of that part designated "~~§2-1105.~~" the following:

UNIFORM COMMENT

Uniform Statutory Source: Section 9-103(2)(a) and (b).

Changes: Substantially revised. The provisions of the last sentence of Section 9-103(2)(b) have not been incorporated as it is superfluous in this context. The provisions of Section 9-103(2)(d) have not been incorporated because the problems dealt with are adequately addressed by this section and Sections 2A-304(3) [Section 2-1304(3)] and 305(3).

Purposes: The new certificate referred to in (b) [subsection (2)] must be permanent, not temporary. Generally, the lessor or creditor whose interest is indicated on the most recently issued certificate of title will prevail over interests indicated on certificates issued previously by other jurisdictions. This provision reflects a policy that it is reasonable to require holders of interests in goods covered by a certificate of title to police the goods or risk losing their interests when a new certificate of title is issued by another jurisdiction.

Cross References:

Sections 2A-304(3), 2A-305(3) [Sections 2-1304(3), 2-1305(3)], 9-103(2)(b) and 9-103(2)(d) .

Definitional Cross Reference:

"Goods". Section 2A-103(1)(h) [Section 2-1103(1)(h)].'

Further amend the bill in section 3 by inserting at the end of that part designated "~~§2-1106.~~" the following:

UNIFORM COMMENT

Uniform Statutory Source: Unif. Consumer Credit Code § 1.201(8),
7A U.L.A. 36 (1974).

Changes: Substantially revised.

Purposes: There is a real danger that a lessor may induce a consumer lessee to agree that the applicable law will be a jurisdiction that has little effective consumer protection, or to agree that the applicable forum will be a forum that is inconvenient for the lessee in the event of litigation. As a result, this section invalidates these choice of law or forum clauses, except where the law chosen is that of the state of the consumer's residence or where the goods will be kept, or the forum chosen is one that otherwise would have jurisdiction over the lessee.

Subsection (1) limits potentially abusive choice of law clauses in consumer leases. The 30-day rule in subsection (1) was suggested by Section 9-103(1)(c). This section has no effect on choice of law clauses in leases that are not consumer leases. Such clauses would be governed by other law.

Subsection (2) prevents enforcement of potentially abusive jurisdictional consent clauses in consumer leases. By using the term judicial forum, this section does not limit selection of a nonjudicial forum, such as arbitration. This section has no effect on choice of forum clauses in leases that are not consumer leases; such clauses are, as a matter of current law, "prima facie valid". The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 10 (1972). Such clauses would be governed by other law, including the Model Choice of Forum Act (1968).

Cross Reference:

Section 9-103(1)(c).

Definitional Cross References:

"Consumer lease". Section 2A-103(1)(e) [Section 2-1103(1)(e)].

"Lease agreement". Section 2A-103(1)(k) [Section 2-1103(1)(k)].

"Lessee". Section 2A-103(1)(n) [Section 2-1103(1)(n)].

"Goods". Section 2A-103(1)(h) [Section 2-1103(1)(h)].

"Party". Section 1-201(29).'

Further amend the bill in section 3 by inserting at the end of that part designated "~~§2-1107.~~" the following:

2.412

UNIFORM COMMENT

Uniform Statutory Source: Section 1-107.

Changes: Revised to reflect leasing practices and terminology. This clause is used throughout the official comments to this Article to indicate the scope of change in the provisions of the Uniform Statutory Source included in the section; these changes range from one extreme, e.g., a significant difference in practice (a warranty as to merchantability is not implied in a finance lease (Section 2A-212 [Section 2-1212])) to the other extreme, e.g., a modest difference in style or terminology (the transaction governed is a lease not a sale (Section 2A-203 [Section 2-1203])).

Cross References:

Sections 2A-203 and 2A-212 [Sections 2-1203 and 2-1212].

Definitional Cross References:

"Aggrieved party". Section 1-201(2).

"Delivery". Section 1-201(14).

"Rights". Section 1-201(36).

"Signed". Section 1-201(39).

"Written". Section 1-201(46).'

Further amend the bill in section 3 by inserting at the end of that part designated "~~§2-1108.~~" the following:

UNIFORM COMMENT

Uniform Statutory Source: Section 2-302 and Unif. Consumer Credit Code § 5.108, 7A U.L.A. 167-69 (1974).

Changes: Subsection (1) is taken almost verbatim from the provisions of Section 2-302(1). Subsection (2) is suggested by the provisions of Unif. Consumer Credit Code § 5.108(1), (2), 7A U.L.A. 167 (1974). Subsection (3), taken from the provisions of Section 2-302(2), has been expanded to cover unconscionable conduct. Unif. Consumer Credit Code § 5.108(3), 7A U.L.A. 167 (1974). The provision for the award of attorney's fees to consumers, subsection (4), covers unconscionability under subsection (1) as well as (2). Subsection (4) is modeled on the provisions of Unif. Consumer Credit Code § 5.108(6), 7A U.L.A. 169 (1974).

COMMITTEE AMENDMENT "A" to S.P. 680, L.D. 1802

Purposes: Subsections (1) and (3) of this section apply the concept of unconscionability reflected in the provisions of Section 2-302 to leases. See Dillman & Assocs. v. Capitol Leasing Co., 110 Ill. App. 3d 335, 342, 442 N.E.2d 311, 316 (App. Ct. 1982). Subsection (3) omits the adjective "commercial" found in subsection 2-302(2) because subsection (3) is concerned with all leases and the relevant standard of conduct is determined by the context.

The balance of the section is modeled on the provisions of Unif. Consumer Credit Code § 5.108, 7A U.L.A. 167-69 (1974). This subsection (2) recognizes that a consumer lease or a clause in a consumer lease may not itself be unconscionable but that the agreement would never have been entered into if unconscionable means had not been employed to induce the consumer to agree. To make a statement to induce the consumer to lease the goods, in the expectation of invoking an integration clause in the lease to exclude the statement's admissibility in a subsequent dispute, may be unconscionable. Subsection (2) also provides a consumer remedy for unconscionable conduct, such as using or threatening to use force or violence, in the collection of a claim arising from a lease contract. These provisions are not exclusive. The remedies of this section are in addition to remedies otherwise available for the same conduct under other law, for example, an action in tort for abusive debt collection or under another statute of this State for such conduct. The reference to appropriate relief in subsection (2) is intended to foster liberal administration of this remedy. Sections 2A-103(4) [Section 2-1103(4)] and 1-106(1).

Subsection (4) authorizes an award of reasonable attorney's fees if the court finds unconscionability with respect to a consumer lease under subsections (1) or (2). Provision is also made for recovery by the party against whom the claim was made if the court does not find unconscionability and does find that the consumer knew the action to be groundless. Further, subsection (4)(b) is independent of, and thus will not override, a term in the lease agreement that provides for the payment of attorney's fees.

Cross References:

Sections 1-106(1), 2-302 and 2A-103(4) [Section 2-1103(4)].

Definitional Cross Reference:

"Action". Section 1-201(1).

COMMITTEE AMENDMENT "A" to S.P. 680, L.D. 1802

"Consumer lease". Section 2A-103(1)(e) [Section 2-1103(1)(e)].
"Lease contract". Section 2A-103(1)(1) [Section 2-1103(1)(1)].
"Lessee". Section 2A-103(1)(n) [Section 2-1103(1)(n)].
"Party". Section 1-201(29).'

Further amend the bill in section 3 by inserting at the end of that part designated "§2-1109." the following:

UNIFORM COMMENT

Uniform Statutory Source: Section 1-208 and Unif. Consumer Credit Code § 5.109(2), 7A U.L.A. 171 (1974).

Purposes:

Subsection (1) reflects modest changes in style to the provisions of the first sentence of Section 1-208.

Subsection (2), however, reflects a significant change in the provisions of the second sentence of Section 1-208 by creating a new rule with respect to a consumer lease. A lease provision allowing acceleration at the will of the lessor or when the lessor deems itself insecure is of critical importance to the lessee. In a consumer lease it is a provision that is not usually agreed to by the parties but is usually mandated by the lessor. Therefore, where its invocation depends not on specific criteria but on the discretion of the lessor, its use should be regulated to prevent abuse. Subsection (1) imposes a duty of good faith upon its exercise. Subsection (2) shifts the burden of establishing good faith to the lessor in the case of a consumer lease, but not otherwise.

Cross Reference:

Section 1-208.

Definitional Cross Reference:

"Burden of establishing". Section 1-201(8).
"Consumer lease". Section 2A-103(1)(e) [Section 2-1103(1)(e)].
"Good faith". Sections 1-201(19) and 2-103(1)(b).
"Party". Section 1-201(29).
"Term". Section 1-201(42).'

Further amend the bill in section 3 in that part designated "PART 2" by striking out the first 2 lines (page 11, lines 35 to 37 in L.D.) and inserting in their place the following:

PART 2

FORMATION AND CONSTRUCTION OF LEASE CONTRACT

Further amend the bill in section 3 by inserting at the end of that part designated "~~S2-1201.~~" the following:

UNIFORM COMMENT

Uniform Statutory Source: Sections 2-201, 9-203(1) and 9-110.

Changes: This section is modeled on Section 2-201, with changes to reflect the differences between a lease contract and a contract for the sale of goods. In particular, subsection (1)(b) adds a requirement that the writing "describe the goods leased and the lease term", borrowing that concept, with revisions, from the provisions of Section 9-203(1)(a). Subsection (2), relying on the statutory analogue in Section 9-110, sets forth the minimum criterion for satisfying that requirement.

Purposes: The changes in this section conform the provisions of Section 2-201 to custom and usage in lease transactions. Section 2-201(2), stating a special rule between merchants, was not included in this section as the number of such transactions involving leases, as opposed to sales, was thought to be modest. Subsection (4) creates no exception for transactions where payment has been made and accepted. This represents a departure from the analogue, Section 2-201(3)(c). The rationale for the departure is grounded in the distinction between sales and leases. Unlike a buyer in a sales transaction, the lessee does not tender payment in full for goods delivered, but only payment of rent for one or more months. It was decided that, as a matter of policy, this act of payment is not a sufficient substitute for the required memorandum. Subsection (5) was needed to establish the criteria for supplying the lease term if it is omitted, as the lease contract may still be enforceable under subsection (4).

Cross References:

Sections 2-201, 9-110 and 9-203(1)(a).

Definitional Cross References:

"Action". Section 1-201(1).

"Agreed". Section 1-201(3).
"Buying". Section 2A-103(1)(a) [Section 2-1103(1)(a)].
"Goods". Section 2A-103(1)(h) [Section 2-1103(1)(h)].
"Lease". Section 2A-103(1)(j) [Section 2-1103(1)(j)].
"Lease contract". Section 2A-103(1)(l) [Section 2-1103(1)(l)].
"Lessee". Section 2A-103(1)(n) [Section 2-1103(1)(n)].
"Lessor". Section 2A-103(1)(p) [Section 2-1103(1)(p)].
"Notice". Section 1-201(25).
"Party". Section 1-201(29).
"Sale". Section 2-106(1).
"Signed". Section 1-201(39).
"Term". Section 1-201(42).
"Writing". Section 1-201(46).'

Further amend the bill in section 3 in that part designated "~~S2-1202.~~" in paragraph (a) in the first line (page 13, line 7 in L.D.) by striking out the following: "{a}" and inserting in its place the following: '{1}' and in paragraph (b) in the first line (page 13, line 10 in L.D.) by striking out the following: "{b}" and inserting in its place the following: '{2}'

Further amend the bill in section 3 by inserting at the end of that part designated "~~S2-1202.~~" the following:

UNIFORM COMMENT

Uniform Statutory Source: Section 2-202.

Definitional Cross References:

"Agreement". Section 1-201(3).
"Course of dealing". Section 1-205.
"Party". Section 1-201(29).
"Term". Section 1-201(42).
"Usage of trade". Section 1-205.
"Writing". Section 1-201(46).'

Further amend the bill in section 3 by inserting at the end of that part designated "~~S2-1203.~~" the following:

UNIFORM COMMENT

Uniform Statutory Source: Section 2-203.

Changes: Revised to reflect leasing practices and terminology.

Definitional Cross References:

2 "Lease contract". Section 2A-103(1)(1) [Section
4 2-1103(1)(1)].
"Writing". Section 1-201(46).'

6 Further amend the bill in section 3 by inserting at the end
8 of that part designated "~~S2-1204~~," the following:

10 **UNIFORM COMMENT**

12 **Uniform Statutory Source:** Section 2-204.

14 **Changes:** Revised to reflect leasing practices and terminology.

16 **Definitional Cross References:**

18 "Agreement". Section 1-201(3).
20 "Lease contract". Section 2A-103(1)(1) [Section
22 2-1103(1)(1)].
"Party". Section 1-201(29).
"Remedy". Section 1-201(34).
"Term". Section 1-201(42).'

24 Further amend the bill in section 3 by inserting at the end
26 of that part designated "~~S2-1205~~," the following:

28 **UNIFORM COMMENT**

30 **Uniform Statutory Source:** Section 2-205.

32 **Changes:** Revised to reflect leasing practices and terminology.

34 **Definitional Cross References:**

36 "Goods". Section 2A-103(1)(h) [Section 2-1103(1)(h)].
"Lease". Section 2A-103(1)(j) [Section 2-1103(1)(j)].
"Merchant". Section 2-104(1).
"Person". Section 1-201(30).
"Reasonable time". Section 1-204(1) and (2).
"Signed". Section 1-201(39).
"Term". Section 1-201(42).
"Writing". Section 1-201(46).'

44 Further amend the bill in section 3 by inserting at the end
46 of that part designated "~~S2-1206~~," the following:

48 **UNIFORM COMMENT**

2 **Uniform Statutory Source:** Section 2-206(1)(a) and (2).

4 **Changes:** Revised to reflect leasing practices and terminology.

6 **Definitional Cross References:**

8 "Lease contract". Section 2A-103(1)(1) [Section
10 2-1103(1)(1)].
"Notifies". Section 1-201(26).
"Reasonable time". Section 1-204(1) and (2).'

12 Further amend the bill in section 3 by inserting at the end
14 of that part designated "~~S2-1207~~," the following:

16 **UNIFORM COMMENT**

18 **Uniform Statutory Source:** Sections 2-208 and 1-205(4).

20 **Changes:** Revised to reflect leasing practices and terminology,
22 except that subsection (2) was further revised to make the
subsection parallel the provisions of Section 1-205(4) by adding
that course of dealing controls usage of trade.

24 **Purposes:** The section should be read in conjunction with Section
26 2A-208 [Section 2-1208]. In particular, although a specific term
28 may control over course of performance as a matter of lease
30 construction under subsection (2), subsection (3) allows the same
course of dealing to show a waiver or modification, if Section
32 2A-208 [Section 2-1208] is satisfied.

34 **Cross References:**

36 Sections 1-205(4), 2-208 and 2A-208 [Section 2-1208].

38 **Definitional Cross References:**

40 "Course of dealing". Section 1-205.
"Knowledge". Section 1-201(25).
"Lease agreement". Section 2A-103(1)(k) [Section
42 2-1103(1)(k)].
"Lease contract". Section 2A-103(1)(1) [Section
44 2-1103(1)(1)].
"Party". Section 1-201(29).
"Term". Section 1-201(42).
"Usage of trade". Section 1-205.'

46 Further amend the bill in section 3 by inserting at the end
48 of that part designated "~~S2-1208~~," the following:

UNIFORM COMMENT

Uniform Statutory Source: Section 2-209.

Changes: Revised to reflect leasing practices and terminology, except that the provisions of subsection 2-209(3) were omitted.

Purposes: Section 2-209(3) provides that "the requirements of the statute of frauds section of this Article (Section 2-201) must be satisfied if the contract as modified is within its provisions." This provision was not incorporated as it is unfair to allow an oral modification to make the entire lease contract unenforceable, e.g. if the modification takes it a few dollars over the dollar limit. At the same time, the problem could not be solved by providing that the lease contract would still be enforceable in its pre-modification state (if it then satisfied the statute of frauds) since in some cases that might be worse than no enforcement at all. Resolution of the issue is left to the courts based on the facts of each case.

Cross References:

Sections 2-201 and 2-209.

Definitional Cross References:

- "Agreement". Section 1-201(3).
"Between merchants". Section 2-104(3).
"Lease agreement". Section 2A-103(1)(k) [Section 2-1103(1)(k)].
"Lease contract". Section 2A-103(1)(l) [Section 2-1103(1)(l)].
"Merchant". Section 2-104(1).
"Notification". Section 1-201(26).
"Party". Section 1-201(29).
"Signed". Section 1-201(39).
"Term". Section 1-201(42).
"Writing". Section 1-201(46).

Further amend the bill in section 3 in that part designated "S2-1209" in subsection (1) in the last line (page 15, line 11 in L.D.) by inserting after the following: "therefrom," the following: "In a finance lease that is a consumer lease, the supplier's ability to disclaim, exclude or modify any implied warranties of merchantability and fitness of a particular purpose or to exclude or modify the consumer's remedies for breach of

those warranties is subject to and governed by the terms and provisions of section 2-316, subsection (5).

Further amend the bill in section 3 by inserting at the end of that part designated "S2-1209," the following:

UNIFORM COMMENT

Uniform Statutory Source: None.

Changes: This section is modeled on Section 9-318, the Restatement (Second) of Contracts §§ 302-315 (1981), and leasing practices. See Earman Oil Co. v. Burroughs Corp., 625 F.2d 1291, 1296-97 (5th Cir. 1980).

Purposes:

1. The function performed by the lessor in a finance lease is extremely limited. Section 2A-103(1)(g) [Section 2-1103(1)(g)]. The lessee looks to the supplier of the goods for warranties and the like or, in some cases as to warranties, to the manufacturer if a warranty made by that person is passed on. That expectation is reflected in subsection (1), which is self-executing. As a matter of policy, the operation of this provision may not be excluded, modified or limited; however, an exclusion, modification, or limitation of any term of the supply contract or warranty, including any with respect to rights and remedies, and any defense or claim such as a statute of limitations, effective against the lessor as buyer the acquiring party under the supply contract, is also effective against the lessee as the beneficiary designated under this provision. The For example, the supplier is not precluded from excluding or modifying an express or implied warranty under a supply contract. Sections 2-312(2) and 2-316, or Section 2A-214 [Section 2-1214]. Further, the supplier is not precluded from limiting the rights and remedies of the lessor, as buyer, and from liquidating damages. Sections 2-718 and 2-719 or Sections 2A-503 and 2A-504 [Sections 2-1503 and 2-1504]. If the supply contract excludes or modifies warranties, limits remedies for breach, or liquidates damages with respect to the lessor, such provisions are enforceable against the lessee as beneficiary. Thus, only selective discrimination against the beneficiaries designated under this section is precluded, i.e.; exclusion of the supplier's liability to the lessee with respect to warranties made to the lessor. This section does not affect the development of other law with respect to products liability.

2. Enforcement of this benefit is by action. Sections 2A-103(4) [Section 2-1103(4)] and 1-106(2).

3. The benefit extended by these provisions is not without a price, as this Article also provides in the case of a finance lease that is not a consumer lease that the lessee's promises to the lessor under the lease contract become irrevocable and independent upon the lessee's acceptance of the goods. Section 2A-407 [Section 2-1407].

4. Subsection (2) limits the effect of subsection (1) on the supplier and the lessor by preserving, notwithstanding the transfer of the benefits of the supply contract to the lessee, all of the supplier's and the lessor's rights and obligations with respect to each other and others; it further absolves the lessee of any duties with respect to the supply contract that might have been inferred from the extension of the benefits thereof.

5. Subsections (2) and (3) also deal with difficult issues related to modification or rescission of the supply contract. Subsection (2) states a rule that determines the impact of the statutory extension of benefit contained in subsection (1) upon the relationship of the parties to the supply contract and, in a limited respect, upon the lessee. This statutory extension of benefit, like that contained in Sections 2A-216 [Section 2-1216] and 2-318, is not a modification of the supply contract by the parties. Thus, subsection (3) states the rules that apply to a modification or rescission of the supply contract by the parties. Subsection (3) ~~recognizes the lessee's potential causes of action against the lessor and the supplier arising from modification or rescission of the supply contract. The existence and extent of a cause of action by the supplier against the lessor is left to resolution by the courts based on the facts of each case.~~ provides that a modification or rescission is not effective between the supplier and the lessee if, before the modification or rescission occurs, the supplier received notice that the lessee has entered into the finance lease. On the other hand, if the modification or rescission is effective, then to the extent of the modification or rescission of the benefit or warranty, the lessor by statutory dictate assumes an obligation to provide to the lessee that which the lessee would otherwise lose. For example, assume a reduction in an express warranty from four years to one year. No prejudice to the lessee may occur if the goods perform as agreed. If, however, there is a breach of the express warranty after one year and before four years pass, the lessor is liable. A remedy for any prejudice to the lessee because of the bifurcation of the lessee's recourse

resulting from the action of the supplier and the lessor is left to resolution by the courts based on the facts of each case.

6. Subsection (4) makes it clear that the rights granted to the lessee by this section do not displace any rights the lessee otherwise may have against the supplier.

Cross References:

Sections 2A-103(g) 2A-103(l)(g) [Section 2-1103(l)(g)], 2A-407 [Section 2-1407] and 9-318.

Definitional Cross References:

- "Action". Section 1-201(1).
- "Finance lease". Section 2A-103(1)(g) [Section 2-1103(1)(g)].
- "Leasehold interest". Section 2A-103(1)(m) [Section 2-1103(1)(m)].
- "Lessee". Section 2A-103(1)(n) [Section 2-1103(1)(n)].
- "Lessor". Section 2A-103(1)(p) [Section 2-1103(1)(p)].
- "Notice". Section 1-201(25).
- "Party". Section 1-201(29).
- "Rights". Section 1-201(36).
- "Supplier". Section 2A-103(1)(x) [Section 2-1103(1)(x)].
- "Supply contract". Section 2A-103(1)(y) [Section 2-1103(1)(y)].
- "Term". Section 1-201(42).

1991 MAINE COMMENT

Sec. 2-1209 provides that in finance leases that are consumer leases the supplier's ability to disclaim, exclude or modify implied warranties and remedies for breach of warranty is governed by section 2-316(5).'

Further amend the bill in section 3 by inserting at the end of that part designated "~~§2-1210~~," the following:

UNIFORM COMMENT

Uniform Statutory Source: Section 2-313.

Changes: Revised to reflect leasing practices and terminology.

Purposes: All of the express and implied warranties of the Article on Sales (Article 2) are included in this Article, revised to reflect the differences between a sale of goods and a

lease of goods. Sections 2A-210 through 2A-216 [Sections 2-1210 to 2-1216]. The lease of goods is sufficiently similar to the sale of goods to justify this decision. Hawkland, The Impact of the Uniform Commercial Code on Equipment Leasing, 1972 Ill. L.F. 446, 459-60. Many state and federal courts have reached the same conclusion.

Value of the goods, as used in subsection (2), includes rental value.

Cross References:

Article 2, esp. Section 2-313, and Sections 2A-210 through 2A-216 [Sections 2-1210 to 2-1216].

Definitional Cross References:

- "Conforming". Section 2A-103(1)(d) [Section 2-1103(1)(d)].
- "Goods". Section 2A-103(1)(h) [Section 2-1103(1)(h)].
- "Lessee". Section 2A-103(1)(n) [Section 2-1103(1)(n)].
- "Lessor". Section 2A-103(1)(p) [Section 2-1103(1)(p)].
- "Value". Section 1-201(44).

Further amend the bill in section 3 by inserting at the end of that part designated "~~2-1211~~," the following:

UNIFORM COMMENT

Uniform Statutory Source: Section 2-312.

Changes: This section is modeled on the provisions of Section 2-312, with modifications to reflect the limited interest transferred by a lease contract and the total interest transferred by a sale. Section 2-312(2), which is omitted here, is incorporated in Section 2A-214 [Section 2-1214]. The warranty of quiet possession was abolished with respect to sales of goods. Section 2-312 official comment 1. Section 2A-211(1) [Section 2-1211(1)] reinstates the warranty of quiet possession with respect to leases. Inherent in the nature of the limited interest transferred by the lease - the right to possession and use of the goods - is the need of the lessee for protection greater than that afforded to the buyer. Since the scope of the protection is limited to claims or interests that arose from acts or omissions of the lessor, the lessor will be in position to evaluate the potential cost, certainly a far better position than that enjoyed by the lessee. Further, to the extent the market will allow, the lessor can attempt to pass on the anticipated additional cost to the lessee in the guise of higher rent.

Purposes: General language was chosen for subsection (1) that expresses the essence of the lessee's expectation: with an exception for infringement and the like, no person holding a claim or interest that arose from an act or omission of the lessor will be able to interfere with the lessee's use and enjoyment of the goods for the lease term. Subsection (2), like other similar provisions in later sections, excludes the finance lessor from extending this warranty; with few exceptions (Sections 2A-210 and 2A-211(1) [Sections 2-1210 and 2-1211(1)]), the lessee under a finance lease is to look to the supplier for warranties and the like or, in some cases as to warranties, to the manufacturer if a warranty made by that person is passed on. Subsections (2) and (3) are derived from Section 2-312(3). These subsections, as well as the analogue, should be construed so that applicable principles of law and equity supplement their provisions. Sections 2A-103(4) [Section 2-1103(4)] and 1-103.

Cross References:

Sections 2-312, 2-312(1), 2-312(2), 2-312 official comment 1, 2A-210 [Section 2-1210], 2A-211(1) [Section 2-1211(1)] and 2A-214 [Section 2-1214].

Definitional Cross References:

- "Delivery". Section 1-201(14).
- "Finance lease". Section 2A-103(1)(g) [Section 2-1103(1)(g)].
- "Goods". Section 2A-103(1)(h) [Section 2-1103(1)(h)].
- "Lease". Section 2A-103(1)(j) [Section 2-1103(1)(j)].
- "Lease contract". Section 2A-103(1)(l) [Section 2-1103(1)(l)].
- "Leasehold interest". Section 2A-103(1)(m) [Section 2-1103(1)(m)].
- "Lessee". Section 2A-103(1)(n) [Section 2-1103(1)(n)].
- "Lessor". Section 2A-103(1)(p) [Section 2-1103(1)(p)].
- "Merchant". Section 2-104(1).
- "Person". Section 1-201(30).
- "Supplier". Section 2A-103(1)(x) [Section 2-1103(1)(x)].

Further amend the bill in section 3 by inserting at the end of that part designated "~~2-1212~~," the following:

UNIFORM COMMENT

Uniform Statutory Source: Section 2-314.

Changes: Revised to reflect leasing practices and terminology. E.g., Glenn Dick Equip. Co. v. Galey Constr., Inc., 97 Idaho 216, 225, 541 P.2d 1184, 1193 (1975) (implied warranty of merchantability (Article 2) extends to lease transactions).

Definitional Cross References:

- "Conforming". Section 2A-103(1)(d) [Section 2-1103(1)(d)].
"Course of dealing". Section 1-205.
"Finance lease". Section 2A-103(1)(g) [Section 2-1103(1)(g)].
"Fungible". Section 1-201(17).
"Goods". Section 2A-103(1)(h) [Section 2-1103(1)(h)].
"Lease agreement". Section 2A-103(1)(k) [Section 21103(1)(k)].
"Lease contract". Section 2A-103(1)(l) [Section 2-1103(1)(l)].
"Lessor". Section 2A-103(1)(p) [Section 2-1103(1)(p)].
"Merchant". Section 2-104(1).
"Usage of trade". Section 1-205.

Further amend the bill in section 3 by inserting at the end of that part designated "§2-1213," the following:

UNIFORM COMMENT

Uniform Statutory Source: Section 2-315.

Changes: Revised to reflect leasing practices and terminology. E.g., All-States Leasing Co. v. Bass, 96 Idaho 873, 879, 538 P.2d 1177, 1183 (1975) (implied warranty of fitness for a particular purpose (Article 2) extends to lease transactions).

Definitional Cross References:

- "Finance lease". Section 2A-103(1)(g) [Section 2-1103(1)(g)].
"Goods". Section 2A-103(1)(h) [Section 2-1103(1)(h)].
"Knows". Section 1-201(25).
"Lease contract". Section 2A-103(1)(l) [Section 2-1103(1)(l)].
"Lessee". Section 2A-103(1)(n) [Section 2-1103(1)(n)].
"Lessor". Section 2A-103(1)(p) [Section 2-1103(1)(p)].

Further amend the bill in section 3 in that part designated "§2-1214," by inserting at the end the following:

(5) In a consumer lease that is not a finance lease, the lessor's ability to disclaim, exclude or modify any implied warranties of merchantability and fitness for a particular purpose or to exclude or modify the consumer's remedies for breach of those warranties is subject to and governed by the terms and provisions of section 2-316, subsection (5).

UNIFORM COMMENT

Uniform Statutory Source: Sections 2-316 and 2-312(2).

Changes: Subsection (2) requires that a disclaimer of the warranty of merchantability be conspicuous and in writing as is the case for a disclaimer of the warranty of fitness; this is contrary to the rule stated in Section 2-316(2) with respect to the disclaimer of the warranty of merchantability. This section also provides that to exclude or modify the implied warranty of merchantability, fitness or against interference or infringement the language must be in writing and conspicuous. There are, however, exceptions to the rule. E.g., course of dealing, course of performance, or usage of trade may exclude or modify an implied warranty. Section 2A-214(3)(c) [Section 2-1214(3)(c)]. The analogue of Section 2-312(2) has been moved to subsection (4) of this section for a more unified treatment of disclaimers; there is no policy with respect to leases of goods that would justify continuing certain distinctions found in the Article on Sales (Article 2) regarding the treatment of the disclaimer of various warranties. Compare Sections 2-312(2) and 2-316(2). Finally, the example of a disclaimer of the implied warranty of fitness stated in subsection (2) differs from the analogue stated in Section 2-316(2); this example should promote a better understanding of the effect of the disclaimer.

Purposes: These changes were made to reflect leasing practices. E.g., FMC Finance Corp. v. Murphree, 632 F.2d 413, 418 (5th Cir. 1980) (disclaimer of implied warranty under lease transactions must be conspicuous and in writing). The omission of the provisions of Section 2-316(4) was not substantive. Sections 2A-503 and 2A-504 [Sections 2-1503 and 2-1504].

Cross References:

Article 2, esp. Sections 2-312(2) and 2-316, and Sections 2A-503 and 2A-504 [Sections 2-1503 and 2-1504].

Definitional Cross References:

- "Conspicuous". Section 1-201(10).

2 "Course of dealing". Section 1-205.
3 "Fault". Section 2A-103(1)(f) [Section 2-1103(1)(f)].
4 "Goods". Section 2A-103(1)(h) [Section 2-1103(1)(h)].
5 "Knows". Section 1-201(25).
6 "Lease". Section 2A-103(1)(j) [Section 2-1103(1)(j)].
7 "Lease contract". Section 2A-103(1)(1) [Section
8 2-1103(1)(1)].
9 "Lessee". Section 2A-103(1)(n) [Section 2-1103(1)(n)].
10 "Person". Section 1-201(30).
11 "Usage of trade". Section 1-205.
12 "Writing". Section 1-201(46).

1991 MAINE COMMENT

13 Sec. 2-1214 provides that in a consumer lease that is not a
14 finance lease the lessor's ability to disclaim, exclude or modify
15 implied warranties or remedies for breach of those warranties is
16 governed by section 2-316(5).'
17

18 Further amend the bill in section 3 in that part designated
19 "§2-1215." in paragraph (a) in the first line (page 18, line 28
20 in L.D.) by striking out the following: "{a}" and inserting in
21 its place the following: '{1}' and in paragraph (b) in the first
22 line (page 18, line 32 in L.D.) by striking out the following:
23 "{b}" and inserting in its place the following: '{2}' and in
24 paragraph (c) in the first line (page 18, line 35 in L.D.) by
25 striking out the following: "{c}" and inserting in its place the
26 following: '{3}'
27

28 Further amend the bill in section 3 in that part designated
29 "§2-1215." by inserting at the end the following:
30

UNIFORM COMMENT

31 Uniform Statutory Source: Section 2-317.
32
33 Definitional Cross Reference:

34 "Party". Section 1-201(29).'
35

36 Further amend the bill in section 3 in that part designated
37 "§2-1216." by inserting at the end the following:
38

UNIFORM COMMENT

39 Uniform Statutory Source: Section 2-318.
40

2 Changes: The provisions of Section 2-318 have been included in
3 this section, modified in two respects: first, to reflect
4 leasing practice, including the special practices of the lessor
5 under a finance lease; second, to reflect and thus codify
6 elements of the official comment to Section 2-318 with respect to
7 the effect of disclaimers and limitations of remedies against
8 third parties.

9 Purposes: Alternative A is based on the 1962 version of Section
10 2-318 and is least favorable to the injured person as the
11 doctrine of privity imposed by other law is abrogated to only a
12 limited extent. Alternatives B and C are based on later
13 additions to Section 2-318 and are more favorable to the injured
14 person. In determining which alternative to select, the state
15 legislature should consider making its choice parallel to the
16 choice it made with respect to Section 2-318, as interpreted by
17 the courts.

18 The last sentence of each of Alternatives A, B and C does
19 not preclude the lessor from excluding or modifying an express or
20 implied warranty under a lease. Section 2A-214 [Section
21 2-1214]. Further, that sentence does not preclude the lessor
22 from limiting the rights and remedies of the lessee and from
23 liquidating damages. Sections 2A-503 and 2A-504 [Sections 2-1503
24 and 2-1504]. If the lease excludes or modifies warranties,
25 limits remedies for breach, or liquidates damages with respect to
26 the lessee, such provisions are enforceable against the
27 beneficiaries designated under this section. However, this last
28 sentence forbids selective discrimination against the
29 beneficiaries designated under this section, i.e., exclusion of
30 the lessor's liability to the beneficiaries with respect to
31 warranties made by the lessor to the lessee.

32 Other law, including the Article on Sales (Article 2), may
33 apply in determining the extent to which a warranty to or for the
34 benefit of the lessor extends to the lessee and third parties.
35 This is in part a function of whether the lessor has bought or
36 leased the goods.
37

38 This Article does not purport to change the development of
39 the relationship of the common law, with respect to products
40 liability, including strict liability in tort (as restated in
41 Restatement (Second) of Torts, § 402A (1965)), to the provisions
42 of this Act. Compare Cline v. Prowler Indus. of Maryland, 418
43 A.2d 968 (Del. 1980) and Hawkins Constr. Co. v. Matthews Co.,
44 190 Neb. 546, 209 N.W.2d 643 (1973) with Dippel v. Sciano, 37
45 Wis. 2d 443, 155 N.W.2d 55 (1967).
46
47

Cross References:

Article 2, esp. Section 2-318, and Sections 2A-214, 2A-503 and 2A-504 [Sections 2-1214, 2-1503 and 2-1504].

Definitional Cross References:

- "Goods". Section 2A-103(1)(h) [Section 2-1103(1)(h)].
- "Lessee". Section 2A-103(1)(n) [Section 2-1103(1)(n)].
- "Person". Section 1-201(30).
- "Remedy". Section 1-201(34).
- "Rights". Section 1-201(36).

1991 MAINE COMMENT

Sec. 2-1216 chooses alternative C to parallel the interpretation of 2-318.

Further amend the bill in section 3 in that part designated "~~§2-1217.~~" in paragraph (a) in the first line (page 19, line 9 in L.D.) by striking out the following: "(a)" and inserting in its place the following: '(1)' and in paragraph (b) in the first line (page 19, line 12 in L.D.) by striking out the following: "(b)" and inserting in its place the following: '(2)' and in paragraph (c) in the first line (page 19, line 17 in L.D.) by striking out the following: "(c)" and inserting in its place the following: '(3)'

Further amend the bill in section 3 in that part designated "~~§2-1217.~~" by inserting at the end the following:

UNIFORM COMMENT

Uniform Statutory Source: Section 2-501.

Changes: This section, together with Section 2A-218 [Section 2-1218], is derived from the provisions of Section 2-501, with changes to reflect lease terminology; however, this section omits as irrelevant to leasing practice the treatment of special property.

Purposes: With respect to subsection (b) [subsection (2)] there is a certain amount of ambiguity in the reference to when goods are designated, e.g., when the lessor is both selling and leasing goods to the same lessee/buyer and has marked goods for delivery but has not distinguished between those related to the lease contract and those related to the sales contract. As in Section

2-501(1)(b), this issue has been left to be resolved by the courts, case by case.

Cross References:

Sections 2-501 and 2A-218 [Section 2-1218].

Definitional Cross References:

- "Agreement". Section 1-201(3).
- "Goods". Section 2A-103(1)(h) [Section 2-1103(1)(h)].
- "Lease". Section 2A-103(1)(j) [Section 2-1103(1)(j)].
- "Lease contract". Section 2A-103(1)(l) [Section 2-1103(1)(l)].
- "Lessor". Section 2A-103(1)(p) [Section 2-1103(1)(p)].
- "Party". Section 1-201(29).

Further amend the bill in section 3 in that part designated "~~§2-1218.~~" by inserting at the end the following:

UNIFORM COMMENT

Uniform Statutory Source: Section 2-501.

Changes: This section, together with Section 2A-217 [Section 2-1217], is derived from the provisions of Section 2-501, with changes and additions to reflect leasing practices and terminology.

Purposes: Subsection (2) states a rule allowing substitution of goods by the lessor under certain circumstances, until default or insolvency of the lessor, or until notification to the lessee that identification is final. Subsection (3) states a rule regarding the lessor's insurable interest that, by virtue of the difference between a sale and a lease, necessarily is different from the rule stated in Section 2-501(2) regarding the seller's insurable interest. For this purpose the option to buy shall be deemed to have been exercised by the lessee when the resulting sale is closed, not when the lessee gives notice to the lessor. Further, subsection (5) is new and reflects the common practice of shifting the responsibility and cost of insuring the goods between the parties to the lease transaction.

Cross References:

Sections 2-501, 2-501(2) and 2A-217 [Section 2-1217].

Definitional Cross References:

2 "Agreement". Section 1-201(3).
 3 "Buying". Section 2A-103(1)(a) [Section 2-1103(1)(a)].
 4 "Conforming". Section 2A-103(1)(d) [Section 2-1103(1)(d)].
 5 "Goods". Section 2A-103(1)(h) [Section 2-1103(1)(h)].
 6 "Insolvent". Section 1-201(23).
 7 "Lease contract". Section 2A-103(1)(1) [Section
 8 2-1103(1)(1)].
 9 "Lessee". Section 2A-103(1)(n) [Section 2-1103(1)(n)].
 10 "Lessor". Section 2A-103(1)(p) [Section 2-1103(1)(p)].
 11 "Notification". Section 1-201(26).
 12 "Party". Section 1-201(29).'

13 Further amend the bill in section 3 in that part designated
 14 "~~§2-1219.~~" by inserting at the end the following:

15 **UNIFORM COMMENT**

16 **Uniform Statutory Source:** Section 2-509(1) through (3).

17 **Changes:** Subsection (1) is new. The introduction to subsection
 18 (2) is new, but subparagraph [paragraph] (a) incorporates the
 19 provisions of Section 2-509(1); subparagraph [paragraph] (b)
 20 incorporates the provisions of Section 2-509(2) only in part,
 21 reflecting current practice in lease transactions.

22 **Purposes:** Subsection (1) states rules related to retention or
 23 passage of risk of loss consistent with current practice in lease
 24 transactions. The provisions of subsection (4) of Section 2-509
 25 are not incorporated as they are not necessary. This section
 26 does not deal with responsibility for loss caused by the wrongful
 27 act of either the lessor or the lessee.

28 **Cross References:**

29 Sections 2-509(1), 2-509(2) and 2-509(4).

30 **Definitional Cross References:**

31 "Delivery". Section 1-201(14).
 32 "Finance lease". Section 2A-103(1)(g) [Section
 33 2-1103(1)(g)].
 34 "Goods". Section 2A-103(1)(h) [Section 2-1103(1)(h)].
 35 "Lease contract". Section 2A-103(1)(1) [Section
 36 2-1103(1)(1)].
 37 "Lessee". Section 2A-103(1)(n) [Section 2-1103(1)(n)].
 38 "Lessor". Section 2A-103(1)(p) [Section 2-1103(1)(p)].
 39 "Merchant". Section 2-104(1).

"Receipt". Section 2-103(1)(c).
 "Rights". Section 1-201(36).
 "Supplier". Section 2A-103(1)(x) [Section 2-1103(1)(x)].'

Further amend the bill in section 3 in that part designated
 "~~§2-1220.~~" by inserting at the end the following:

UNIFORM COMMENT

Uniform Statutory Source: Section 2-510.

Changes: Revised to reflect leasing practices and terminology.
 The rule in Section (1)(b) [subsection (1)(b)] does not allow the
 lessee under a finance lease to treat the risk of loss as having
 remained with the supplier from the beginning. This is
 appropriate given the limited circumstances under which the
 lessee under a finance lease is allowed to revoke acceptance.
 Section 2A-517 [Section 2-1517] and Section 2A-516 [Section
 2-1516] official comment.

Definitional Cross References:

"Conforming". Section 2A-103(1)(d) [Section 2-1103(1)(d)].
 "Delivery". Section 1-201(14).
 "Finance lease". Section 2A-103(1)(g) [Section
 2-1103(1)(g)].
 "Goods". Section 2A-103(1)(h) [Section 2-1103(1)(h)].
 "Lease contract". Section 2A-103(1)(1) [Section
 2-1103(1)(1)].
 "Lessee". Section 2A-103(1)(n) [Section 2-1103(1)(n)].
 "Lessor". Section 2A-103(1)(p) [Section 2-1103(1)(p)].
 "Reasonable time". Section 1-204(1) and (2).
 "Rights". Section 1-201(36).
 "Supplier". Section 2A-103(1)(x) [Section 2-1103(1)(x)].'

Further amend the bill in section 3 by striking out all of
 that part designated "~~§2-1221.~~" and inserting in its place the
 following:

~~§2-1221. Casualty to identified goods~~

If a lease contract requires goods identified when the lease
 contract is made, and the goods suffer casualty without fault of
 the lessee, the lessor or the supplier before delivery, or the
 goods suffer casualty before risk of loss passes to the lessee
 pursuant to the lease agreement or section 2-1219, then:

(1) If the loss is total, the lease contract is avoided; and

2 (2) After delivery in a consumer lease, if the goods are
4 lost or destroyed:

6 (a) If the lessee is not in default under the lease, the
8 lessee may provide substitute goods of at least equal kind
10 and quality satisfactory to the lessor and continue the
12 lease. Permission to substitute goods may not be
14 unreasonably withheld by the lessor. Any insurance proceeds
16 paid with respect to the goods must be applied to the
18 purchase of the substitute goods; or

20 (b) At the consumer's option, any insurance proceeds must be
22 paid to the lessor and, in such an instance, the lessee
24 remains liable only for the insurance deductible plus any
26 amounts otherwise due to the lessor because of any prior
28 default by the lessee under the terms of the lease.

30 **UNIFORM COMMENT**

32 **Uniform Statutory Source:** Section 2-613.

34 **Changes:** Revised to reflect leasing practices and terminology.

36 **Purposes:** Due to the vagaries of determining the amount of due
38 allowance (Section 2-613(b), no attempt was made in subsection
40 (b) to treat a problem unique to lease contracts and installment
42 sales contracts: determining how to recapture the allowance,
44 e.g., application to the first or last rent payments or
46 allocation, pro rata, to all rent payments.

48 **Cross References:**

Section 2-613.

Definitional Cross References:

- "Conforming". Section 2A-103(1)(d) [Section 2-1103(1)(d)].
- "Consumer lease". Section 2A-103(1)(e) [Section 2-1103(1)(e)].
- "Delivery". Section 1-201(14).
- "Fault". Section 2A-103(1)(f) [Section 2-1103(1)(f)].
- "Finance lease". Section 2A-103(1)(g) [Section 2-1103(1)(g)].
- "Goods". Section 2A-103(1)(h) [Section 2-1103(1)(h)].
- "Lease". Section 2A-103(1)(j) [Section 2-1103(1)(j)].
- "Lease agreement". Section 2A-103(1)(k) [Section 2-1103(1)(k)].

"Lease contract". Section 2A-103(1)(1) [Section 2-1103(1)(1)].

"Lessee". Section 2A-103(1)(n) [Section 2-1103(1)(n)].

"Lessor". Section 2A-103(1)(p) [Section 2-1103(1)(p)].

"Rights". Section 1-201(36).

"Supplier". Section 2A-103(1)(x) [Section 2-1103(1)(x)].

1991 MAINE COMMENT

2 **Sec. 2-1221** adds an additional protection for lessees when
4 leased property is destroyed. It permits a lessee who is not in
6 default to substitute goods satisfactory to the lessor. It also
8 permits the use of insurance to purchase substitute goods or, at
10 the consumer's option insurance proceeds may be paid to the
12 lessor with the lessee remaining liable for only the insurance
14 deductible plus any amounts owed because of a prior default.'

16 Further amend the bill in section 3 by inserting at the end
18 of that part designated "~~§2-1301~~," the following:

UNIFORM COMMENT

20 **Uniform Statutory Source:** Section 9-201.

22 **Changes:** The first sentence of Section 9-201 was incorporated,
24 modified to reflect leasing terminology. The second sentence of
26 Section 9-201 was eliminated as not relevant to leasing practices.

28 **Purposes:**

30 1. This section establishes a general rule regarding the
32 validity and enforceability of a lease contract. The lease
34 contract is effective and enforceable between the parties and
36 against third parties. Exceptions to this general rule arise
38 where there is a specific rule to the contrary in this Article.
40 Enforceability is, thus, dependent upon the lease contract
42 meeting the requirements of the Statute of Frauds provisions of
Section 2A-201 [Section 2-1201]. Enforceability is also a
function of the lease contract conforming to the principles of
construction and interpretation contained in the Article on
General Provisions (Article 1). Section 2A-103(4) [Section
2-1103(4)].

44 2. The effectiveness or enforceability of the lease
46 contract is not dependent upon the lease contract or any
48 financing statement or the like being filed or recorded; however,
the priority of the interest of a lessor of fixtures with respect
to the interests of certain third parties in such fixtures is

subject to the provisions of the Article on Secured Transactions (Article 9). Section 2A-309 [Section 2-1309]. Prior to the adoption of this Article filing or recording was not required with respect to leases, only leases intended as security. The definition of security interest, as amended concurrently with the adoption of this Article, more clearly delineates leases and leases intended as security and thus signals the need to file. Section 1-201(37). Those lessors who are concerned about whether the transaction creates a lease or a security interest will continue to file a protective financing statement. Section 9-408. Coogan, Leasing and the Uniform Commercial Code, in Equipment Leasing-Leveraged Leasing 681, 744-46 (2d ed. 1980).

3. Hypothetical:

1. (a) In construing this section it is important to recognize its relationship to other sections in this Article. This is best demonstrated by reference to a hypothetical. Assume that on February 1 A, a manufacturer of combines and other farm equipment, leased a fleet of six combines to B, a corporation engaged in the business of farming, for a 12 month term. Under the lease agreement between A and B, A agreed to defer B's payment of the first two months' rent to April 1. On March 1 B recognized that it would need only four combines and thus subleased two combines to C for an 11 month term.

2. (b) This hypothetical raises a number of issues that are answered by the sections contained in this part. Since lease is defined to include sublease (Section 2A-103(1)(j) and (w) [Section 2-1103(1)(j) and (w)]), this section provides that the prime lease between A and B and the sublease between B and C are enforceable in accordance with their terms, except as otherwise provided in this Article; that exception, in this case, is one of considerable scope.

3. (c) The separation of ownership, which is in A, and possession, which is in B with respect to four combines and which is in C with respect to two combines, is not relevant. Section 2A-302 [Section 2-1302]. A's interest in the six combines cannot be challenged simply because A parted with possession to B, who in turn parted with possession of some of the combines to C. Yet it is important to note that by the terms of Section 2A-302 [Section 2-1302] this conclusion is subject to change if otherwise provided in this Article.

4. (d) B's entering the sublease with C raises an issue that is treated by this part. In a dispute over the leased combines A may challenge B's right to sublease. The general rule

is permissive as to transfers of interests under a lease contract, including subleases. Section ~~2A-303(1)~~ Section 2A-303(2) [Section 2-1303(2)]. However, the rule creates ~~has~~ two significant exceptions ~~qualifications~~. If the prime lease contract between A and B prohibits B from subleasing the combines, Section ~~2A-303(1)(a)~~ ~~or makes such a sublease an event of default~~, Section 2A-303(2) [Section 2-1303(2)] applies, ~~as the transfer is voluntary and prohibited~~; thus, while B's interest under the prime lease may not be transferred under the sublease to C, ~~A may have a remedy pursuant to Section 2A-303(5) [Section 2-1303(5)]~~. Absent a prohibition ~~or default provision~~ in the prime lease contract A might be able to argue that the sublease to C materially increases A's risk; thus, ~~while~~ B's interest under the prime lease may ~~not~~ be transferred under the sublease to C, ~~if after demand by A, C fails to provide the assurances required by Section 2A-303(2)~~ ~~A may have a remedy pursuant to Section 2A-303(5) [Section 2-1303(5)]~~. Section ~~2A-303(1)(b)~~ Section 2A-303(5)(b)(ii) [Section 2-1303(5)(b)(ii)].

5. (e) Resolution of this issue is also a function of the section dealing with the sublease of goods by a prime lessee (Section 2A-305 [Section 2-1305]). Subsection (1) of Section 2A-305 [Section 2-1305(1)], which is subject to the rule ~~rules~~ of Section 2A-303 [Section 2-1303] stated above, provides that C takes subject to the interest of A under the prime lease between A and B. However, there are two exceptions. First, if B is a merchant (Sections 2A-103(3) and 2-104(1) [Sections 2-1103(3) and 2-1104(1)]) dealing in goods of that kind and C is a sublessee in the ordinary course of business (Sections 2A-103(1)(o) and 2A-103(1)(n) [Sections 2-1103(1)(o) and 2-1103(1)(n)]), C takes free of the prime lease between A and B. Second, if B has rejected the six combines under the prime lease with A, and B disposes of the goods by sublease to C, C takes free of the prime lease if C can establish good faith. Section 2A-511(4) [Section 2-1511(4)].

6. (f) If the facts of this hypothetical are expanded and we assume that the prime lease obligated B to maintain the combines, an additional issue may be presented. Prior to entering the sublease, B, in satisfaction of its maintenance covenant, brought the two combines that it desired to sublease to a local independent dealer of A's. The dealer did the requested work for B. C inspected the combines on the dealer's lot after the work was completed. C signed the sublease with B two days later. C, however, was prevented from taking delivery of the two combines as B refused to pay the dealer's invoice for the repairs. The dealer furnished the repair service to B in the ordinary course of the dealer's business. If under applicable

law the dealer has a lien on repaired goods in the dealer's possession, the dealer's lien will take priority over A's, B's and C's interests, and also should take priority over A's interest, depending upon the terms of the lease contract and the applicable law. Section 2A-306 [Section 2-1306].

7. (g) Now assume that C is in financial straits and one of C's creditors obtains a judgment against C. If the creditor levies on C's subleasehold interest in the two combines, who will prevail? Unless the levying creditor also holds a lien covered by Section 2A-306 [Section 2-1306], discussed above, the judgment creditor will take its interest subject to B's rights under the sublease and A's rights under the prime lease. Section 2A-307(1) [Section 2-1307(1)]. The hypothetical becomes more complicated if we assume that B is in financial straits and B's creditor holds the judgment. Here the judgment creditor takes subject to the sublease unless the lien attached to the two combines before the sublease contract became enforceable. Section 2A-307(2)(a) [Section 2-1307(2)(a)]. However, B's judgment creditor cannot prime A's interest in the goods because, with respect to A, the judgment creditor is a creditor of B in its capacity as lessee under the prime lease between A and B. Thus, here the judgment creditor's interest is subject to the lease between A and B. Section 2A-307(1) [Section 2-1307(1)].

8. (h) Finally, assume that on April 1 B is unable to pay A the deferred rent then due under the prime lease, but that C is current in its payments under the sublease from B. What effect will B's default under the prime lease between A and B have on C's rights under the sublease between B and C? Section 2A-301 [Section 2-1301] provides that a lease contract is effective against the creditors of either party. Since a lease contract includes a sublease contract (Section 2A-103(1)(1) [Section 2-1103(1)(1)]); the sublease contract between B and C arguably could be enforceable against A, a prime lessor who has extended unsecured credit to B the prime lessee/sublessor, if the sublease contract meets the requirements of Section 2A-201 [Section 2-1201]. However, the rule stated in Section 2A-301 [Section 2-1301] is subject to other provisions in this Article. Under Section 2A-305 [Section 2-1305], C, as sublessee, would take subject to the prime lease contract in most cases. Thus, B's default under the prime lease will in most cases lead to A's recovery of the goods from C. Section 2A-523 [Section 2-1523]. A and C could provide otherwise by agreement. Section 2A-311 [Section 2-1311]. C's recourse will be to assert a claim for damages against B. Section Sections 2A-211(1) [Section 2-1211(1)] and 2A-508 [Section 2-1508].

4. Relationship Between Sections:

1. (a) As the analysis of the hypothetical demonstrates, Part 3 of the Article focuses on issues that relate to the enforceability of the lease contract (Sections 2A-301, 2A-302 and 2A-303 [Sections 2-1301, 2-1302 and 2-1303]) and to the priority of various claims to the goods subject to the lease contract (Sections 2A-304, 2A-305, 2A-306, 2A-307, 2A-308, 2A-309, and 2A-310, and 2A-311 [Sections 2-1304, 2-1305, 2-1306, 2-1307, 2-1308, 2-1309, 2-1310 and 2-1311]).

2. (b) This section states a general rule of enforceability, which is subject to specific rules to the contrary stated elsewhere in the Article. Section 2A-302 [Section 2-1302] negates any notion that the separation of title and possession is fraudulent as a rule of law. Finally, Section 2A-303 [Section 2-1303] states a ~~permissive~~ rule with respect to the transfer of the lessor's interest (as well as the residual interest in the goods) or the lessee's interest under the lease contract. Conditions Qualifications are imposed as a function of various issues, including whether the transfer is ~~voluntary~~ or involuntary the creation or enforcement of a security interest or one that is material to the other party to the lease contract. In addition, a system of rules is created to deal with the rights and duties among assignor, assignee and the other party to the lease contract.

3. (c) Sections 2A-304 and 2A-305 [Sections 2-1304 and 2-1305] are twins that deal with good faith transferees of goods subject to the lease contract. Section 2A-304 [Section 2-1304] creates a set of rules with respect to transfers by the lessor of goods subject to a lease contract; the transferee considered is a subsequent lessee of the goods. The priority dispute covered here is between the subsequent lessee and the original lessee of the goods (or persons claiming through the original lessee). Section 2A-305 [Section 2-1305] creates a set of rules with respect to transfers by the lessee of goods subject to a lease contract; the transferees considered are buyers of the goods or sublessees of the goods. The priority dispute covered here is between the transferee and the lessor of the goods (or persons claiming through the lessor).

4. (d) Section 2A-306 [Section 2-1306] creates a rule with respect to priority disputes between holders of liens for services or materials furnished with respect to goods subject to a lease contract and the lessor or the lessee under that contract. Section 2A-307 [Section 2-1307] creates a rule with respect to priority disputes between the lessee and creditors of

the lessor and priority disputes between the lessor and creditors of the lessee.

5- (e) Section 2A-308 [Section 2-1308] creates a series of rules relating to allegedly fraudulent transfers and preferences. The most significant rule is that set forth in subsection (3) which validates sale-leaseback transactions if the buyer-lessor can establish that he or she bought for value and in good faith.

6- (f) Finally, Sections 2A-309 and 2A-310 [Section 2-1309 and 2-1310] create a series of rules with respect to priority disputes between various third parties and a lessor of fixtures or accessions, respectively, with respect thereto.

(g) Finally, Section 2A-311 [Section 2-1311] allows parties to alter the statutory priorities by agreement.

Cross References:

Article 1, esp. especially Section 1-201(37), and Sections 2-104(1), 2A-103(1)(j) [Section 2-1103(1)(j)], 2A-103(1)(l) [Section 2-1103(1)(l)], 2A-103(1)(n) [Section 2-1103(1)(n)], 2A-103(1)(o) [Section 2-1103(1)(o)] and 2A-103(1)(w) [Section 2-1103(1)(w)], 2A-103(3) [Section 2-1103(3)], 2A-103(4) [Section 2-1103(4)], 2A-201 [Section 2-1201], 2A-301 through 2A-303 [Section 2-1301 to 2-1303], 2A-303(1), 2A-303(1)(a), 2A-303(1)(b), 2A-303(2) [Section 2-1303(2)], 2A-303(5) [Section 2-1303(5)], 2A-304 through 2A-307 [Section 2-1304 to 2-1307], 2A-307(1) [Section 2-1307(1)], 2A-307(2)(a) [Section 2-1307(2)(a)], 2A-308 through 2A-310 2A-311 [Section 2-1308 to 2-1311], 2A-508 [Section 2-1508], 2A-511(4) [Section 2-1511(4)], 2A-523 [Section 2-1523], Article 9, esp. especially Sections 9-201 and 9-408.

Definitional Cross References:

"Creditor". Section 1-201(12).
"Goods". Section 2A-103(1)(h) [Section 2-1103(1)(h)].
"Lease contract". Section 2A-103(1)(l) [Section 2-1103(1)(l)].
"Party". Section 1-201(29).
"Purchaser". Section 1-201(33).
"Term". Section 1-201(42).

Further amend the bill in section 3 by inserting at the end of that part designated "2-1302." the following:

UNIFORM COMMENT

Uniform Statutory Source: Section 9-202.

Changes: Section 9-202 was modified to reflect leasing terminology and to clarify the law of leases with respect to fraudulent conveyances or transfers.

Purposes: The separation of ownership and possession of goods between the lessor and the lessee (or a third party) has created problems under certain fraudulent conveyance statutes. See, e.g., In re Ludlum Enters., 510 F.2d 996 (5th Cir. 1975); Suburbia Fed. Sav. & Loan Ass'n v. Bel-Air Conditioning Co., 385 So. 2d 1151 (Fla. Dist. Ct. App. 1980). This section provides, among other things, that separation of ownership and possession per se does not affect the enforceability of the lease contract. Sections 2A-301 and 2A-308 [Sections 2-1301 and 2-1308].

Cross References:

Sections 2A-301 [Section 2-1301], 2A-308 [Section 2-1308] and 9-202.

Definitional Cross References:

"Goods". Section 2A-103(1)(h) [Section 2-1103(1)(h)].
"Lessee". Section 2A-103(1)(n) [Section 2-1103(1)(n)].
"Lessor". Section 2A-103(1)(p) [Section 2-1103(1)(p)].

Further amend the bill in section 3 in that part designated "2-1303." in subsection (8) by inserting after the following: "conspicuous," the following: 'The lessor's remedies with regard to a prohibited transfer or a transfer that results in default are subject to the duty of the lessor to mitigate damages.'

Further amend the bill in section 3 by inserting at the end of that part designated "2-1303." the following:

UNIFORM COMMENT

Uniform Statutory Source: Section Sections 2-210 and 9-311.

Changes: The provisions of Section 2-210 were incorporated in this Article, with substantial modifications to reflect leasing terminology and practice, as well as certain developments of the law with respect to creditors' rights. The provisions of Sections 2-210 and 9-311 were incorporated in this section, with substantial modifications to reflect leasing terminology and

practice and to harmonize the principles of the respective provisions, i.e. limitations on delegation of performance on the one hand and alienability of rights on the other. In addition, unlike Section 2-210 which deals only with voluntary transfers, this section deals with involuntary as well as voluntary transfers. Moreover, the principle of Section 9-318(4) denying effectiveness to contractual terms prohibiting assignments of receivables due and to become due also is implemented.

Purposes: Unlike Section 2-210, which deals with voluntary transfers of rights and duties under a sales contract, this section deals with involuntary as well as voluntary transfers of rights and duties under a lease contract. Voluntary transfers are permitted unless prohibited by the lease contract or, as is also the case for involuntary transfers, there is a material change in the duty of, or a material increase in the burden of risk to, the other party to the lease contract and the transferee fails to comply with the conditions in subsection (2) within a reasonable time after a demand, which need not be in writing, has been made for such compliance.

Subsection (4) establishes four criteria that must be satisfied by the transferee after a demand has been made. These criteria are modeled on the requirements contained in the Bankruptcy Reform Act of 1978, as amended, 11 U.S.C. § 365 (1982 & Supp. II 1984), governing the assumption and assignment of an unexpired lease or executory contract by a trustee in bankruptcy. Section 2-210(5) resolves this issue for sales by allowing the other party to demand assurances from the transferee (Section 2-609). Section 365 of the Bankruptcy Code, a modern version of the provisions of Section 2-609, provided a better model for resolving this issue for leases.

Sections 9-206 and 9-318 are also relevant in this context. Section 9-206 sanctions an agreement by a lessee not to assert certain types of claims or defenses against the lessor's assignee. Section 9-318 deals with, among other things, the other party's rights against the assignee where Section 9-206(1) does not apply. Since the definition of contract under Section 1-201(11) includes a lease agreement, the definition of assignee debtor under Section 9-105(1)(a) includes a lessee of goods and Section 9-206 applies to lease agreements; thus, there is no need to restate those sections in this Article. However, the reference to "defenses or claims arising out of a sale" in Section 9-318(1) should be interpreted broadly to include defenses or claims arising out of a lease. This should follow as Section 9-318(1) codifies the common law rule with respect to contracts, including contracts of sale and contracts of lease.

Further, Section 9-318(4) should be interpreted to allow the rule of this section to control with respect to transfers of leases.

1. Subsection (2) states a rule, consistent with Section 9-311, that voluntary and involuntary transfers of an interest of a party under the lease contract or of the lessor's residual interest, including by way of the creation or enforcement of a security interest, are effective, notwithstanding a provision in the lease agreement prohibiting the transfer or making the transfer an event of default. Although the transfers are effective, the provision in the lease agreement is nevertheless enforceable, but only as provided in subsection (5). Under subsection (5) the prejudiced party is limited to the remedies on "default under the lease contract" in this Article and, except as limited by this Article, as provided in the lease agreement, if the transfer has been made an event of default. Section 2A-501(2) [Section 2-1501(2)]. Usually, there will be a specific provision to this effect or a general provision making a breach of a covenant an event of default. In those cases where the transfer is prohibited, but not made an event of default, the prejudiced party may recover damages; or, if the damage remedy would be ineffective adequately to protect that party, the court can order cancellation of the lease contract or enjoin the transfer. This rule that such provisions generally are enforceable is subject to subsections (3) and (4), which make such provisions unenforceable in certain instances.

2. The first such instance is described in subsection (3). A provision in a lease agreement which prohibits the creation or enforcement of a security interest, including sales of lease contracts subject to Article 9 (Sections 9-102(1)(b) and 9-104(f)), or makes it an event of default is generally not enforceable, reflecting the policy of Section 9-318(4). However, that policy gives way to the doctrine stated in Section 2-210(2), which gives one party to a contract the right to protect itself against an actual delegation (but not just a provision under which delegation might later occur) of a material performance by the other party. Accordingly, such a provision in a lease agreement is enforceable when the transfer delegates a material performance. Generally, as expressly provided in subsection (6), a transfer for security is not a delegation of duties. However, inasmuch as the creation of a security interest includes the sale of a lease contract, if there are then unperformed duties on the part of the lessor/seller, there could be a delegation of duties in the sale, and, if such a delegation actually takes place and is of a material performance, a provision in a lease agreement prohibiting it or making it an event of default would be enforceable, giving rise to the rights and remedies stated in

2 subsection (5). The statute does not define "material." The
 4 parties may set standards to determine its meaning. The term is
 6 intended to exclude delegations of matters such as accounting to
a professional accountant and the performance of, as opposed to
the responsibility for, maintenance duties to a person in the
maintenance service industry.

8 3. For similar reasons, the lessor is entitled to protect
 10 its residual interest in the goods by prohibiting anyone but the
 12 lessee from possessing or using them. Accordingly, under
 14 subsection (3) if there is an actual transfer by the lessee of
 16 its right of possession or use of the goods in violation of a
 18 provision in the lease agreement, such a provision likewise is
enforceable, giving rise to the rights and remedies stated in
subsection (5). A transfer of the lessee's right of possession
or use of the goods resulting from the enforcement of a security
interest granted by the lessee in its leasehold interest is a
"transfer by the lessee" under this subsection.

20 4. Finally, subsection (3) protects against a claim that
 22 the creation or enforcement of a security interest in the
 24 lessor's interest under the lease contract or in the residual
 26 interest is a transfer that materially impairs the prospect of
 28 obtaining return performance by, materially changes the duty of,
or materially increases the burden or risk imposed on the lessee
so as to give rise to the rights and remedies stated in
subsection (5), unless the transfer involves an actual delegation
of a material performance of the lessor.

30 5. While it is not likely that a transfer by the lessor of
 32 its right to payment under the lease contract would impair at a
 34 future time the ability of the lessee to obtain the performance
 36 due the lessee under the lease contract from the lessor, if under
 38 the circumstances reasonable grounds for insecurity as to
receiving that performance arise, the lessee may employ the
provision of this Article for demanding adequate assurance of due
performance and has the remedy provided in that circumstance.
Section 2A-401 [Section 2-1401].

40 6. Sections 9-206 and 9-318(1) through (3) also are
 42 relevant. Section 9-206 sanctions an agreement by a lessee not
 44 to assert certain types of claims or defenses against the
 46 lessor's assignee. Section 9-318(1) through (3) deal with, among
 48 other things, the other party's rights against the assignee where
Section 9-206(1) does not apply. Since the definition of
contract under Section 1-201(1) includes a lease agreement, the
definition of account debtor under Section 9-105(1)(a) includes a
lessee of goods. As a result, Section 9-206 applies to lease

2 agreements, and there is no need to restate those sections in
 4 this Article. The reference to "defenses or claims arising out
 6 of a sale" in Section 9-318(1) should be interpreted broadly to
include defenses or claims arising out of a lease inasmuch as
that section codifies the common law rule with respect to
contracts, including lease contracts.

8 7. Subsection (4) is based upon Section 2-210(2) and
 10 Section 9-318(4). It makes unenforceable a prohibition against
 12 transfers of certain rights to payment or a provision making the
 14 transfer an event of default. It also provides that such
 16 transfers do not materially impair the prospect of obtaining
 18 return performance by, materially change the duty of, or
 20 materially increase the burden or risk imposed on, the other
 22 party to the lease contract so as to give rise to the rights and
 24 remedies stated in subsection (5). Accordingly, a transfer of a
 26 right to payment cannot be prohibited or made an event of
 28 default, or be one that materially impairs performance, changes
 30 duties or increases risk, if the right is already due or will
 32 become due without further performance being required by the
 34 party to receive payment. Thus, a lessor can transfer the right
 36 to future payments under the lease contract, including by way of
 38 a grant of a security interest, and the transfer will not give
 40 rise to the rights and remedies stated in subsection (5) if the
 42 lessor has no remaining performance under the lease contract.
 44 The mere fact that the lessor is obligated to allow the lessee
 46 to remain in possession and to use the goods as long as the lessee
 48 is not in default does not mean that there is "remaining
performance" on the part of the lessor. Likewise, the fact that
the lessor has potential liability under a "non-operating" lease
contract for breaches of warranty does not mean that there is
"remaining performance." In contrast, the lessor would have
"remaining performance" under a lease contract requiring the
lessor to regularly maintain and service the goods or to provide
"upgrades" of the equipment on a periodic basis in order to avoid
obsolescence. The basic distinction is between a mere potential
duty to respond which is not "remaining performance," and an
affirmative duty to render stipulated performance. Although the
distinction may be difficult to draw in some cases, it is
instructive to focus on the difference between "operating" and
"non-operating" leases as generally understood in the
marketplace. Even if there is "remaining performance" under a
lease contract, a transfer for security of a right to payment
that is made an event of default or that is in violation of a
prohibition against transfer does not give rise to the rights and
remedies under subsection (5) if it does not constitute an actual
delegation of a material performance under subsection (3).

8. The application of either the rule of subsection (3) or the rule of subsection (4) to the grant by the lessor of a security interest in the lessor's right to future payment under the lease contract may produce the same result. Both subsections generally protect security transfers by the lessor in particular because the creation by the lessor of a security interest or the enforcement of that interest generally will not prejudice the lessee's rights if it does not result in a delegation of the lessor's duties. To the contrary, the receipt of loan proceeds or relief from the enforcement of an antecedent debt normally should enhance the lessor's ability to perform its duties under the lease contract. Nevertheless, there are circumstances where relief might be justified. For example, if ownership of the goods is transferred pursuant to enforcement of a security interest to a party whose ownership would prevent the lessee from continuing to possess the goods, relief might be warranted. See 49 U.S.C. § 1401(a) and (b) which places limitations on the operation of aircraft in the United States based on the citizenship or corporate qualification of the registrant.

9. Relief on the ground of material prejudice when the lease agreement does not prohibit the transfer or make it an event of default should be afforded only in extreme circumstances, considering the fact that the party asserting material prejudice did not insist upon a provision in the lease agreement that would protect against such a transfer.

10. Subsection (5) implements the rule of subsection (2). Subsection (2) provides that, even though a transfer is effective, a provision in the lease agreement prohibiting it or making it an event of default may be enforceable as provided in subsection (5). See Brummond v. First National Bank of Clovis, 656 P.2d 884, 35 U.C.C. Rep. Serv. (Callaghan) 1311 (N. Mex. 1983), stating the analogous rule for Section 9-311. If the transfer prohibited by the lease agreement is made an event of default, then, under subsection 5(a), unless the default is waived or there is an agreement otherwise, the aggrieved party has the rights and remedies referred to in Section 2A-501(2) [Section 2-1501(2)], viz. those in this Article and, except as limited in the Article, those provided in the lease agreement. In the unlikely circumstance that the lease agreement prohibits the transfer without making a violation of the prohibition an event of default or, even if there is no prohibition against the transfer, and the transfer is one that materially impairs performance, changes duties, or increases risk (for example, a sublease or assignment to a party using the goods improperly or for an illegal purpose), then subsection 5(b) is applicable. In that circumstance, unless the party aggrieved by the transfer has

otherwise agreed in the lease contract, such as by assenting to a particular transfer or to transfers in general, or agrees in some other manner, the aggrieved party has the right to recover damages from the transferor and a court may, in appropriate circumstances, grant other relief, such as cancellation of the lease contract or an injunction against the transfer.

11. If a transfer gives rise to the rights and remedies provided in subsection (5), the transferee as an alternative may propose, and the other party may accept, adequate cure or compensation for past defaults and adequate assurance of future due performance under the lease contract. Subsection (5) does not preclude any other relief that may be available to a party to the lease contract aggrieved by a transfer subject to an enforceable prohibition, such as an action for interference with contractual relations.

12. Subsection (8) requires that a provision in a consumer lease prohibiting a transfer, or making it an event of default, must be specific, written and conspicuous. See Section 1-201(10). This assists in protecting a consumer lessee against surprise assertions of default.

13. Subsection (4) (6) is taken almost verbatim from the provisions of Section 2-210(4). The subsection states a rule of construction that distinguishes a commercial assignment, which substitutes the assignee for the assignor as to rights and duties, and an assignment for security or financing assignment, which substitutes the assignee for the assignor only as to rights. Note that the assignment for security or financing assignment is a subset of all security interests. Security interest is defined to include "any interest of a buyer of ... chattel paper". Section 1-201(37). Chattel paper is defined to include a lease. Section 9-105(1)(b). Thus, a buyer of leases is the holder of a security interest in the leases. That conclusion should not influence this issue, as the policy is quite different. Whether a buyer of leases is the holder of a commercial assignment, or an assignment for security or financing assignment should be determined by the language of the assignment or the circumstances of the assignment.

~~While it is recognized that a lease contract may impose restrictions on the transfer of an interest of a party under a lease, such restrictions are not generally favored in law. Subsection (7) balances these competing interests and ensures that both parties knowingly impose prohibitions on transfer, by providing that the language of prohibition be specific, by a writing, and conspicuous.~~

2 Cross References:

4 Sections 1-201(11), 1-201(37), 2-210, 3-609 2A-401 [Section
2-1401], 9-102(1)(b), 9-104(f), 9-105(1)(a), 9-206, and 9-318.

6 Definitional Cross References:

- 8 "Agreed" and "Agreement". Section 1-201(3).
- 10 "Conspicuous". Section 1-201(10).
- 12 "Goods". Section 2A-103(1)(h) [Section 2-1103(1)(h)].
- 14 "Lease". Section 2A-103(1)(j) [Section 2-1103(1)(j)].
- 16 "Lease contract". Section 2A-103(1)(1) [Section
2-1103(1)(1)].
- 18 "Lessee". Section 2A-103(1)(n) [Section 2-1103(1)(n)].
- 20 "Lessor". Section 2A-103(1)(p) [Section 2-1103(1)(p)].
- 22 "Lessor's residual interest". Section 2A-103(1)(q) [Section
2-1103(1)(q)].
- 24 "Notice". Section 1-201(25).
- 26 "Party". Section 1-201(29).
- 28 "Person". Section 1-201(30).
- 30 "Reasonable time". Section 1-204(1) and (2).
- 32 "Rights". Section 1-201(36).
- 34 "Term". Section 1-201(42).
- 36 "Writing". Section 1-201(46).

28 1991 MAINE COMMENT

30 Sec. 2-1303(8) clarifies that a lessor's remedies with regard
to a prohibited transfer or a transfer that results in default is
subject to the duty to mitigate damages.'

34 Further amend the bill in section 3 by inserting at the end
of that part designated "~~§2-1304.~~" the following:

36 UNIFORM COMMENT

38 Uniform Statutory Source: Section 2-403.

40 Changes: While Section 2-403 was used as a model for this
section, the provisions of Section 2-403 were significantly
revised to reflect leasing practices and to integrate this
Article with certificate of title statutes.

44 Purposes:

46 1. This section must be read in conjunction with, as it is
48 subject to, the provisions of Section 2A-303 [Section 2-1303],

2 which govern voluntary and involuntary transfers of rights and
duties under a lease contract, including the lessor's residual
interest in the goods.

4 2. This section must also be read in conjunction with
6 Section 2-403. This section and Section 2A-305 [Section 2-1305]
are derived from Section 2-403, which states a unified policy on
8 good faith purchases of goods. Given the scope of the definition
of purchaser (Section 1-201(33)), a person who bought goods to
10 lease as well as a person who bought goods subject to an existing
lease from a lessor will take pursuant to Section 2-403.
12 Further, a person who leases such goods from the person who
bought them should also be protected under Section 2-403, first
14 because the lessee's rights are derivative and second because the
definition of purchaser should be interpreted to include one who
16 takes by lease; no negative implication should be drawn from the
inclusion of lease in the definition of purchase in this
18 Article. Section 2A-103(1)(v) [Section 2-1103(1)(v)].

20 3. There are hypotheticals that relate to an entrustee's
unauthorized lease of entrusted goods to a third party that are
22 outside the provisions of Sections 2-403, 2A-304 and 2A-305
[Section 2-1305]. Consider a sale of goods by M, a merchant, to
24 B, a buyer. After paying for the goods B allows M to retain
possession of the goods as B is short of storage. Before B calls
26 for the goods M leases the goods to L, a lessee. This
transaction is not governed by Section 2-403(2) as L is not a
28 buyer in the ordinary course of business. Section 1-201(9).
Further, this transaction is not governed by Section 2A-304(2)
30 [Section 2-1304(2)] as B is not an existing lessee. Finally,
this transaction is not governed by Section 2A-305(2) [Section
32 2-1305(2)] as B is not M's lessor. Section 2A-307(2) [Section
2-1307(2)] resolves the potential dispute between B, M and L. By
34 virtue of B's entrustment of the goods to M and M's lease of the
goods to L, B has a cause of action against M under the common
36 law. Sections 2A-103(4) [Section 2-1103(4)] and 1-103. See,
e.g., Restatement (Second) of Torts §§ 222A-243. Thus, B is a
38 creditor of M. Sections 2A-103(4) [Section 2-1103(4)] and
1-201(12). Section 2A-307(2) [Section 2-1307(2)] provides that
40 B, as M's creditor, takes subject to M's lease to L. Thus, if L
does not default under the lease, L's enjoyment and possession of
42 the goods should be undisturbed. However, B is not without
recourse. B's action should result in a judgment against M
44 providing, among other things, a turnover of all proceeds arising
from M's lease to L, as well as a transfer of all of M's right,
46 title and interest as lessor under M's lease to L, including M's
residual interest in the goods. Section 2A-103(1)(q) [Section
48 2-1103(1)(q)].

2 4. Subsection (1) states a rule with respect to the
 4 leasehold interest obtained by a subsequent lessee from a lessor
 6 of goods under an existing lease contract. The interest will
 8 include such leasehold interest as the lessor has in the goods as
 10 well as the leasehold interest that the lessor had the power to
 12 transfer. Thus, the subsequent lessee obtains unimpaired all
 14 rights acquired under the law of agency, apparent agency,
 16 ownership or other estoppel, whether based upon statutory
 provisions or upon case law principles. Sections 2A-103(4)
 [Section 2-1103(4)] and 1-103. In general, the subsequent lessee
 takes subject to the existing lease contract, including the
 existing lessee's rights thereunder. Furthermore, the subsequent
 lease contract is, of course, limited by its own terms, and the
 subsequent lessee takes only to the extent of the leasehold
 interest transferred thereunder.

18 5. Subsection (1) further provides that a lessor with
 20 voidable title has power to transfer a good leasehold interest to
 22 a good faith subsequent lessee for value. In addition,
 24 subsections (1)(a) through (d) [subsection (1)(a) to (d)] provide
 specifically for the protection of the good faith subsequent
 lessee for value in a number of specific situations which have
 been troublesome under prior law.

26 6. The position of an existing lessee who entrusts leased
 28 goods to its lessor is not distinguishable from the position of
 30 other entrusters. Thus, subsection (2) provides that the
 32 subsequent lessee in the ordinary course of business takes free
 34 of the existing lease contract between the lessor entruster and
 36 the lessee entruster, if the lessor is a merchant dealing in
 goods of that kind. Further, the subsequent lessee obtains all
 of the lessor entruster's and the lessee entruster's rights to
 the goods, but only to the extent of the leasehold interest
 transferred by the lessor entruster. Thus, the lessor entruster
 retains the residual interest in the goods. Section 2A-103(1)(q)
 [Section 2-1103(1)(q)]. However, entrustment by the existing
 lessee must have occurred before the interest of the subsequent
 lessee became enforceable against the lessor. Entrusting is
 defined in Section 2-403(3) and that definition applies here.
 Section 2A-103(3) [Section 2-1103(3)].

42 7. Subsection (3) states a rule with respect to a transfer
 44 of goods from a lessor to a subsequent lessee where the goods are
 46 subject to an existing lease and covered by a certificate of
 title. The subsequent lessee's rights are no greater than those
 48 provided by this section and the applicable certificate of title
 statute, including any applicable case law construing such

2 statute. Where the relationship between the certificate of title
 4 statute and Section 2-403, the statutory analogue to this
 6 section, has been construed by a court, that construction is
 8 incorporated here. Sections 2A-103(4) [Section 2-1103(4)] and
 10 1-102(1) and (2). The better rule is that the certificate of
 12 title statutes are in harmony with Section 2-403 and thus would
 14 be in harmony with this section. E.g., Atwood Chevrolet-Olds v.
 16 Aberdeen Mun. School Dist., 431 So.2d 926, 928, (Miss.1983);
 18 Godfrey v. Gilsdorf, 476 P.2d 3, 6, 86 Nev. 714, 718 (1970);
 20 Martin v. Nager, 192 N.J.Super. 189, 197-98, 469 A.2d 519, 523
 (Super. Ct. Ch. Div. 1983). Where the certificate of title
 statute is silent on this issue of transfer, this section will
 control.

Cross References:

18 Sections 1-102, 1-103, 1-201(33), 2-403, 2A-103(1)(v)
 [Section 2-1103(1)(v)], 2A-103(3) [Section 2-1103(3)], 2A-103(4)
 [Section 2-1103(4)], 2A-303 [Section 2-1303] and 2A-305 [Section
 2-1305].

Definitional Cross References:

24 "Agreed". Section 1-201(3).
 26 "Delivery". Section 1-201(14).
 "Entrusting". Section 2-403(3).
 "Good faith". Sections 1-201(19) and 2-103(1)(b).
 28 "Goods". Section 2A-103(1)(h) [Section 2-1103(1)(h)].
 "Lease". Section 2A-103(1)(j) [Section 2-1103(1)(j)].
 30 "Lease contract". Section 2A-103(1)(i) [Section
 2-1103(1)(i)].
 32 "Leasehold interest". Section 2A-103(1)(m) [Section
 2-1103(1)(m)].
 34 "Lessee". Section 2A-103(1)(n) [Section 2-1103(1)(n)].
 "Lessee in the ordinary course of business". Section
 2A-103(1)(o) [Section 2-1103(1)(o)].
 "Lessor". Section 2A-103(1)(p) [Section 2-1103(1)(p)].
 38 "Merchant". Section 2-104(1).
 "Purchase". Section 2A-103(1)(v) [Section 2-1103(1)(v)].
 40 "Rights". Section 1-201(36).
 "Value". Section 1-201(44).

44 Further amend the bill in section 3 by inserting at the end
 of that part designated "~~§2-1305~~," the following:

UNIFORM COMMENT

48 Uniform Statutory Source: Section 2-403.

2 **Changes:** While Section 2-403 was used as a model for this
 4 section, the provisions of Section 2-403 were significantly
 6 revised to reflect leasing practice and to integrate this Article
 with certificate of title statutes.

8 **Purposes:** This section, a companion to Section 2A-304 [Section
 10 2-1304], states the rule with respect to the leasehold interest
 12 obtained by a buyer or sublessee from a lessee of goods under an
 14 existing lease contract. Cf. Section 2A-304 [Section 2-1304]
 16 official comment. Note that this provision is consistent with
 existing case law, which prohibits the bailee's transfer of title
 to a good faith purchaser for value under Section 2-403(1).
 Rohweder v. Aberdeen Product. Credit Ass'n, 765 F.2d 109 (8th
 Cir.1985).

18 Subsection (2) is also consistent with existing case law.
 20 American Standard Credit, Inc. v. National Cement Co., 643 F.2d
 248, 269-70 (5th Cir.1981); but cf. Exxon Co., U.S.A. v. TLW
 22 Computer Indus., 37 U.C.C. Rep. Serv. (Callaghan) 1052, 1057-58
 (D.Mass.1983). Unlike Section 2A-304(2) [Section 2-1304(2)],
 24 this subsection does not contain any requirement with respect to
 the time that the goods were entrusted to the merchant. In
 26 Section 2A-304(2) [Section 2-1304(2)] the competition is between
 28 two customers of the merchant lessor; the time of entrusting was
 added as a criterion to create additional protection to the
 customer who was first in time: the existing lessee. In
 subsection (2) the equities between the competing interests were
 viewed as balanced.

30 There appears to be some overlap between Section 2-403(2)
 32 and Section 2A-305(2) [Section 2-1305(2)] with respect to a buyer
 in the ordinary course of business. However, an examination of
 34 this Article's definition of buyer in the ordinary course of
 36 business (Section 2A-103(1)(a) [Section 2-1102(1)(a)]) makes
 clear that this reference was necessary to treat entrusting in
 the context of a lease.

38 Subsection (3) states a rule of construction with respect to
 40 a transfer of goods from a lessee to a buyer or sublessee, where
 the goods are subject to an existing lease and covered by a
 42 certificate of title. Cf. Section 2A-304 [Section 2-1304]
 44 official comment.

46 Cross References:

48 Sections 2-403, 2A-103(1)(a) [Section 2-1103(1)(a)], 2A-304
 [Section 2-1304] and 2A-305(2) [Section 2-1304(2)].

2 Definitional Cross References:

4 "Buyer". Section 2-103(1)(a).
 6 "Buyer in the ordinary course of business". Section
 2A-103(1)(a) [Section 2-1103(1)(a)].
 8 "Delivery". Section 1-201(14).
 "Entrusting". Section 2-403(3).
 "Good faith". Sections 1-201(19) and 2-103(1)(b).
 10 "Goods". Section 2A-103(1)(h) [Section 2-1103(1)(h)].
 "Lease". Section 2A-103(1)(j) [Section 2-1103(1)(j)].
 12 "Lease contract". Section 2A-103(1)(l) [Section
 2-1103(1)(l)].
 14 "Leasehold interest". Section 2A-103(1)(m) [Section
 2-1103(1)(m)].
 16 "Lessee". Section 2A-103(1)(n) [Section 2-1103(1)(n)].
 "Lessee in the ordinary course of business". Section
 18 2A-103(1)(o) [Section 2-1103(1)(o)].
 "Lessor". Section 2A-103(1)(p) [Section 2-1103(1)(p)].
 20 "Merchant". Section 2-104(1).
 "Rights". Section 1-201(36).
 22 "Sale". Section 2-106(1).
 "Sublease". Section 2A-103(1)(w) [Section 2-1103(1)(w)].
 24 "Value". Section 1-201(44).'

26 Further amend the bill in section 3 by inserting at the end
 28 of that part designated "~~§2-1306~~," the following:

30 UNIFORM COMMENT

32 **Uniform Statutory Source:** Section 9-310.

34 **Changes:** The approach reflected in the provisions of Section
 9-310 was included, but revised to conform to leasing terminology
 and to expand the exception to the special priority granted to
 36 protected liens to cover liens created by rule of law as well as
 those created by statute.

38 **Purposes:** This section should be interpreted to allow a
 40 qualified lessor or a qualified lessee to be the competing
 lienholder if the statute or rule of law so provides. The
 42 reference to statute includes applicable regulations and cases;
 these sources must be reviewed in resolving a priority dispute
 44 under this section.

46 Cross Reference:

48 Section 9-310.

2 **Definitional Cross References:**

4 "Goods". Section 2A-103(1)(h) [Section 2-1103(1)(h)].
6 "Lease contract". Section 2A-103(1)(1) [Section
2-1103(1)(1)].
8 "Lessee". Section 2A-103(1)(n) [Section 2-1103(1)(n)].
"Lessor". Section 2A-103(1)(p) [Section 2-1103(1)(p)];
10 "Lien". Section 2A-103(1)(r) [Section 2-1103(1)(r)].
"Person". Section 1-201(30).

12 Further amend the bill in section 3 in that part designated
14 "~~§2-1307.~~" by striking out all of the first 2 lines (page 25,
lines 27 and 28 in L.D.) and inserting in their place the
16 following:

18 '~~§2-1307. Priority of liens arising by attachment or levy on
security interests in and other claims to goods'~~

20 Further amend the bill in section 3 by inserting at the end
of that part designated "~~§2-1307.~~" the following:

22 **UNIFORM COMMENT**

24 **Uniform Statutory Source:** None for subsections subsection (1)
26 and (2). Subsections Subsection (2) is derived from Section
28 9-301, and subsections (3) and (4) are derived from the
provisions of Section 9-307(1) and (3), respectively.

30 **Changes:** The provisions of Section Sections 9-301 and 9-307(1)
and (3) were incorporated, and modified to reflect leasing
32 terminology and the basic concepts reflected in this Article.

34 **Purposes:**

36 1. Subsection (1) states a general rule of priority that a
creditor of the lessee takes subject to the lease contract. The
38 term lessee (Section 2A-103(1)(n) [Section 2-1103(1)(n)]) includes
sublessee. Therefore, this subsection not only covers disputes
40 between the prime lessor and a creditor of the prime lessee but
also disputes between the prime lessor, or the sublessor, and a
42 creditor of the sublessee. Section 2A-301 [Section 2-1301]
official comment 3(g). Further, by using the term creditor
44 (Section 1-201(12)), this subsection will cover disputes with a
general creditor, a secured creditor, a lien creditor and any
46 representative of creditors. Section 2A-103(4) [Section
2-1103(4)].
48

2 2. Subsection (2) states a general rule of priority that a
creditor of a lessor takes subject to the lease contract. Note
the discussion above with regard to the scope of these rules.
4 Section 2A-301 [Section 2-1301] official comment 3(g). Thus, the
section will not only cover disputes between the prime lessee and
6 a creditor of the prime lessor but also disputes between the
prime lessee, or the sublessee, and a creditor of the sublessor.
8

10 3. To take priority over the lease contract, and the
interests derived therefrom, the creditor must come within one of
two three exceptions stated within the rule. First, subsection
12 (2)(a) provides that where the creditor holds a lien (Section
2A-103(1)(r) [Section 2-1103(1)(r)]) that attached before the
lease contract became enforceable (Section 2A-301 [Section
14 2-1301]), the creditor does not take subject to the lease.
Second, subsection (2)(b) provides that when the creditor holds a
16 security interest (Section 1-201(37)) ~~that would have, whether or~~
~~not perfected, the creditor has priority over a hypothetical~~
~~lessee who did not give value (Section 1-201(44)) and receive~~
~~delivery of the goods without knowledge (Section 1-201(25)) of~~
~~the security interest. As to other lessees, under subsection~~
18 (2)(c) a secured creditor holding a perfected security interest
perfected by a filing made at before the time the lease contract
became enforceable (Section 2A-301 [Section 2-1301]), the
creditor does not take subject to the lease. With respect to
this provision the hypothetical secured creditor is not the
holder of a purchase money security interest entitled to special
priority; first, the facts and circumstances relating to the
security interest described in Section 2A-307(2)(b) would not
create a purchase money security interest as defined in Section
9-107, and second, assuming arguendo that it did create a
purchase money security interest, the facts and circumstances
relating to the security interest described in Section
2A-307(2)(b) would not create a special priority under the
provisions of Section 9-312(3) or (4). Thus, the priority rules
of Section 9-312(5) govern the security interest held by the
hypothetical secured creditor. The use of a hypothetical
creditor as a statutory means to resolve disputes between
competing interests is not without precedent. The Bankruptcy
Reform Act of 1978, as amended, 11 U.S.C. § 544(a) (1982 & Supp.
II-1984), the lessee in these circumstances is treated like a
buyer so that perfection of a purchase money security interest
does not relate back (Section 9-301).
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46 4. The rules of this section operate in favor of whichever
party to the lease contract may enforce it, even if one party
perhaps may not, e.g., under Section 2A-201(1)(b) [Section
48 2-1201(1)(b)].

5. The rule rules stated in subsections (2)(b) and (c), and the rule in subsection (3), is are best understood by reviewing a hypothetical. Assume that a merchant engaged in the business of selling and leasing musical instruments obtained possession of a truck load of musical instruments on deferred payment terms from a supplier of musical instruments on January 5. To secure payment of such credit the merchant granted the supplier a security interest in the instruments; the security interest was perfected by filing on January 15. The merchant, as lessor, entered into a lease to an individual of one of the musical instruments supplied by the supplier; the lease became enforceable on March 1 January 10. Under subsection (2)(b) the lessee will prevail (assuming the lessee qualifies thereunder) unless subsection (c) [paragraph (c)] provides otherwise. Under the rule stated in subsection (2)(b) (2)(c) a priority dispute between the supplier, as the lessor's secured creditor, and the lessee would be determined by assuming that ascertaining on March 1 January 10 (the day the lease became enforceable) the merchant had granted a the validity and perfected status of the security interest in such the musical instruments--to--a--hypothetical secured creditor--and--the--hypothetical--secured--creditor--perfected such security interest by filing on March 1--Under the priority rules--of--the--Article--on--Secured--Transactions--(Article--9)--the hypothetical secured creditor would lose in a priority dispute with the supplier,--Section 9-312(5)(a)--Thus instrument and the enforceability of the lease contract by the lessee. Nothing more appearing, under the rule stated in subsection (2)(b) (2)(c), the supplier's security interest in the musical instrument would not have priority over the lease contract. However Moreover, subsection (2)(b) (2) states that its rule is rules are subject to the rules of subsections (3) and (4). Under this hypothetical the lessee should qualify as a "lessee in the ordinary course of business". Section 2A-103(1)(o) [Section 2-1103(1)(o)]. Subsection (3) also makes clear that the lessee in the ordinary course of business will win even if he or she knows of the existence of the supplier's security interest.

6. Subsections (3) and (4), which are modeled on the provisions of Section 9-307(1) and (3), respectively, state two exceptions to the priority rule stated in subsection (2) with respect to a creditor who holds a security interest. The lessee in the ordinary course of business will be treated in the same fashion as the buyer in the ordinary course of business, given a priority dispute with a secured creditor over goods subject to a lease contract.

Cross References:

Sections 1-201(12), 1-201(25), 1-201(37), 1-201(44), 2A-103(1)(n) [Section 2-1103(1)(n)], 2A-103(1)(o) [Section 2-1103(1)(o)], 2A-103(1)(r) [Section 2-1103(1)(r)], 2A-103(4) [Section 2-1103(4)], 2A-201(1)(b) [Section 2-1201(1)(b)], 2A-301 [Section 2-1301] official comment 3(g), Article 9, esp. especially Sections 9-301, 9-307(1), and 9-307(3) and 9-312(5)(a).

Definitional Cross References:

"Creditor". Section 1-201(12).
 "Goods". Section 2A-103(1)(h) [Section 2-1103(1)(h)].
 "Knowledge" and "Knows". Section 1-201(25).
 "Lease". Section 2A-103(1)(j) [Section 2-1103(1)(j)].
 "Lease contract". Section 2A-103(1)(1) [Section 2-1103(1)(1)].
 "Leasehold interest". Section 2A-103(1)(m) [Section 2-1103(1)(m)].
 "Lessee". Section 2A-103(1)(n) [Section 2-1103(1)(n)].
 "Lessee in the ordinary course of business". Section 2A-103(1)(o) [Section 2-1103(1)(o)].
 "Lessor". Section 2A-103(1)(p) [Section 2-1103(1)(p)].
 "Lien". Section 2A-103(1)(r) [Section 2-1103(1)(r)].
 "Party". Section 1-201(29).
 "Pursuant to commitment". Section 2A-103(3) [Section 2-1103(3)].
 "Security interest". Section 1-201(37)."

Further amend the bill in section 3 by inserting at the end of that part designated "~~§2-1308~~" the following:

UNIFORM COMMENT

Uniform Statutory Source: Section 2-402(2) and (3)(b).

Changes: Rephrased and new material added to conform to leasing terminology and practice.

Purposes: Subsection (1) states a general rule of avoidance where the lessor has retained possession of goods if such retention is fraudulent under any statute or rule of law. However, the subsection creates an exception under certain circumstances for retention of possession of goods for a commercially reasonable time after the lease contract becomes enforceable.

Subsection (2) also preserves the possibility of an attack on the lease by creditors of the lessor if the lease was made in

satisfaction of or as security for a pre-existing claim, and would constitute a fraudulent transfer or voidable preference under other law.

Finally, subsection (3) states a new rule with respect to sale-leaseback transactions, i.e., transactions where the seller sells goods to a buyer but possession of the goods is retained by the seller pursuant to a lease contract between the buyer as lessor and the seller as lessee. Notwithstanding any statute or rule of law that would treat such retention as fraud, whether per se, prima facie, or otherwise, the retention is not fraudulent if the buyer bought for value (Section 1-201(44)) and in good faith (Sections 1-201(19) and 2-103(1)(b)). Section 2A-103(3) and (4) [Section 2-1103(3) and (4)]. This provision overrides Section 2-402(2) to the extent it would otherwise apply to a sale-leaseback transaction.

Cross References:

Sections 1-201(19), 1-201(44), 2-402(2) and 2A-103(4) [Section 2-1103(4)].

Definitional Cross References:

- "Buyer". Section 2-103(1)(a).
- "Contract". Section 1-201(11).
- "Creditor". Section 1-201(12).
- "Good faith". Sections 1-201(19) and 2-103(1)(b).
- "Goods". Section 2A-103(1)(h) [Section 2-1103(1)(h)].
- "Lease contract". Section 2A-103(1)(1) [Section 2-1103(1)(1)].
- "Lessee". Section 2A-103(1)(n) [Section 2-1103(1)(n)].
- "Lessor". Section 2A-103(1)(p) [Section 2-1103(1)(p)].
- "Money". Section 1-201(24).
- "Reasonable time". Section 1-204(1) and (2).
- "Rights". Section 1-201(36).
- "Sale". Section 2-106(1).
- "Seller". Section 2-103(1)(d).
- "Value". Section 1-201(44).

Further amend the bill in section 3 in that part designated "~~S2-1309~~," in subsection (8) in the last line (page 29, line 9 in L.D.) by striking out the following: "~~the~~"

Further amend the bill in section 3 by inserting at the end of that part designated "~~S2-1309~~," the following:

'UNIFORM COMMENT

Uniform Statutory Source: Section 9-313.

Changes: Revised to reflect leasing terminology and to add new material.

Purposes:

1. While Section 9-313 provided a model for this section, certain provisions were substantially revised.

2. Section 2A-309(1)(c) [Section 2-1309(1)(c)], which is new, defines purchase money lease to exclude leases where the lessee had possession or use of the goods or the right thereof before the lease agreement became enforceable. This term is used in subsection (4)(a) as one of the conditions that must be satisfied to obtain priority over the conflicting interest of an encumbrancer or owner of the real estate.

3. Section 2A-309(4) [Section 2-1309(4)], which states one of several priority rules found in this section, deletes reference to office machines and the like (Section 9-313(4)(c)) as well as certain liens (Section 9-313(4)(d)). However, these items are included in subsection (5), another priority rule that is more permissive than the rule found in subsection (4) as it applies whether or not the interest of the lessor is perfected. In addition, subsection (5)(a) expands the scope of the provisions of Section 9-313(4)(c) to include readily removable equipment not primarily used or leased for use in the operation of real estate; the qualifier is intended to exclude from the expanded rule equipment integral to the operation of real estate, e.g., heating and air conditioning equipment.

4. The rule stated in subsection (7) is more liberal than the rule stated in Section 9-313(7) in that issues of priority not otherwise resolved in this subsection are left for resolution by the priority rules governing conflicting interests in real estate, as opposed to the Section 9-313(7) automatic subordination of the security interest in fixtures. Note that, for the purpose of this section, where the interest of an encumbrancer or owner of the real estate is paramount to the intent of the lessor, the latter term includes the residual interest of the lessor.

5. The rule stated in subsection (8) is more liberal than the rule stated in Section 9-313(8) in that the right of removal is extended to both the lessor and the lessee and the occasion for removal includes expiration, termination or cancellation of

the lease agreement, and enforcement of rights and remedies under this Article, as well as default. The new language also provides that upon removal the goods are free and clear of conflicting interests of owners and encumbrancers of the real estate.

6. Finally, subsection (9) provides a mechanism for the lessor of fixtures to perfect its interest by filing a financing statement under the provisions of the Article on Secured Transactions (Article 9), even though the lease agreement does not create a security interest. Section 1-201(37). The relevant provisions of Article 9 must be interpreted permissively to give effect to this mechanism as it implicitly expands the scope, perfection and priority provisions of Article 9 so that its filing provisions apply to govern transactions that create a lease of fixtures, even though the lease agreement does not create a security interest. This mechanism is similar to that provided in Section 2-326(3)(c) for the seller of goods on consignment, even though the consignment is not "intended as security". Section 1-201(37). Given the lack of litigation with respect to the mechanism created for consignment sales, this new mechanism should prove effective. ~~Note, however, that this is a more pervasive change in Article 9 than that wrought by expanding the filing system to accommodate permissive filing for leases. U.C.C. § 9-408 app. II (West 1983) (Reasons for 1972 Adoption of New Section).~~

Cross References:

Sections 1-201(37), 2A-309(1)(c) [Section 2-1309(1)(c)], 2A-309(4) [Section 2-1309(4)], Article 9, esp. especially Sections 9-313, 9-313(4)(c), 9-313(4)(d), 9-313(7), 9-313(8) and 9-408.

Definitional Cross References:

"Agreed". Section 1-201(3).
 "Cancellation". Section 2A-103(1)(b) [Section 2-1103(1)(b)].
 "Conforming". Section 2A-103(1)(d) [Section 2-1103(1)(d)].
 "Consumer lease". Section 2A-103(1)(e) [Section 2-1103(1)(e)].
 "Goods". Section 2A-103(1)(h) [Section 2-1103(1)(h)].
 "Lease". Section 2A-103(1)(j) [Section 2-1103(1)(j)].
 "Lease agreement". Section 2A-103(1)(k) [Section 2-1103(1)(k)].
 "Lease contract". Section 2A-103(1)(l) [Section 2-1103(1)(l)].
 "Lessee". Section 2A-103(1)(n) [Section 2-1103(1)(n)].
 "Lessor". Section 2A-103(1)(p) [Section 2-1103(1)(p)].

"Lien". Section 2A-103(1)(r) [Section 2-1103(1)(r)].
 "Mortgage". Section 9-105(1)(j).
 "Party". Section 1-201(29).
 "Person". Section 1-201(30).
 "Reasonable time". Section 1-204(1) and (2).
 "Remedy". Section 1-201(34).
 "Rights". Section 1-201(36).
 "Security interest". Section 1-201(37).
 "Termination". Section 2A-103(1)(z) [Section 2-1103(1)(z)].
 "Value". Section 1-201(44).
 "Writing". Section 1-201(46).

Further amend the bill in section 3 by inserting at the end of that part designated "~~§2-1310~~," the following:

UNIFORM COMMENT

Uniform Statutory Source: Section 9-314.

Changes: Revised to reflect leasing terminology and to add new material.

Purposes: Subsections (1) and (2) restate the provisions of subsection (1) of Section 9-314 to clarify the definition of accession and to add leasing terminology to the priority rule that applies when the lease is entered into before the goods become accessions. Subsection (3) restates the provisions of subsection (2) of Section 9-314 to add leasing terminology to the priority rule that applies when the lease is entered into on or after the goods become accessions. Unlike the rule with respect to security interests, the lease is merely subordinate, not invalid.

Subsection (4) creates two exceptions to the priority rules stated in subsections (2) and (3). Subsection (4) deletes the special priority rule found in the provisions of Section 9-314(3)(b) as the interests of the lessor and lessee are entitled to greater protection.

Finally, subsection (5) is modeled on the provisions of Section 9-314(4) with respect to removal of accessions, restated to reflect the parallel changes in Section 2A-309(8) [Section 2-1309(8)].

Neither this section nor Section 9-314 governs where the accession to the goods is not subject to the interest of a lessor or a lessee under a lease contract and is not subject to the

interest of a secured party under a security agreement. This issue is to be resolved by the courts, case by case.

Cross References:

Sections 2A-309(8) [Section 2-1309(8)], 9-314(1), 9-314(2), 9-314(3)(b), 9-314(4).

Definitional Cross References:

- "Agreed". Section 1-201(3).
- "Buyer in the ordinary course of business". Section 2A-103(1)(a) [Section 2-1103(1)(a)].
- "Cancellation". Section 2A-103(1)(b) [Section 2-1103(1)(b)].
- "Creditor". Section 1-201(12).
- "Goods". Section 2A-103(1)(h) [Section 2-1103(1)(h)].
- "Holder". Section 1-201(20).
- "Knowledge". Section 1-201(25).
- "Lease". Section 2A-103(1)(j) [Section 2-1103(1)(j)].
- "Lease contract". Section 2A-103(1)(1) [Section 2-1103(1)(1)].
- "Lessee". Section 2A-103(1)(n) [Section 2-1103(1)(n)].
- "Lessee in the ordinary course of business". Section 2A-103(1)(o) [Section 2-1103(1)(o)].
- "Lessor". Section 2A-103(1)(p) [Section 2-1103(1)(p)].
- "Party". Section 1-201(29).
- "Person". Section 1-201(30).
- "Remedy". Section 1-201(34).
- "Rights". Section 1-201(36).
- "Security interest". Section 1-201(37).
- "Termination". Section 2A-103(1)(z) [Section 2-1103(1)(z)].
- "Value". Section 1-201(44).
- "Writing". Section 1-201(46).

Further amend the bill in section 3 by inserting at the end of that part designated "~~§2-1311~~," the following:

UNIFORM COMMENT

Uniform Statutory Source: Section 9-316.

Purposes: The several preceding sections deal with questions of priority. This section is inserted to make it entirely clear that a person entitled to priority may effectively agree to subordinate the claim. Only the person entitled to priority may make such an agreement; the rights of such a person cannot be adversely affected by an agreement to which that person is not a party.

Cross References:

Sections 1-102 and 2A-304 through 2A-310 [Sections 2-1304 to 2-1310].

Definitional Cross References:

- "Agreement". Section 1-201(3).
- "Person". Section 1-201(30).

Further amend the bill in section 3 by inserting at the end of that part designated "~~§2-1401~~," the following:

UNIFORM COMMENT

Uniform Statutory Source: Section 2-609.

Changes: Revised to reflect leasing practices and terminology. Note that in the analogue to subsection (3) (Section 2-609(4)), the adjective "justified" modifies demand. The adjective was deleted here as unnecessary, implying no substantive change.

Definitional Cross References:

- "Aggrieved party". Section 1-201(2).
- "Agreed". Section 1-201(3).
- "Between merchants". Section 2-104(3).
- "Conforming". Section 2A-103(1)(d) [Section 2-1103(1)(d)].
- "Delivery". Section 1-201(14).
- "Lease contract". Section 2A-103(1)(1) [Section 2-1103(1)(1)].
- "Party". Section 1-201(29).
- "Reasonable time". Section 1-204(1) and (2).
- "Receipt". Section 2-103(1)(c).
- "Rights". Section 1-201(36).
- "Writing". Section 1-201(46).

Further amend the bill in section 3 in that part designated "~~§2-1402~~," in paragraph (a) in the first line (page 31, line 4 in L.D.) by striking out the following: "~~(a)~~" and inserting in its place the following: '~~(1)~~' and in paragraph (b) in the first line (page 31, line 7 in L.D.) by striking out the following: "~~(b)~~" and inserting in its place the following: '~~(2)~~' and in paragraph (c) in the first line (page 31, line 11 in L.D.) by striking out the following: "~~(c)~~" and inserting in its place the following: '~~(3)~~'

Further amend the bill in section 3 by inserting at the end of that part designated "~~§2-1402.~~" the following:

UNIFORM COMMENT

Uniform Statutory Source: Section 2-610.

Changes: Revised to reflect leasing practices and terminology.

Definitional Cross References:

- "Aggrieved party". Section 1-201(2).
- "Goods". Section 2A-103(1)(h) [Section 2-1103(1)(h)].
- "Lease contract". Section 2A-103(1)(1) [Section 2-1103(1)(1)].
- "Lessor". Section 2A-103(1)(p) [Section 2-1103(1)(p)].
- "Notifies". Section 1-201(26).
- "Party". Section 1-201(29).
- "Reasonable time". Section 1-204(1) and (2).
- "Remedy". Section 1-201(34).
- "Rights". Section 1-201(36).
- "Value". Section 1-201(44).

Further amend the bill in section 3 by inserting at the end of that part designated "~~§2-1403.~~" the following:

UNIFORM COMMENT

Uniform Statutory Source: Section 2-611.

Changes: Revised to reflect leasing practices and terminology. Note that in the analogue to subsection (2) (Section 2-611(2)) the adjective "justifiably" modifies demanded. The adjective was deleted here (as it was in Section 2A-401 [Section 2-1401]) as unnecessary, implying no substantive change.

Definitional Cross References:

- "Aggrieved party". Section 1-201(2).
- "Cancellation". Section 2A-103(1)(b) [Section 2-1103(1)(b)].
- "Lease contract". Section 2A-103(1)(1) [Section 2-1103(1)(1)].
- "Party". Section 1-201(29).
- "Rights". Section 1-201(36).

Further amend the bill in section 3 by inserting at the end of that part designated "~~§2-1404.~~" the following:

UNIFORM COMMENT

Uniform Statutory Source: Section 2-614.

Changes: Revised to reflect leasing practices and terminology.

Definitional Cross References:

- "Agreed". Section 1-201(3).
- "Delivery". Section 1-201(14).
- "Fault". Section 2A-103(1)(f) [Section 2-1103(1)(f)].
- "Lessee". Section 2A-103(1)(n) [Section 2-1103(1)(n)].
- "Lessor". Section 2A-103(1)(p) [Section 2-1103(1)(p)].
- "Supplier". Section 2A-103(1)(x) [Section 2-1103(1)(x)].

Further amend the bill in section 3 in that part designated "~~§2-1405.~~" by striking out all of paragraphs (a) to (c) and inserting in their place the following:

'(1) Delay in delivery or nondelivery in whole or in part by a lessor or a supplier who complies with subsections (2) and (3) is not a default under the lease contract if performance as agreed has been made impracticable by the occurrence of a contingency the nonoccurrence of which was a basic assumption on which the lease contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order, whether or not the regulation or order later proves to be invalid.

(2) If the causes mentioned in subsection (1) affect only part of the lessor's or the supplier's capacity to perform, the lessor or supplier shall allocate production and deliveries among the lessor's or supplier's customers but at the lessor's or supplier's option may include regular customers not then under contract for sale or lease as well as the lessor's or supplier's own requirements for further manufacture. The lessor or supplier may so allocate in any manner that is fair and reasonable.

(3) The lessor seasonably shall notify the lessee and in the case of a finance lease the supplier seasonably shall notify the lessor and the lessee, if known, that there will be delay or nondelivery and, if allocation is required under subsection (2), of the estimated quota thus made available for the lessee.'

Further amend the bill in section 3 by inserting at the end of that part designated "~~§2-1405.~~" the following:

UNIFORM COMMENT

Uniform Statutory Source: Section 2-615.

Changes: Revised to reflect leasing practices and terminology.

Definitional Cross References:

- "Agreed". Section 1-201(3).
"Contract". Section 1-201(11).
"Delivery". Section 1-201(14).
"Finance lease". Section 2A-103(1)(g) [Section 2-1103(1)(g)].
"Good faith". Sections 1-201(19) and 2-103(1)(b).
"Knows". Section 1-201(25).
"Lease". Section 2A-103(1)(j) [Section 2-1103(1)(j)].
"Lease contract". Section 2A-103(1)(l) [Section 2-1103(1)(l)].
"Lessee". Section 2A-103(1)(n) [Section 2-1103(1)(n)].
"Lessor". Section 2A-103(1)(p) [Section 2-1103(1)(p)].
"Notifies". Section 1-201(26).
"Sale". Section 2-106(1).
"Seasonably". Section 1-204(3).
"Supplier". Section 2A-103(1)(x) [Section 2-1103(1)(x)].

Further amend the bill in section 3 by inserting at the end of that part designated "S2-1406," the following:

UNIFORM COMMENT

Uniform Statutory Source: Section 2-616(1) and (2).

Changes: Revised to reflect leasing practices and terminology. Note that subsection 1(a) allows the lessee under a lease, including a finance lease, the right to terminate the lease for excused performance (Sections 2A-404 and 2A-405 [Sections 2-1404 and 2-1405]). However, subsection 1(b), which allows the lessee the right to modify the lease for excused performance, excludes a finance lease that is not a consumer lease. This exclusion is compelled by the same policy that led to codification of provisions with respect to irrevocable promises. Section 2A-407 [Section 2-1407].

Definitional Cross References:

- "Consumer lease". Section 2A-103(1)(e) [Section 2-1103(1)(e)].
"Delivery". Section 1-201(14).

- "Finance lease". Section 2A-103(1)(g) [Section 2-1103(1)(g)].
"Goods". Section 2A-103(1)(h) [Section 2-1103(1)(h)].
"Installment lease contract". Section 2A-103(1)(i) [Section 2-1103(1)(i)].
"Lease agreement". Section 2A-103(1)(k) [Section 2-1103(1)(k)].
"Lease contract". Section 2A-103(1)(l) [Section 2-1103(1)(l)].
"Lessee". Section 2A-103(1)(n) [Section 2-1103(1)(n)].
"Lessor". Section 2A-103(1)(p) [Section 2-1103(1)(p)].
"Notice". Section 1-201(25).
"Reasonable time". Section 1-204(1) and (2).
"Receipt". Section 2-103(1)(c).
"Rights". Section 1-201(36).
"Termination". Section 2A-103(1)(z) [Section 2-1103(1)(z)].
"Value". Section 1-201(44).
"Written". Section 1-201(46).

Further amend the bill in section 3 by inserting at the end of that part designated "S2-1407," the following:

UNIFORM COMMENT

Uniform Statutory Source: None.

Purposes:

1. This section extends the benefits of the classic "hell or high water" clause to a finance lease that is not a consumer lease. This section is self-executing; no special provision need be added to the contract. This section makes covenants in a finance lease irrevocable and independent due to the function of the finance lessor in a three party relationship: the lessee is looking to the supplier to perform the essential covenants and warranties. Section 2A-209 [Section 2-1209]. Thus, upon the lessee's acceptance of the goods the lessee's promises to the lessor under the lease contract become irrevocable and independent. The provisions of this section remain subject to the obligation of good faith (Sections 2A-103(4) [Section 2-1103(4)] and 1-203), and the lessee's revocation of acceptance (Section 2A-517 [Section 2-1517]).

2. The section requires the lessee to perform even if the lessor's performance after the lessee's acceptance is not in accordance with the lease contract; the lessee may, however, have and pursue a cause of action against the lessor, e.g., breach of certain limited warranties (Sections 2A-210 and 2A-211(1)).

[Sections 2-1210 and 2-1211(1)]). This is appropriate because the benefit of the supplier's promises and warranties to the lessor under the supply contract and, in some cases, the warranty of a manufacturer who is not the supplier, is extended to the lessee under the finance lease. Section 2A-209 [Section 2-1209]. Despite this balance, this section excludes a finance lease that is a consumer lease. That a consumer be obligated to pay notwithstanding defective goods or the like is a principle that is not tenable under case law (Unico v. Owen, 50 N.J. 101, 232 A.2d 405 (1967)), state statute (Unif. Consumer Credit Code §§ 3.403-.405, 7A U.L.A. 126-31 (1974), or federal statute (15 U.S.C. § 1666i (1982))).

3. The relationship of the three parties to a transaction that qualifies as a finance lease is best demonstrated by a hypothetical. A, the potential lessor, has been contracted by B, the potential lessee, to discuss the lease of an expensive line of equipment that B has recently placed an order for with C, the manufacturer of such goods. The negotiation is completed and A, as lessor, and B, as lessee, sign a lease of the line of equipment for a 60-month term. B, as buyer, assigns the purchase order with C to A. If this transaction creates a lease (Section 2A-103(1)(j) [Section 2-1103(1)(j)]), this transaction should qualify as a finance lease. Section 2A-103(1)(g) [Section 2-1103(1)(g)].

4. The line of equipment is delivered by C to B's place of business. After installation by C and testing by B, B accepts the goods by signing a certificate of delivery and acceptance, a copy of which is sent by B to A and C. One year later the line of equipment malfunctions and B falls behind in its manufacturing schedule.

5. Under this Article, because the lease is a finance lease, no warranty of fitness or merchantability is extended by A to B. Sections 2A-212(1) and 2A-213 [Sections 2-1212(1) and 2-1213]. Absent an express provision in the lease agreement, application of Section 2A-210 [Section 2-1210] or Section 2A-211(1) [Section 2-1211(1)], or application of the principles of law and equity, including the law with respect to fraud, duress, or the like (Sections 2A-103(4) [Section 2-1103(4)] and 1-103), B has no claim against A. B's obligation to pay rent to A continues as the obligation became irrevocable and independent when B accepted the line of equipment (Section 2A-407(1) [Section 2-1407(1)]). B has no right of set-off with respect to any part of the rent still due under the lease. Section 2A-508(6) [Section 2-1508(6)]. However, B may have another remedy. Despite the lack of privity between B and C (the purchase order

with C having been assigned by B to A), B may have a claim against C. Section 2A-209(1) [Section 2-1209(1)].

6. This section is ~~silent as to~~ does not address whether a "hell or high water" clause, i.e., a clause that is to the effect of this section, is enforceable if included in a finance lease that is a consumer lease or a lease that is not a finance lease. That issue will continue to be determined by the facts of each case and other law which this section does not affect. Sections 2A-104 [Section 2-1104], 2A-103(4) [Section 2-1103(4)], 9-206 and 9-318. However, with respect to finance leases that are not consumer leases courts have enforced "hell or high water" clauses. In re O.P.M. Leasing Servs., 21 Bankr. 993, 1006 (Bankr. S.D.N.Y. 1982).

7. Subsection (2) further provides that a promise that has become irrevocable and independent under subsection (1) is enforceable not only between the parties but also against third parties. Thus, the finance lease can be transferred or assigned without disturbing enforceability. Further, subsection (2) also provides that the promise cannot, among other things, be cancelled or terminated without the consent of the lessor.

Cross References:

Sections 1-103, 1-203, 2A-103(1)(g) [Section 2-1103(1)(g)], 2A-103(1)(j) [Section 2-1103(1)(j)], 2A-103(4) [Section 2-1103(4)], 2A-104 [Section 2-1104], 2A-209 [Section 2-1209], 2A-209(1) [Section 2-1209(1)], 2A-210 [Section 2-1210], 2A-211(1) [Section 2-1211(1)], 2A-212(1) [Section 2-1212(1)], 2A-213 [Section 2-1213], 2A-517(1)(b) [Section 2-1517(1)(b)], 9-206 and 9-318.

Definitional Cross References:

"Cancellation". Section 2A-103(1)(b) [Section 2-1103(1)(b)].
 "Consumer lease". Section 2A-103(1)(e) [Section 2-1103(1)(e)].
 "Finance lease". Section 2A-103(1)(g) [Section 2-1103(1)(g)].
 "Goods". Section 2A-103(1)(h) [Section 2-1103(1)(h)].
 "Lease contract". Section 2A-103(1)(l) [Section 2-1103(1)(l)].
 "Lessee". Section 2A-103(1)(n) [Section 2-1103(1)(n)].
 "Party". Section 1-201(29).
 "Termination". Section 2A-103(1)(z) [Section 2-1103(1)(z)].

Further amend the bill in section 3 by inserting at the end of that part designated "~~S2-1501~~," the following:

UNIFORM COMMENT

Uniform Statutory Source: Section 9-501.

Changes: Substantially revised.

Purposes:

1. Subsection (1) is new and represents a departure from the Article on Secured Transactions (Article 9) as the subsection makes clear that whether a party to the lease agreement is in default is determined by the agreement-as-well-as this Article as well as the agreement. Sections 2A-508 and 2A-523 [Sections 2-1508 and 2-1523]. It further departs from Article 9 in recognizing the potential default of either party, a function of the bilateral nature of the obligations between the parties to the lease contract.

2. Subsection (2) is a version of the first sentence of Section 9-501(1), revised to reflect leasing terminology.

3. Subsection (3), an expansive version of the second sentence of Section 9-501(1), lists the procedures that may be followed by the party seeking enforcement; in effect, the scope of the procedures listed in subsection (3) is consistent with the scope of the procedures available to the foreclosing secured party.

4. Subsection (4) establishes that the parties' rights and remedies are cumulative. DeKoven, Leases of Equipment: Puritan Leasing Company v. August, A Dangerous Decision, 12 U.S.F. L. Rev. 257, 276-80 (1978). Cumulation, and largely unrestricted selection, of remedies is allowed in furtherance of the general policy of the Commercial Code, stated in Section 1-106, that remedies be liberally administered to put the aggrieved party in as good a position as if the other party had fully performed. Therefore, cumulation of, or selection among, remedies is available to the extent necessary to put the aggrieved party in as good a position as it would have been in had there been full performance. However, cumulation of, or selection among, remedies is not available to the extent that the cumulation or selection would put the aggrieved party in a better position than it would have been in had there been full performance by the other party.

5. Section 9-501(3), which, among other things, states that certain rules, to the extent they give rights to the debtor and impose duties on the secured party, may not be waived or varied, was not incorporated in this Article. Given the significance of freedom of contract in the development of the common law as it applies to bailments for hire and the lessee's lack of an equity of redemption, there was no reason to impose that restraint.

Cross References:

Sections 1-106, 2A-508 [Section 2-1508], 2A-523 [Section 2-1523], Article 9, esp. especially Sections 9-501(1) and 9-501(3).

Definitional Cross References:

- "Goods". Section 2A-103(1)(h) [Section 2-1103(1)(h)].
- "Lease agreement". Section 2A-103(1)(k) [Section 2-1103(1)(k)].
- "Lease contract". Section 2A-103(1)(l) [Section 2-1103(1)(l)].
- "Lessee". Section 2A-103(1)(n) [Section 2-1103(1)(n)].
- "Lessor". Section 2A-103(1)(p) [Section 2-1103(1)(p)].
- "Party". Section 1-201(29).
- "Remedy". Section 1-201(34).
- "Rights". Section 1-201(36).'

Further amend the bill in section 3 by inserting at the end of that part designated "~~S2-1502~~," the following:

UNIFORM COMMENT

Uniform Statutory Source: None.

Purposes: This section makes clear that absent agreement to the contrary or provision in this Article to the contrary, e.g., Section 2A-516(3)(a) [Section 2-1516(3)(a)], the party in default is not entitled to notice of default or enforcement. While a review of Part 5 of Article 9 leads to the same conclusion with respect to giving notice of default to the debtor, it is never stated. Although Article 9 requires notice of disposition and strict foreclosure, the different scheme of lessors' and lessees' rights and remedies developed under the common law, and codified by this Article, generally does not require notice of enforcement; furthermore, such notice is not mandated by due process requirements. However, certain sections of this Article do require notice. E.g., Section 2A-517(2) [Section 2-1517(2)].

Cross References:

Sections 2A-516(3)(a) [Section 2-1516(3)(a)], 2A-517(2) [Section 2-1517(2)], and Article 9, esp. Part 5.

Definitional Cross References:

"Lease agreement". Section 2A-103(1)(k) [Section 2-1103(1)(k)].
 "Lease contract". Section 2A-103(1)(l) [Section 2-1103(1)(l)].
 "Lessee". Section 2A-103(1)(n) [Section 2-1103(1)(n)].
 "Lessor". Section 2A-103(1)(p) [Section 2-1103(1)(p)].
 "Notice". Section 1-201(25).
 "Party". Section 1-201(29).'

Further amend the bill in section 3 by inserting at the end of that part designated "§2-1503," the following:

UNIFORM COMMENT

Uniform Statutory Source: Sections 2-719 and 2-701.

Changes: Rewritten to reflect lease terminology and to clarify the relationship between this section and Section 2A-504 [Section 2-1504].

Purposes:

1. A significant purpose of this Part is to provide rights and remedies for those parties to a lease who fail to provide them by agreement or whose rights and remedies fall of their essential purpose or are unenforceable. However, it is important to note that this implies no restriction on freedom to contract. Sections 2A-103(4) [Section 2-1103(4)] and 1-102(3). Thus, subsection (1), a revised version of the provisions of Section 2-719(1), allows the parties to the lease agreement freedom to provide for rights and remedies in addition to or in substitution for those provided in this Article and to alter or limit the measure of damages recoverable under this Article. Except to the extent otherwise provided in this Article (e.g., Sections 2A-105, 106 and 108(1) and (2) [Sections 2-1105, 2-1106 and 2-1108(1) and (2)]), this Part shall be construed neither to restrict the parties' ability to provide for rights and remedies or to limit or alter the measure of damages by agreement, nor to imply disapproval of rights and remedy schemes other than those set forth in this Part.

2. Subsection (2) makes explicit with respect to this Article what is implicit in Section 2-719 with respect to the Article on Sales (Article 2): if an exclusive remedy is held to be unconscionable, remedies under this Article are available. Section 2-719 official comment 1.

3. Subsection (3), a revision of Section 2-719(3), makes clear that consequential damages may also be liquidated. Section 2A-504(1) [Section 2-1504(1)].

4. Subsection (4) is a revision of the provisions of Section 2-701. This subsection leaves the treatment of default with respect to obligations or promises collateral or ancillary to the lease contract to other law. Sections 2A-103(4) [Section 2-1103(4)] and 1-103. An example of such an obligation would be that of the lessor to the secured creditor which has provided the funds to leverage the lessor's lease transaction; an example of such a promise would be that of the lessee, as seller, to the lessor, as buyer, in a sale-leaseback transaction.

Cross References:

Sections 1-102(3), 1-103, Article 2, esp. especially Sections 2-701, 2-719, 2-719(1), 2-719(3), 2-719 official comment 1, and Sections 2A-103(4) [Section 2-1103(4)], 2A-105 [Section 2-1105], 2A-106 [Section 2-1106], 2A-108(1) [Section 2-1108(1)], 2A-108(2) [Section 2-1108(2)], and 2A-504 [Section 2-1504] and 2A-504(1).

Definitional Cross References:

"Agreed". Section 1-201(3).
 "Consumer goods". Section 9-109(1).
 "Lease agreement". Section 2A-103(1)(k) [Section 2-1103(1)(k)].
 "Lease contract". Section 2A-103(1)(l) [Section 2-1103(1)(l)].
 "Lessee". Section 2A-103(1)(n) [Section 2-1103(1)(n)].
 "Lessor". Section 2A-103(1)(p) [Section 2-1103(1)(p)].
 "Person". Section 1-201(30).
 "Remedy". Section 1-201(34).
 "Rights". Section 1-201(36).'

Further amend the bill in section 3 by inserting at the end of that part designated "§2-1504," the following:

UNIFORM COMMENT

Uniform Statutory Source: Sections 2-718(1), (2), (3) and 2-719(2).

Changes: Substantially rewritten.

Purposes: Many leasing transactions are predicated on the parties' ability to agree to an appropriate amount of damages or formula for damages in the event of default or other act or omission. The rule with respect to sales of goods (Section 2-718) may not be sufficiently flexible to accommodate this practice. Thus, consistent with the common law emphasis upon freedom to contract with respect to bailments for hire, this section has created a revised rule that allows greater flexibility with respect to leases of goods.

Subsection (1), a significantly modified version of the provisions of Section 2-718(1), provides for liquidation of damages in the lease agreement at an amount or by a formula. Section 2-718(1) does not by its express terms include liquidation by a formula; this change was compelled by modern leasing practice. Subsection (1), in a further expansion of Section 2-718(1), provides for liquidation of damages for default as well as any other act or omission.

A liquidated damages formula that is common in leasing practice provides that the sum of lease payments past due, accelerated future lease payments, and the lessor's estimated residual interest, less the net proceeds of disposition (whether by sale or re-lease) of the leased goods is the lessor's damages. Tax indemnities, costs, interest and attorney's fees are also added to determine the lessor's damages. Another common liquidated damages formula utilizes a periodic depreciation allocation as a credit to the aforesaid amount in mitigation of a lessor's damages. A third formula provides for a fixed number of periodic payments as a means of liquidating damages. Stipulated loss or stipulated damage schedules are also common. Whether these formulae are enforceable will be determined in the context of each case by applying a standard of reasonableness in light of the harm anticipated when the formula was agreed to. Whether the inclusion of these formulae will affect the classification of the transaction as a lease or a security interest is to be determined by the facts of each case. Section 1-201(37). E.g., In re Noack, 44 Bankr. 172, 174-75 (Bankr. E.D. Wis. 1984).

This section does not incorporate two other tests that under sales law determine enforceability of liquidated damages, i.e., difficulties of proof of loss and inconvenience or nonfeasibility of otherwise obtaining an adequate remedy. The ability to

liquidate damages is critical to modern leasing practice; given the parties' freedom to contract at common law, the policy behind retaining these two additional requirements here was thought to be outweighed. Further, given the expansion of subsection (1) to enable the parties to liquidate the amount payable with respect to an indemnity for loss or diminution of anticipated tax benefits resulted in another change: the last sentence of Section 2-718(1), providing that a term fixing unreasonably large liquidated damages is void as a penalty, was also not incorporated. The impact of local, state and federal tax laws on a leasing transaction can result in an amount payable with respect to the tax indemnity many times greater than the original purchase price of the goods. By deleting the reference to unreasonably large liquidated damages the parties are free to negotiate a formula, restrained by the rule of reasonableness in this section. These changes should invite the parties to liquidate damages. Peters, Remedies for Breach of Contracts Relating to the Sale of Goods Under the Uniform Commercial Code: A Roadmap for Article Two, 73 Yale L.J. 199, 278 (1963).

Subsection (2), a revised version of Section 2-719(2), provides that if the liquidated damages provision is not enforceable or fails of its essential purpose, remedy may be had as provided in this Article.

Subsection (3)(b) of this section differs from subsection (2)(b) of Section 2-718; in the absence of a valid liquidated damages amount or formula the lessor is permitted to retain 20 percent of the present value of the total rent payable under the lease. The alternative limitation of \$500 contained in Section 2-718 is deleted as unrealistically low with respect to a lease other than a consumer lease.

Cross References:

Sections 1-201(37), 2-718, 2-718(1), 2-718(2)(b) and 2-719(2).

Definitional Cross References:

"Consumer lease". Section 2A-103(1)(e) [Section 2-1103(1)(e)].
"Delivery". Section 1-201(14).
"Goods". Section 2A-103(1)(h) [Section 2-1103(1)(h)].
"Insolvent". Section 1-201(23).
"Lease agreement". Section 2A-103(1)(k) [Section 2-1103(1)(k)].

"Lease contract". Section 2A-103(1)(1) [Section 2-1103(1)(1)].
 "Lessee". Section 2A-103(1)(n) [Section 2-1103(1)(n)].
 "Lessor". Section 2A-103(1)(p) [Section 2-1103(1)(p)].
 "Lessor's residual interest". Section 2A-103(1)(q) [Section 2-1103(1)(q)].
 "Party". Section 1-201(29).
 "Present value". Section 2A-103(1)(u) [Section 2-1103(1)(u)].
 "Remedy". Section 1-201(34).
 "Rights". Section 1-201(36).
 "Term". Section 1-201(42).
 "Value". Section 1-201(44).'

Further amend the bill in section 3 by inserting at the end of that part designated "~~§2-1505~~" the following:

UNIFORM COMMENT

Uniform Statutory Source: Sections 2-106(3) and (4), 2-720 and 2-721.

Changes: Revised to reflect leasing practices and terminology.

Definitional Cross References:

"Cancellation". Section 2A-103(1)(b) [Section 2-1103(1)(b)].
 "Goods". Section 2A-103(1)(h) [Section 2-1103(1)(h)].
 "Lease contract". Section 2A-103(1)(1) [Section 2-1103(1)(1)].
 "Party". Section 1-201(29).
 "Remedy". Section 1-201(34).
 "Rights". Section 1-201(36).
 "Termination". Section 2A-103(1)(z) [Section 2-1103(1)(z)].'

Further amend the bill in section 3 by inserting at the end of that part designated "~~§2-1506~~" the following:

UNIFORM COMMENT

Uniform Statutory Source: Section 2-725.

Changes: Substantially rewritten.

Purposes: Subsection (1) does not incorporate the limitation found in Section 2-725(1) prohibiting the parties from extending the period of limitation. Breach of warranty and indemnity claims often arise in a lease transaction; with the passage of

time such claims often diminish or are eliminated. To encourage the parties to commence litigation under these circumstances makes little sense.

Subsection (2) states two rules for determining when a cause of action accrues. With respect to default, the rule of Section 2-725(2) is not incorporated in favor of a more liberal rule of the later of the date when the default occurs or when the act or omission on which it is based is or should have been discovered. With respect to indemnity, a similarly liberal rule is adopted.

Cross References:

Sections 2-725(1) and 2-725(2).

Definitional Cross References:

"Action". Section 1-201(1).
 "Aggrieved party". Section 1-201(2).
 "Lease contract". Section 2A-103(1)(1) [Section 2-1103(1)(1)].
 "Party". Section 1-201(29).
 "Remedy". Section 1-201(34).
 "Termination". Section 2A-103(1)(z) [Section 2-1103(1)(z)].'

Further amend the bill in section 3 by inserting at the end of that part designated "~~§2-1507~~" the following:

UNIFORM COMMENT

Uniform Statutory Source: Sections 2-723 and 2-724.

Changes: Revised to reflect leasing practices and terminology. ~~Section 2A-519(2) [Section 2-1519(2)] provides an example of one of the several times this Article refers to a determination of market rent prevailing at a given time or place. Section 2A-507(2) [Section 2-1507(2)], Sections 2A-519 and 2A-528 [Sections 2-1519 and 2-1528] specify the times as of which market rent is to be determined.~~

Definitional Cross References:

"Goods". Section 2A-103(1)(h) [Section 2-1103(1)(h)].
 "Lease". Section 2A-103(1)(j) [Section 2-1103(1)(j)].
 "Lease agreement". Section 2A-103(1)(k) [Section 2-1103(1)(k)].
 "Notice". Section 1-201(25).
 "Party". Section 1-201(29).

"Reasonable time". Section 1-204(1) and (2).
"Usage of trade". Section 1-205.
"Value". Section 1-201(44).'

Further amend the bill in section 3 by inserting at the end of that part designated "~~S2-1508~~," the following:

UNIFORM COMMENT

Uniform Statutory Source: Sections 2-711 and 2-717.

Changes: Substantially rewritten.

Purposes:

1. This section is an index to Sections 2A-509 through 522 [Sections 2-1509 to 2-1522] and ~~their effect on which set out~~ the lessee's rights and remedies after the lessor's default. The lessor and the lessee can otherwise agree to modify the rights and remedies available under this Article; thus, ~~the parties they can, among other things, raise or lower the threshold of events that give rise to a lessor's default or provide that for defaults other than those specified in subsection (1) the lessee can exercise the rights and remedies referred to in subsection (1); and they can create a new scheme of rights and remedies triggered by the occurrence of the default.~~ Sections 2A-103(4) [Section 2-1103(4)] and 1-102(3).

2. Subsection (1), a substantially rewritten version of the provisions of Section 2-711(1), lists three cumulative remedies of the lessee where the lessor has failed to deliver conforming goods or has repudiated the contract, or the lessee has rightfully rejected or justifiably revoked. Sections 2A-501(2) and (4) [Section 2-1501(2) and (4)]. Subsection (1) also allows the lessee to exercise any contractual remedy. This Article rejects any general doctrine of election of remedy. To determine if one remedy bars another in a particular case is a function of whether the lessee has been put in as good a position as if the lessor had fully performed the lease agreement. Use of multiple remedies is barred only if the effect is to put the lessee in a better position than it would have been in had the lessor fully performed under the lease. Sections 2A-103(4), 2A-501(4), [Sections 2-1103(4) and 2-1501(4)] and 1-106(1). ~~Note that a special rule has been created regarding the lessee's recovery of rent and security that have been paid in the case of an installment lease -- recovery is limited to that which is just under the circumstances. With the various different types of installment leases, no bright line can be created that would~~

~~operate fairly in all cases; in addition, this provision should further encourage the parties to establish their own rules by agreement. Subsection (1)(b), in recognition that no bright line can be created that would operate fairly in all installment lease cases and in recognition of the fact that a lessee may be able to cancel the lease (revoke acceptance of the goods) after the goods have been in use for some period of time, does not require that all lease payments made by the lessee under the lease be returned upon cancellation. Rather, only such portion as is just of the rent and security payments made may be recovered. If a defect in the goods is discovered immediately upon tender to the lessee and the goods are rejected immediately, then the lessee should recover all payments made. If, however, for example, a 36-month equipment lease is terminated in the 12th month because the lessor has materially breached the contract by failing to perform its maintenance obligations, it may be just to return only a small part or none of the rental payments already made.~~

3. Subsection (2), a version of the provisions of Section 2-711(2) revised to reflect leasing terminology, lists two alternative remedies for the recovery of the goods by the lessee; however, each of these remedies is cumulative with respect to those listed in subsection (1).

4. Subsection (3) is new and allows the lessee access to the remedy scheme of this Article as well as the lease contract if the lessor is in default for reasons other than those stated in subsection (1). ~~Note that the reference to this Article includes supplemental principles of law and equity. Sections 2A-103(4) and 1-103. It covers defaults which do not deprive the lessee of the goods and which are not so serious as to justify rejection or revocation of acceptance under subsection (1). It also covers defaults for which the lessee could have rejected or revoked acceptance of the goods but elects not to do so and retains the goods. In either case, a lessee which retains the goods is entitled to recover damages as stated in Section 2A-519(3) [Section 2-1519(3)]. That measure of damages is "the loss resulting in the ordinary course of events from the lessor's default as determined in any manner that is reasonable together with incidental and consequential damages, less expenses saved in consequence of the lessor's breach."~~

5. Subsection (1)(d) and subsection (3) recognize that the lease agreement may provide rights and remedies in addition to or different from those which Article 2A provides. In particular, subsection (3) provides that the lease agreement may give the remedy of cancellation of the lease for defaults by the lessor that would not otherwise be material defaults which would justify

cancellation under subsection (1). If there is a right to cancel, there is, of course, a right to reject or revoke acceptance of the goods.

6. Subsection (4) is new and merely adds to the completeness of the index by including a reference to the lessee's recovery of damages upon the lessor's breach of warranty; such breach may not rise to the level of a default by the lessor (e.g., breach of an express warranty that the goods subject to the lease conform to description where the non-conformity is such that when measured by objective criteria it reflects a minimal deviation from description) unless the breach is material or unless so provided by the lease agreement justifying revocation of acceptance. If the lessee properly rejects or revokes acceptance of the goods because of a breach of warranty, the rights and remedies are those provided in subsection (1) rather than those in Section 2A-519(4) [Section 2-1519(4)].

7. Subsection (5), a revised version of the provisions of Section 2-711(3), recognizes, on rightful rejection or justifiable revocation, the lessee's security interest in goods in its possession and control. Section 9-113, which recognized security interests arising under the Article on Sales (Article 2), was amended with the adoption of this Article to reflect the security interests arising under this Article. Pursuant to Section 2A-511(4) [Section 2-1511(4)], a purchaser who purchases goods from the lessee in good faith takes free of any rights of the lessor, or in the case of a finance lease the supplier. Such goods, however, must have been rightfully rejected and disposed of pursuant to Section 2A-511 or 2A-512 [Section 2-1511 or 2-1512]. However, Section 2A-517(3) 2A-517(5) [Section 2-1517(5)] provides that the lessee will have the same rights and duties with respect to goods where acceptance has been revoked as with respect to goods rejected. Thus, Section 2A-511(4) [Section 2-1511(4)] will apply to the lessee's disposition of such goods.

8. Pursuant to Section 2A-527(5) [Section 2-1527(5)], the lessee must account to the lessor for the excess proceeds of such disposition, after satisfaction of the claim secured by the lessee's security interest.

9. Subsection (6), a slightly revised version of the provisions of Section 2-717, sanctions a right of set-off by the lessee, subject to the rule of Section 2A-407 [Section 2-1407] with respect to irrevocable promises in a finance lease that is not a consumer lease, and further subject to an enforceable "hell or high water" clause in the lease agreement. Section 2A-407

[Section 2-1407] official comment. No attempt is made to state how the set-off should occur; this is to be determined by the facts of each case.

10. There is no special treatment of the finance lease in this section. Absent supplemental principles of law and equity to the contrary, in the case of most finance leases, following the lessee's acceptance of the goods the lessee will have no rights or remedies against the lessor, because the lessor's obligations to the lessee are minimal. Sections 2A-210 and 2A-211(1) [Sections 2-1210 and 2-1211(1)]. Since the lessee will look to the supplier for performance, this is appropriate. Section 2A-209 [Section 2-1209].

Cross References:

Sections 1-102(3), 1-103, 1-106(1), Article 2, especially Sections 2-711, 2-717 and Sections 2A-103(4) [Section 2-1103(4)], 2A-209 [Section 2-1209], 2A-210 [Section 2-1210], 2A-211(1) [Section 2-1211(1)], 2A-407 [Section 2-1407], 2A-501(2) [Section 2-1501(2)], 2A-501(4) [Section 2-1501(4)], 2A-509 through 2A-522 [Sections 2-1509 to 2-1522], 2A-511(3) [Section 2-1511(3)], 2A-517(3) 2A-517(5) [Section 2-1517(5)], 2A-527(5) [Section 2-1527(5)] and Section 9-113.

Definitional Cross References:

- "Conforming". Section 2A-103(1)(d) [Section 2-1103(1)(d)].
- "Delivery". Section 1-201(14).
- "Good faith". Sections 1-201(19) and 2-103(1)(b).
- "Goods". Section 2A-103(1)(h) [Section 2-1103(1)(h)].
- "Installment lease contract". Section 2A-103(1)(i) [Section 2-1103(1)(i)].
- "Lease contract". Section 2A-103(1)(j) [Section 2-1103(1)(j)].
- "Lessee". Section 2A-103(1)(n) [Section 2-1103(1)(n)].
- "Lessor". Section 2A-103(1)(p) [Section 2-1103(1)(p)].
- "Notifies". Section 1-201(26).
- "Receipt". Section 2-103(1)(c).
- "Remedy". Section 1-201(34).
- "Rights". Section 1-201(36).
- "Security interest". Section 1-201(37).
- "Value". Section 1-201(44).

Further amend the bill in section 3 by inserting at the end of that part designated "§2-1509," the following:

UNIFORM COMMENT

2 Uniform Statutory Source: Sections 2-601 and 2-602(1).

4 Changes: Revised to reflect leasing practices and terminology.

6 **Definitional Cross References:**

- 8 "Commercial unit". Section 2A-103(1)(c) [Section 2-1103(1)(c)].
- 10 "Conforming". Section 2A-103(1)(d) [Section 2-1103(1)(d)].
- 12 "Delivery". Section 1-201(14).
- 14 "Goods". Section 2A-103(1)(h) [Section 2-1103(1)(h)].
- 16 "Installment lease contract". Section 2A-103(1)(i) [Section 2-1103(1)(i)].
- 18 "Lease contract". Section 2A-103(1)(l) [Section 2-1103(1)(l)].
- 20 "Lessee". Section 2A-103(1)(n) [Section 2-1103(1)(n)].
- 22 "Lessor". Section 2A-103(1)(p) [Section 2-1103(1)(p)].
- 24 "Notifies". Section 1-201(26).
- 26 "Reasonable time". Section 1-204(1) and (2).
- 28 "Rights". Section 1-201(36).
- 30 "Seasonably". Section 1-204(3).

Further amend the bill in section 3 by inserting at the end of that part designated "~~S2-1510~~," the following:

UNIFORM COMMENT

Uniform Statutory Source: Section 2-612.

Changes: Revised to reflect leasing practices and terminology.

Definitional Cross References:

- 34 "Action". Section 1-201(1)
- 36 "Aggrieved party". Section 1-201(2).
- 38 "Cancellation". Section 2A-103(1)(b) [Section 2-1103(1)(b)].
- 40 "Conforming". Section 2A-103(1)(d) [Section 2-1103(1)(d)].
- 42 "Delivery". Section 1-201(14).
- 44 "Installment lease contract". Section 2A-103(1)(i) [Section 2-1103(1)(i)].
- 46 "Lessee". Section 2A-103(1)(n) [Section 2-1103(1)(n)].
- 48 "Lessor". Section 2A-103(1)(p) [Section 2-1103(1)(p)].
- "Notifies". Section 1-201(26).
- "Seasonably". Section 1-204(3).
- "Supplier". Section 2A-103(1)(x) [Section 2-1103(1)(x)].
- "Value". Section 1-201(44).

2 Further amend the bill in section 3 by inserting at the end of that part designated "~~S2-1511~~," the following:

UNIFORM COMMENT

6 Uniform Statutory Source: Sections 2-603 and 2-706(5).

8 Changes: Revised to reflect leasing practices and terminology. This section, by its terms, applies to merchants as well as others. Thus, in construing the section it is important to note that under this Act the term good faith is defined differently for merchants (Section 2-103(1)(b)) than for others (Section 1-201(19)). Section 2A-103(3) and (4) [Section 2-1103(3) and (4)].

Definitional Cross References:

- 18 "Action". Section 1-201(1).
- 20 "Good faith". Sections 1-201(19) and 2-103(1)(b).
- 22 "Goods". Section 2A-103(1)(h) [Section 2-1103(1)(h)].
- 24 "Lease". Section 2A-103(1)(j) [Section 2-1103(1)(j)].
- 26 "Lessee". Section 2A-103(1)(n) [Section 2-1103(1)(n)].
- 28 "Lessor". Section 2A-103(1)(p) [Section 2-1103(1)(p)].
- 30 "Merchant lessee". Section 2A-103(1)(t) [Section 2-1103(1)(t)].
- 32 "Purchaser". Section 1-201(33).
- 34 "Rights". Section 1-201(36).
- 36 "Security interest". Section 1-201(37).
- 38 "Supplier". Section 2A-103(1)(x) [Section 2-1103(1)(x)].
- 40 "Value". Section 1-201(44).

Further amend the bill in section 3 by inserting at the end of that part designated "~~S2-1512~~," the following:

UNIFORM COMMENT

Uniform Statutory Source: Sections 2-602(2)(b) and (c) and 2-604.

Changes: Substantially rewritten.

Purposes: The introduction to subsection (1) references goods that threaten to decline in value speedily and not perishables, the reference in Section 2-604, the statutory analogue. This is a change in style, not substance, as the first phrase includes the second. Subparagraphs [paragraphs] (a) and (c) are revised versions of the provisions of Section 2-602(2)(b) and (c). Subparagraph [paragraph] (a) states the rule with respect to the lessee's treatment of goods in its possession following

rejection; subparagraph [paragraph] (b) states the rule regarding such goods if the lessor or supplier then fails to give instructions to the lessee. If the lessee performs in a fashion consistent with subparagraphs [paragraphs] (a) and (b), subparagraph [paragraph] (c) exonerates the lessee.

Cross References:

Sections 2-602(2)(b), 2-602(2)(c) and 2-604.

Definitional Cross References:

- "Action". Section 1-201(1).
- "Goods". Section 2A-103(1)(h) [Section 2-1103(1)(h)].
- "Lessee". Section 2A-103(1)(n) [Section 2-1103(1)(n)].
- "Lessor". Section 2A-103(1)(p) [Section 2-1103(1)(p)].
- "Notification". Section 1-201(26).
- "Reasonable time". Section 1-204(1) and (2).
- "Seasonably". Section 1-204(3).
- "Security interest". Section 1-201(37).
- "Supplier". Section 2A-103(1)(x) [Section 2-1103(1)(x)].
- "Value". Section 1-201(44).

Further amend the bill in section 3 by inserting at the end of that part designated "~~S2-1513~~." the following:

UNIFORM COMMENT

Uniform Statutory Source: Section 2-508.

Changes: Revised to reflect leasing practices and terminology.

Definitional Cross References:

- "Conforming". Section 2A-103(1)(d) [Section 2-1103(1)(d)].
- "Delivery". Section 1-201(14).
- "Lease contract". Section 2A-103(1)(1) [Section 2-1103(1)(1)].
- "Lessee". Section 2A-103(1)(n) [Section 2-1103(1)(n)].
- "Lessor". Section 2A-103(1)(p) [Section 2-1103(1)(p)].
- "Money". Section 1-201(24).
- "Notifies". Section 1-201(26).
- "Reasonable time". Section 1-204(1) and (2).
- "Seasonably". Section 1-204(3).
- "Supplier". Section 2A-103(1)(x) [Section 2-1103(1)(x)].

Further amend the bill in section 3 by inserting at the end of that part designated "~~S2-1514~~." the following:

UNIFORM COMMENT

Uniform Statutory Source: Section 2-605.

Changes: Revised to reflect leasing practices and terminology.

Purposes: The principles applicable to the commercial practice of payment against documents (subsection 2) are explained in official comment 4 to Section 2-605, the statutory analogue to this section.

Cross Reference:

Section 2-605 official comment 4.

Definitional Cross References:

- "Between merchants". Section 2-104(3).
- "Goods". Section 2A-103(1)(h) [Section 2-1103(1)(h)].
- "Lessee". Section 2A-103(1)(n) [Section 2-1103(1)(n)].
- "Lessor". Section 2A-103(1)(p) [Section 2-1103(1)(p)].
- "Rights". Section 1-201(36).
- "Seasonably". Section 1-204(3).
- "Supplier". Section 2A-103(1)(x) [Section 2-1103(1)(x)].
- "Writing". Section 1-201(46).

Further amend the bill in section 3 by inserting at the end of that part designated "~~S2-1515~~." the following:

UNIFORM COMMENT

Uniform Statutory Source: Section 2-606.

Changes: The provisions of Section 2-606(1)(a) were substantially rewritten to provide that the lessee's conduct may signify acceptance. Further, the provisions of Section 2-606(1)(c) were not incorporated as irrelevant given the lessee's possession and use of the leased goods.

Cross References:

Sections 2-606(1)(a) and 2-606(1)(c).

Definitional Cross References:

"Commercial unit". Section 2A-103(1)(c) [Section 2-1103(1)(c)].

"Conforming". Section 2A-103(1)(d) [Section 2-1103(1)(d)].
"Goods". Section 2A-103(1)(h) [Section 2-1103(1)(h)].
"Lessee". Section 2A-103(1)(n) [Section 2-1103(1)(n)].
"Lessor". Section 2A-103(1)(p) [Section 2-1103(1)(p)].
"Supplier". Section 2A-103(1)(x) [Section 2-1103(1)(x)]."

Further amend the bill in section 3 in that part designated "~~§2-1516.~~" in subsection 3 in paragraph (a) in the first line (page 42, line 11 in L.D.) by striking out the following: "Within" and inserting in its place the following: 'Except in the case of a consumer lease, within'

Further amend the bill in section 3 in that part designated "~~§2-1516.~~" in subsection 3 by striking out all of paragraph (b) (page 42, lines 16 to 20 in L.D.) and inserting in its place the following:

'(b) In the case of a consumer lease, within a reasonable time after the lessee discovers or should have discovered any default, the lessee shall notify either the lessor or any assignee of the lessor. By notifying one of these parties the lessee preserves any remedy against any of the parties; and'

Further amend the bill in section 3 by inserting at the end of that part designated "~~§2-1516.~~" the following:

UNIFORM COMMENT

Uniform Statutory Source: Section 2-607.

Changes: Substantially revised.

Purposes:

1. Subsection (2) creates a special rule for finance leases, precluding revocation if acceptance is made with knowledge of nonconformity with respect to the lease agreement, as opposed to the supply agreement; this is not inequitable as the lessee has a direct claim against the supplier. Section 2A-209(1) [Section 2-1209(1)]. Revocation of acceptance of a finance lease is permitted if the lessee's acceptance was without discovery of the nonconformity (with respect to the lease agreement, not the supply agreement) and was reasonably induced by the lessor's assurances. Section 2A-517(1)(b) [Section 2-1517(1)(b)]. Absent exclusion or modification, the lessor under a finance lease makes certain warranties to the lessee. Sections 2A-210 and 2A-211(1) [Sections 2-1210 and 2-1211(1)].

Revocation of acceptance is not prohibited even after the lessee's promise has become irrevocable and independent. Section 2A-407 [Section 2-1407] official comment. Where the finance lease creates a security interest, the rule may be to the contrary. General Elec. Credit Corp. of Tennessee v. Ger-Beck Mach. Co., 806 F.2d 1207 (3rd Cir. 1986).

2. Subsection (3)(a) requires the lessee to give notice of default, within a reasonable time after the lessee discovered or should have discovered the default. ~~In all cases, notice of default must be given to the lessor. In the case of a finance lease, notice of default must be given to the lessor and the supplier. The In a finance lease, notice may be given either to the supplier, the lessor, or both, but remedy is barred against the party not notified. In a finance lease, the lessor is usually not liable for defects in the goods and the essential notice is to the supplier. While notice to the finance lessor will often not give any additional rights to the lessee, it would be good practice to give the notice since the finance lessor has an interest in the goods. Subsection (3)(a) does not use the term finance lease, but the definition of supplier is a person from whom a lessor buys or leases goods to be leased under a finance lease. Section 2A-103(1)(x) [Section 2-1103(1)(x)]. Thus, not all sellers or lessors of goods to be leased are included within the set of persons to be given notice of default, as suppliers. Therefore, there can be a "supplier" only in a finance lease. Subsection (4) applies similar notice rules as to lessors and suppliers if a lessee is sued for a breach of warranty or other obligation for which a lessor or supplier is answerable over.~~

3. Subsection (3)(b) requires the lessee to give the lessor notice of litigation for infringement or the like. There is an exception created in the case of a consumer lease. While such an exception was considered for a finance lease, it was not created because it was not necessary - the lessor in a finance lease does not give a warranty against infringement. Section 2A-211(2) [Section 2-1211(2)]. Even though not required under subsection (3)(b), the lessee who takes under a finance lease should consider giving notice of litigation for infringement or the like to the supplier, because the lessee obtains the benefit of the suppliers' promises subject to the suppliers' defenses or claims. Sections 2A-209(1) [Section 2-1209(1)] and 2-607(3)(b).

Cross References:

Sections 2-607(3)(b), 2A-103(1)(x) [Section 2-1103(1)(x)], 2A-209(1) [Section 2-1209(1)], 2A-210 [Section 2-1210], 2A-211(1)

[Section 2-1211(1)], 2A-211(2) [Section 2-1211(2)], 2A-407 [Section 2-1407] official comment and 2A-517(1)(b) [Section 2-1517(1)(b)].

Definitional Cross References:

- "Action". Section 1-201(1).
- "Agreement". Section 1-201(3).
- "Burden of establishing". Section 1-201(8).
- "Conforming". Section 2A-103(1)(d) [Section 2-1103(1)(d)].
- "Consumer lease". Section 2A-103(1)(e) [Section 2-1103(1)(e)].
- "Delivery". Section 1-201(14).
- "Discover". Section 1-201(25).
- "Finance lease". Section 2A-103(1)(g) [Section 2-1103(1)(g)].
- "Goods". Section 2A-103(1)(h) [Section 2-1103(1)(h)].
- "Knowledge". Section 1-201(25).
- "Lease agreement". Section 2A-103(1)(k) [Section 2-1103(1)(k)].
- "Lease contract". Section 2A-103(1)(l) [Section 2-1103(1)(l)].
- "Lessee". Section 2A-103(1)(n) [Section 2-1103(1)(n)].
- "Lessor". Section 2A-103(1)(p) [Section 2-1103(1)(p)].
- "Notice". Section 1-201(25).
- "Notifies". Section 1-201(26).
- "Person". Section 1-201(30).
- "Reasonable time". Section 1-204(1) and (2).
- "Receipt". Section 2-103(1)(c).
- "Remedy". Section 1-201(34).
- "Seasonably". Section 1-204(3).
- "Supplier". Section 2A-103(1)(x) [Section 2-1103(1)(x)].
- "Written". Section 1-201(46).

1991 MAINE COMMENT

Sec. 2-516 permits a lessee in a consumer lease to preserve remedies by notifying either the lessor or any assignee of the lessor of any default.'

Further amend the bill in section 3 by inserting at the end of that part designated "~~2-1517.~~" the following:

UNIFORM COMMENT

Uniform Statutory Source: Section 2-608.

Changes: Revised to reflect leasing practices and terminology. Note that in the case of a finance lease the lessee retains a

limited right to revoke acceptance. Sections 2A-517(1)(b) and 2A-516 [Section 2-1517(1)(b) and 2-1516] official comment. New subsections (2) and (3) added.

Purposes:

1. The section states the situations under which the lessee may return the goods to the lessor and cancel the lease. Subsection (2) recognizes that the lessor may have continuing obligations under the lease and that a default as to those obligations may be sufficiently material to justify revocation of acceptance of the leased items and cancellation of the lease by the lessee. For example, a failure by the lessor to fulfill its obligation to maintain leased equipment or to supply other goods which are necessary for the operation of the leased equipment may justify revocation of acceptance and cancellation of the lease.

2. Subsection (3) specifically provides that the lease agreement may provide that the lessee can revoke acceptance for defaults by the lessor which in the absence of such an agreement might not be considered sufficiently serious to justify revocation. That is, the parties are free to contract on the question of what defaults are so material that the lessee can cancel the lease.

Cross References:

Sections Section 2A-516 [Section 2-1516] official comment and ~~2A-517(1)(b)~~.

Definitional Cross References:

- "Commercial unit". Section 2A-103(1)(c) [Section 2-1103(1)(c)].
- "Conforming". Section 2A-103(1)(d) [Section 2-1103(1)(d)].
- "Discover". Section 1-201(25);
- "Finance lease". Section 2A-103(1)(g) [Section 2-1103(1)(g)].
- "Goods". Section 2A-103(1)(h) [Section 2-1103(1)(h)].
- "Lessee". Section 2A-103(1)(n) [Section 2-1103(1)(n)].
- "Lessor". Section 2A-103(1)(p) [Section 2-1103(1)(p)].
- "Lot". Section 2A-103(1)(s) [Section 2-1103(1)(s)].
- "Notifies." Section 1-201(26).
- "Reasonable time". Section 1-204(1) and (2).
- "Rights". Section 1-201(36).
- "Seasonably". Section 1-204(3).
- "Value". Section 1-201(44).'

Further amend the bill in section 3 by inserting at the end of that part designated "~~S2-1518~~," the following:

UNIFORM COMMENT

Uniform Statutory Source: Section 2-712.

Changes: Substantially revised.

Purposes:

1. Subsection (1) allows the lessee to take action to fix its damages after default by the lessor. Such action may consist of the purchase or lease of goods. The decision to cover is a function of commercial judgment, not a statutory mandate replete with sanctions for failure to comply. Cf. Section 9-507.

2. Subsection (2) states a rule for determining the amount of lessee's damages provided that there is no agreement to the contrary. The lessee's damages will be established using the new lease agreement as a measure if the following three criteria are met: (i) the lessee's cover is by lease agreement, (ii) the lease agreement is substantially similar to the original lease agreement, and (iii) such cover was effected in good faith, and in a commercially reasonable manner. Thus, the lessee will be entitled to recover from the lessor the present value, as of the date of default commencement of the term of the new lease agreement, of the difference between rent under the new lease agreement applicable to that period which is comparable to the then remaining term of the original lease agreement less the present value of the rent reserved for the remaining term under the new lease and the original lease, together with incidental or consequential damages less expenses saved in consequence of the lessor's default. ~~Note that the reference in Section 2A-518(2)(a) [Section 2-1518(2)(a)] is to the date of default not to the date of an event of default. An event of default under a lease agreement becomes a default under a lease agreement only after the expiration of any relevant period of grace and compliance with any notice requirements under this Article and the lease agreement. American Bar Foundation, Commentaries on Indentures, 5-1, at 216-217 (1971). Section 2A-501(1). This conclusion is also a function of whether, as a matter of fact or law, the event of default has been waived, suspended or cured. Sections 2A-103(4) and 1-103. Consequential damages may include loss suffered by the lessee because of deprivation of the use of the goods during the period between the default and the acquisition of the goods under the new lease agreement. If the~~

lessee's cover does not satisfy the criteria of subsection (2), Section 2A-519 [Section 2-1519] governs.

3. Two of the three criteria to be met by the lessee are familiar, but the concept of the new lease agreement being substantially similar to the original lease agreement is not. Given the many variables facing a party who intends to lease goods and the rapidity of change in the market place, the policy decision was made not to draft with specificity. It was thought unwise to seek to establish certainty at the cost of fairness. Thus, the decision of whether the new lease agreement is substantially similar to the original will be determined case by case.

4. While the section does not draw a bright line, it is possible to describe some of the factors that should be considered in finding that a new lease agreement is substantially similar to the original. First, the goods subject to the new lease agreement should be examined. For example, in a lease of computer equipment the new lease might be for more modern equipment. However, it may be that at the time of the lessor's breach it was not possible to obtain the same type of goods in the market place. Because the lessee's remedy under Section 2A-519 [Section 2-1519] is intended to place the lessee in essentially the same position as if he had covered, if goods similar to those to have been delivered under the original lease are not available, then the computer equipment in this hypothetical should qualify as a commercially reasonable substitute. See Section 2-712(1).

5. Second, the various elements of the new lease agreement should also be examined. Those elements include the term of the new lease (because the damages are calculated under subsection (2) as the difference between the total rent payable for the entire term of the new lease agreement and the remaining term of the original lease); the presence or absence of options to purchase or release; the lessor's representations, warranties and covenants to the lessee, as well as those to be provided by the lessee to the lessor; and the services, if any, to be provided by the lessor or by the lessee. All of these factors allocate cost and risk between the lessor and the lessee and thus affect the amount of rent to be paid. If the differences between the original lease and the new lease can be easily valued, it would be appropriate for a court to adjust the difference in rental to take account of the difference between the two leases, find that the new lease is substantially similar to the old lease, and award cover damages under this section. If, for example, the new lease requires the lessor to insure the goods in the hands of the

lessee, while the original lease required the lessee to insure, the usual cost of such insurance could be deducted from the rent due under the new lease before determining the difference in rental between the two leases.

6. Having examined the goods and the agreement, the test to be applied is whether, in light of these comparisons, the new lease agreement is substantially similar to the original lease agreement. These findings should not be made with scientific precision, as they are a function of economics, nor should they be made independently with respect to the goods and each element of the agreement, as it is important that a sense of commercial judgment pervade the finding. To establish the new lease as a proper measure of damage under subsection (2), these factors, taken as a whole, must result in a finding that the new lease agreement is substantially similar to the original.

7. A new lease can be substantially similar to the original lease even though its term extends beyond the remaining term of the original lease, so long as both (a) the lease terms are commercially comparable (e.g., it is highly unlikely that a one-month rental and a five-year lease would reflect similar commercial realities), and (b) the court can fairly apportion a part of the rental payments under the new lease to that part of the term of the new lease which is comparable to the remaining lease term under the original lease. Also, the lease term of the new lease may be comparable to the term of the original lease even though the beginning and ending dates of the two leases are not the same. For example, a two-month lease of agricultural equipment for the months of August and September may be comparable to a two-month lease running from the 15th of August to the 15th of October if in the particular location two-month leases beginning on August 15th are basically interchangeable with two-month leases beginning August 1st. Similarly, the term of a one-year truck lease beginning on the 15th of January may be comparable to the term of a one-year truck lease beginning January 2d. If the lease terms are found to be comparable, the court may base cover damages on the entire difference between the costs under the two leases.

Cross References:

Sections 2-712(1), 2A-519 [Section 2-1519] and 9-507.

Definitional Cross References:

"Agreement". Section 1-201(3).
 "Contract". Section 1-201(11).

"Good faith". Sections 1-201(19) and 2-103(1)(b).
 "Goods". Section 2A-103(1)(h) [Section 2-1103(1)(h)].
 "Lease". Section 2A-103(1)(j) [Section 2-1103(1)(j)].
 "Lease agreement". Section 2A-103(1)(k) [Section 2-1103(1)(k)].
 "Lease contract". Section 2A-103(1)(l) [Section 2-1103(1)(l)].
 "Lessee". Section 2A-103(1)(n) [Section 2-1103(1)(n)].
 "Lessor". Section 2A-103(1)(p) [Section 2-1103(1)(p)].
 "Party". Section 1-201(29).
 "Present value". Section 2A-103(1)(u) [Section 2-1103(1)(u)].
 "Purchase". Section 2A-103(1)(v) [Section 2-1103(1)(v)].

Further amend the bill in section 3 by inserting at the end of that part designated "~~§2-1519.~~" the following:

UNIFORM COMMENT

Uniform Statutory Source: Sections 2-713 and 2-714.

Changes: Substantially revised.

Purposes:

1. Subsection (1), a revised version of the provisions of Section 2-713(1), states the basic rule governing the measure of lessee's damages for non-delivery or repudiation by the lessor or for rightful rejection or revocation of acceptance by the lessee. This measure will apply, absent agreement to the contrary, if the lessee does not cover or if the cover does not qualify under Section 2A-518 [Section 2-1518]. There is no sanction for cover that does not qualify.

2. The measure of damage is the present value, as of the date of default, of the difference between market rent and for the remaining term of the lease less the present value of the original rent for the remaining term of the lease, plus incidental and consequential damages less expenses saved in consequence of the default. Note that the reference in Section 2A-519(1) [Section 2-1519(1)] is to the date of default not to the date of an event of default. An event of default under a lease agreement becomes a default under a lease agreement only after the expiration of any relevant period of grace and compliance with any notice requirements under this Article and the lease agreement. American Bar Foundation, Commentaries on Indentures, § 5-1, at 216-217 (1971). Section 2A-501(1) [Section 2-1501(1)]. This conclusion is also a function of whether, as a

matter of fact or law, the event of default has been waived, suspended or cured. Sections 2A-103(4) [Section 2-1103(4)] and 1-103.

3. Subsection (2), a revised version of the provisions of Section 2-713(2), states the rule with respect to determining market rent.

4. Subsection (3), a revised version of the provisions of Section 2-714(1) and (3), states the measure of damages where goods have been accepted and acceptance is not revoked. The subsection applies both to defaults which occur at the inception of the lease and to defaults which occur subsequently, such as failure to comply with an obligation to maintain the leased goods. The measure in essence is the loss, in the ordinary course of events, flowing from the default.

5. Subsection (4), a revised version of the provisions of Section 2-714(2), states the measure of damages for breach of warranty. The measure in essence is the present value of the difference between the value of the goods accepted and of the goods if they had been as warranted.

6. Subsections (1), (3) and (4) specifically state that the parties may by contract vary the damages rules stated in those subsections.

Cross References:

Sections 2-713(1), 2-713(2), 2-714 and Section 2A-518 [Section 2-1518].

Definitional Cross References:

- "Conforming". Section 2A-103(1)(d) [Section 2-1103(1)(d)].
- "Delivery". Section 1-201(14).
- "Goods". Section 2A-103(1)(h) [Section 2-1103(1)(h)].
- "Lease". Section 2A-103(1)(j) [Section 2-1103(1)(j)].
- "Lease agreement". Section 2A-103(1)(k) [Section 2-1103(1)(k)].
- "Lessee". Section 2A-103(1)(n) [Section 2-1103(1)(n)].
- "Lessor". Section 2A-103(1)(p) [Section 2-1103(1)(p)].
- "Notification". Section 1-201(26).
- "Present value". Section 2A-103(1)(u) [Section 2-1103(1)(u)].
- "Value". Section 1-201(44).

Further amend the bill in section 3 by inserting at the end of that part designated "~~\$2-1520.~~" the following:

UNIFORM COMMENT

Uniform Statutory Source: Section 2-715.

Changes: Revised to reflect leasing terminology and practices.

Purposes:

Subsection (1), a revised version of the provisions of Section 2-715(1), lists some examples of incidental damages resulting from a lessor's default; the list is not exhaustive. Subsection (1) makes clear that it applies not only to rightful rejection, but also to justifiable revocation.

Subsection (2), a revised version of the provisions of Section 2-715(2), lists some examples of consequential damages resulting from a lessor's default; the list is not exhaustive.

Cross References:

Section 2-715.

Definitional Cross References:

- "Goods". Section 2A-103(1)(h) [Section 2-1103(1)(h)].
- "Knows". Section 1-201(25).
- "Lessee". Section 2A-103(1)(n) [Section 2-1103(1)(n)].
- "Lessor". Section 2A-103(1)(p) [Section 2-1193(1)(p)].
- "Person". Section 1-201(30).
- "Receipt". Section 2-103(1)(c).

Further amend the bill in section 3 by inserting at the end of that part designated "~~\$2-1521.~~" the following:

UNIFORM COMMENT

Uniform Statutory Source: Section 2-716.

Changes: Revised to reflect leasing practices and terminology; and to expand the reference to the right of replevin in subsection (3) to include other similar rights of the lessee.

Definitional Cross References:

"Delivery". Section 1-201(14).

"Goods". Section 2A-103(1)(h) [Section 2-1103(1)(h)].
"Lease contract". Section 2A-103(1)(1) [Section 2-1103(1)(1)].
"Lessee". Section 2A-103(1)(n) [Section 2-1103(1)(n)].
"Rights". Section 1-201(36).
"Term". Section 1-201(42).'

Further amend the bill in section 3 by inserting at the end of that part designated "~~§2-1522~~," the following:

UNIFORM COMMENT

Uniform Statutory Source: Section 2-502.

Changes: Revised to reflect leasing practices and terminology.

Definitional Cross References:

"Conforming". Section 2A-103(1)(d) [Section 2-1103(1)(d)].
"Goods". Section 2A-103(1)(h). [Section 2-1103(1)(h)]
"Insolvent". Section 1-201(23).
"Lease contract". Section 2A-103(1)(1) [Section 2-1103(1)(1)].
"Lessee". Section 2A-103(1)(n) [Section 2-1103(1)(n)].
"Lessor". Section 2A-103(1)(p) [Section 2-1103(1)(p)].
"Receipt". Section 2-103(1)(c) [Section 2-1103(1)(c)].
"Rights". Section 1-201(36).'

Further amend the bill in section 3 by inserting at the end of that part designated "~~§2-1523~~," the following:

UNIFORM COMMENT

Uniform Statutory Source: Section 2-703.

Changes: Substantially revised.

Purposes:

1. ~~This section~~ Subsection (1) is an index to Sections 2A-524 through 2A-531 [Sections 2-1524 to 2-1531] and their effect on the lessor's rights and remedies upon the lessee's default states that the remedies provided in those sections are available for the defaults referred to in subsection (1); wrongful rejection or revocation of acceptance, failure to make a payment when due, or repudiation. In addition, remedies provided in the lease contract are available. Subsection (2) sets out a remedy if the lessor does not pursue to completion a right or

actually obtain a remedy available under subsection (1), and subsection (3) sets out statutory remedies for defaults not specifically referred to in subsection (1). Subsection (3) provides that, if any default by the lessee other than those specifically referred to in subsection (1) is material, the lessor can exercise the remedies provided in subsection (1) or (2); otherwise the available remedy is as provided in subsection (3). A lessor who has brought an action seeking or has nonjudicially pursued one or more of the remedies available under subsection (1) may amend so as to claim or may nonjudicially pursue a remedy under subsection (2) unless the right or remedy first chosen has been pursued to an extent actually inconsistent with the new course of action. The intent of the provision is to reject the doctrine of election of remedies and to permit an alteration of course by the lessor unless such alteration would actually have an effect on the lessee that would be unreasonable under the circumstances. Further, the lessor may pursue remedies under both subsections (1) and (2) unless doing so would put the lessor in a better position than it would have been in had the lessee fully performed.

2. ~~The lessor and the lessee can agree otherwise to modify the rights and remedies available under the Article; thus, the parties they can, among other things, raise or lower the threshold that gives rise to lessee's default or provide that for defaults other than those specified in subsection (1) the lessor can exercise the rights and remedies referred to in subsection (1), whether or not the default would otherwise be held to substantially impair the value of the lease contract to the lessor; they can also create a new scheme of rights and remedies triggered by the occurrence of the default. Sections 2A-103(4) [Section 2-1103(4)] and 1-102(3).~~

3. ~~Subsection (1), a substantially rewritten version of Section 2-703, lists various cumulative remedies of the lessor where the lessee wrongfully rejects or revokes acceptance, fails to make a payment when due, or repudiates. Section 2A-501(4) [Section 2-1501(2) and (4)]. The subsection also allows the lessor to exercise any contractual remedy.~~

4. ~~This Article rejects the any general doctrine of election of remedy. Whether, in a particular case, one remedy bars another, is a function of whether lessor has been put in as good a position as if the lessee had fully performed the lease contract. Multiple remedies are barred only if the effect is to put the lessor in a better position than it would have been in had the lessee fully performed under the lease. Sections~~

2A-103(4) [Section 2-1103(4)] , 2A-501(4), [Section 2-1501(4)]
and 1-106(1).

5. **Hypothetical:** 1. To better understand the application of subparagraphs (a) through (e) [subsection (1), paragraphs (a) to (c)], it is useful to review a hypothetical. Assume that A is a merchant in the business of selling and leasing new bicycles of various types. B is about to engage in the business of subleasing bicycles to summer residents of and visitors to an island resort. A, as lessor, has agreed to lease 60 bicycles to B. While there is one master lease, deliveries and terms are staggered. 20 bicycles are to be delivered by A to B's island location on June 1; the term of the lease of these bicycles is four months. 20 bicycles are to be delivered by A to B's island location on July 1; the term of the lease of these bicycles is three months. Finally, 20 bicycles are to be delivered by A to B's island location on August 1; the term of the lease of these bicycles is two months. B is obligated to pay rent to A on the 15th day of each month during the term for the lease. Rent is \$50 per month, per bicycle. B has no option to purchase or release and must return the bicycles to A at the end of the term, in good condition, reasonable wear and tear excepted. Since the retail price of each bicycle is \$400 and bicycles used in the retail rental business have a useful economic life of 36 months, this transaction creates a lease. Sections 2A-103(1)(j) [Section 2-1103(1)(j)] and 1-201(37).

2. **5.** A's current inventory of bicycles is not large. Thus, upon signing the lease with B in February, A agreed to purchase 60 new bicycles from A's principal manufacturer, with special instructions to drop ship the bicycles to B's island location in accordance with the delivery schedule set forth in the lease.

3. **7.** The first shipment of 20 bicycles was received by B on May 21. B inspected the bicycles, accepted the same as conforming to the lease and signed a receipt of delivery and acceptance. However, due to poor weather that summer, business was terrible and B was unable to pay the rent due on June 15. Pursuant to the lease A sent B notice of default and proceeded to enforce his rights and remedies against B.

4. **8.** A's counsel first advised A that under Section 2A-510(2) [Section 2-1510(2)] and the terms of the lease B's failure to pay was a default with respect to the whole. Thus, to minimize A's continued exposure, A was advised to take possession of the bicycles. If A had possession of the goods A could refuse to deliver. Section 2A-525(1) [Section 2-1525(1)]. However, the

facts here are different. With respect to the bicycles in B's possession, A has the right to take possession of the bicycles, without breach of the peace. Section 2A-525(2) [Section 2-1525(2)]. If B refuses to allow A access to the bicycles, A can proceed by action, including replevin or injunctive relief.

5. **9.** With respect to the 40 bicycles that have not been delivered, this Article provides various alternatives. First, assume that 20 of the remaining 40 bicycles have been manufactured and delivered by the manufacturer to a carrier for shipment to B. Given the size of the shipment, the carrier was using a small truck for the delivery and the truck had not yet reached the island ferry when the manufacturer (at the request of A) instructed the carrier to divert the shipment to A's place of business. A's right to stop delivery is recognized under these circumstances. Section 2A-526(1) [Section 2-1526(1)]. Second, assume that the 20 remaining bicycles were in the process of manufacture when B defaulted. A retains the right (as between A as lessor and B as lessee) to exercise reasonable commercial judgment whether to complete manufacture or to dispose of the unfinished goods for scrap. Since A is not the manufacturer and A has a binding contract to buy the bicycles, A elected to allow the manufacturer to complete the manufacture of the bicycles, but instructed the manufacturer to deliver the completed bicycles to A's place of business. Section 2A-524(2) [Section 2-1524(2)].

6. **10.** Thus, so far A has elected to exercise the remedies referred to in subparagraphs [paragraphs] (b) through (d) in subsection (1). None of these remedies bars any of the others because A's election and enforcement merely resulted in A's possession of the bicycles. Had B performed A would have recovered possession of the bicycles. Thus A is in the process of obtaining the benefit of his bargain. Note that A could exercise any other rights or pursue any other remedies provided in the lease contract (Section 2A-523(1)(f) [Section 2-1523(1)(f)]), or elect to recover his loss due to the lessee's default under Section 2A-523(2) [Section 2-1523(2)].

7. **11.** A's counsel next would determine what action, if any, should be taken with respect to the goods. As stated in subparagraph [paragraph] (e) and as discussed fully in Section 2A-527(1) [Section 2-1527(1)] the lessor may, but has no obligation to, dispose of the goods by lease, sale or otherwise a substantially similar lease (indeed, the lessor has no obligation whatsoever to dispose of the goods at all) and recover damages based on that action, but lessor will not be able to recover damages which put it in a better position than performance would have done, nor will it be able to recover damages for losses

which it could have reasonably avoided. In this case, since A is in the business of leasing and selling bicycles, A will probably inventory the 60 bicycles for its retail trade.

8- 12. A's counsel then will determine which of the various alternate means of ascertaining A's claim for damages against B will be computed are available. Subparagraph [paragraph] (e) catalogues each relevant section. First, under Section 2A-527(2) [Section 2-1527(2)] the amount of A's claim will be computed by comparing the original lease between A and B with any subsequent lease of the bicycles but only if the subsequent lease is substantially similar to the original lease contract. While the section does not define this term, the official comment does establish some parameters. If, however, A elects to lease the bicycles to his retail trade, it is unlikely that the resulting lease will be substantially similar to the original, as leases to retail customers are considerably different from leases to wholesale customers like B. If, however, the leases were substantially similar, the damage claim is for accrued and unpaid rent to the beginning of the new lease, plus the present value as of the same date, of the difference between the rent reserved under both leases for the balance of their terms the original lease for the balance of its term less the present value as of the same date of the rent reserved under the replacement lease for a term comparable to the balance of the term of the original lease, together with incidental damages less expenses saved in consequence of the lessee's default.

9- 13. If the new lease is not substantially similar or if A elects to sell the bicycles or to hold the bicycles, damages are computed under Section 2A-528 or 2A-529 [Section 2-1528 or 2-1529].

10- 14. If A elects to pursue his claim under Section 2A-528(1) [Section 2-1528(1)] the damage rule is the same as that stated in Section 2A-527(2) [Section 2-1527(2)] except that damages are measured from default if the lessee never took possession of the goods or from the time when the lessor did or could have regained possession and that the standard of comparison is not the rent reserved under a substantially similar lease entered into by the lessor but a market rent, as defined in Section 2A-507 [Section 2-1507]. Further, if the facts of this hypothetical were more elaborate A may be able to establish that the measure of damage under subsection (1) is inadequate to put him in the same position that B's performance would have, in which case A can claim the present value of his lost profits.

11- 15. Yet another alternative for computing A's damage claim against B which will be available in some situations is prescribed by recovery of the present value, as of entry of judgment, of the rent for the then remaining lease term under Section 2A-529 [Section 2-1529]. However, to use this formula A must, among other things, hold the bicycles identified in the lease contract for B. Since this would include all 60 bicycles and A is a merchant, it is unlikely to occur. Further, subsection (1)(a) which in essence allows A to receive the present value of the rent reserved under the lease, would in this case apply only to the 20 bicycles accepted by B in May. With respect to this formulation is not available if the goods have been repossessed or tendered back to A. For the 20 bicycles repossessed and the remaining 40 bicycles, subsection 1(b) will apply A will be able to recover the present value of the rent only if A is unable to dispose of them, or circumstances indicate the effort will be unavailing, in which case the damage formula identical to the one set forth in (1)(a) will apply. At if A has prevailed in an action for the rent, at any time up to collection of a judgment by A against B, A may might dispose of the bicycles. In such case A's claim for damages against B is governed by Section 2A-527 or 2A-528 [Sections 2-1527 and 2-1528]. Section 2A-529(3) [Section 2-1529(3)]. The resulting recalculation of claim should reduce the amount recoverable by A against B and the lessor is required to cause an appropriate credit to be entered against the earlier judgment. However, the nature of the post-judgment proceedings to resolve this issue, and the sanctions for abuse a failure to comply, if any, will be determined by other law.

12- 16. Finally, if the lease agreement had so provided pursuant to subparagraph [paragraph] (f), A's claim against B would not be determined under any of these statutory formulae, but pursuant to a liquidated damages clause. Section 2A-504(1) [Section 2-1504(1)].

13- 17. These various methods of computing A's damage claim against B are alternatives subject to Section 2A-501(4) [Section 2-1501(4)]. However, the pursuit of any one of these alternatives is not a bar to, nor has it been barred by, A's earlier action to obtain possession of the 60 bicycles. These formulae, which vary as a function of an overt or implied mitigation of damage theory, focus on allowing A a recovery of the benefit of his bargain with B. Had B performed, A would have received the rent as well as the return of the 60 bicycles at the end of the term.

14- 18. Finally, A's counsel should also advise A of his right to cancel the lease contract under subparagraph [paragraph] (a). Section 2A-505(1) [Section 2-1505(1)]. Cancellation will discharge all existing obligations but preserve A's rights and remedies.

19. Subsection (2) recognizes that a lessor who is entitled to exercise the rights or to obtain a remedy granted by subsection (1) may choose not to do so. In such cases, the lessor can recover damages as provided in subsection (2). For example, for non-payment of rent, the lessor may decide not to take possession of the goods and cancel the lease, but rather to merely sue for the unpaid rent as it comes due plus lost interest or other damages "determined in any reasonable manner." Subsection (2) also negates any loss of alternative rights and remedies by reason of having invoked or commenced the exercise or pursuit of any one or more rights or remedies.

15- 20. Subsection ~~(2)~~ ~~is new~~ and (3) allows the lessor access to the a remedy scheme of provided in this Article as well as that contained in the lease contract if the lessee is in default for reasons other than those stated in subsection (1). Note that the reference to this Article includes supplementary principles of law and equity, e.g., fraud, misrepresentation and duress. Sections 2A-103(4) [Section 2-1103(4)] and 1-103.

16- 21. There is no special treatment of the finance lease in this section. Absent supplementary principles of law to the contrary, in most cases the supplier will have no rights or remedies against the defaulting lessee. Section ~~2A-209(2)(b)~~ ~~2A-209(2)(ii)~~ [Section 2-1209(2)(b)]. Given that the supplier will look to the lessor for payment, this is appropriate. However, there is a specific exception to this rule with respect to the right to identify goods to the lease contract. Section 2A-524(2) [Section 2-1524(2)]. The parties are free to create a different result in a particular case. Sections 2A-103(4) [Section 2-1103(4)] and 1-102(3).

Cross References:

Sections 1-102(3), 1-103, 1-106(1), 1-201(37), 2-703, 2A-103(1)(j) [Section 2-1103(1)(j)], 2A-103(4) [Section 2-1103(4)], ~~2A-209(2)(b)~~ ~~2A-209(2)(ii)~~ [Section 2-1209(2)(b)], 2A-501(4) [Section 2-1501(4)], 2A-504(1) [Section 2-1504(1)], 2A-505(1), 2A-507 [Section 2-1507], 2A-510(2) [Section 2-1510(2)], 2A-524 through 2A-531 [Section 2-1524 to 2-1531], 2A-524(2) [Section 2-1524(2)], 2A-525(1) [Section 2-1525(1)], 2A-525(2) [Section 2-1525(2)], 2A-526(1) [Section 2-1526(1)],

2A-527(1) [Section 2-1527(1)], 2A-527(2) [Section 2-1527(2)], 2A-528(1) [Section 2-1528(1)] and 2A-529(3) [Section 2-1529(3)].

Definitional Cross References:

"Delivery". Section 1-201(14).
"Goods". Section 2A-103(1)(h) [Section 2-1103(1)(h)].
"Installment lease contract". Section 2A-103(1)(i) [Section 2-1103(1)(i)].
"Lease contract". Section 2A-103(1)(1) [Section 2-1103(1)(1)].
"Lessee". Section 2A-103(1)(n) [Section 2-1103(1)(n)].
"Lessor". Section 2A-103(1)(p). [Section 2-1103(1)(p)].
"Remedy". Section 1-201(34).
"Rights". Section 1-201(36).
"Value". Section 1-201(44)."

Further amend the bill in section 3 by inserting at the end of that part designated "~~2-1524~~," the following:

UNIFORM COMMENT

Uniform Statutory Source: Section 2-704.

Changes: Revised to reflect leasing practices and terminology.

Purposes: The remedies provided by this section are available to the lessor (i) if there has been a default by the lessee which falls within Section 2A-523(1) [Section 2-1523(1)] or 2A-523(3)(a) [Section 2-1523(3)(a)], or (ii) if there has been any other default for which the lease contract gives the lessor the remedies provided by this section. Under "(i)", the lease contract may give the lessor the remedies of identification and disposition provided by this section in various ways. For example, a lease provision might specifically refer to the remedies of identification and disposition, or it might refer to this section by number (i.e., 2A-524 [Section 2-1524]), or it might do so by a more general reference such as "all rights and remedies provided by Article 2A for default by the lessee."

Definitional Cross References:

"Aggrieved party". Section 1-201(2).
"Conforming". Section 2A-103(1)(d) [Section 2-1103(1)(d)].
"Goods". Section 2A-103(1)(h) [Section 2-1103(1)(h)].
"Learn". Section 1-201(25).
"Lease". Section 2A-103(1)(j) [Section 2-1103(1)(j)].

"Lease contract". Section 2A-103(1)(1) [Section 2-1103(1)(1)].
"Lessor". Section 2A-103(1)(p) [Section 2-1103(1)(p)].
"Rights". Section 1-201(36).
"Supplier". Section 2A-103(1)(x) [Section 2-1103(1)(x)].
"Value". Section 1-201(44).'

Further amend the bill in section 3 by inserting at the end of that part designated "~~§2-1525~~" the following:

UNIFORM COMMENT

Uniform Statutory Source: Section Sections 2-702(1) and 9-503.

Changes: Substantially revised.

Purposes:

1. Subsection (1), a revised version of the provisions of Section 2-702(1), allows the lessor to refuse to deliver goods if the lessee is insolvent. Note that the provisions of Section 2-702(2), granting the unpaid seller certain rights of reclamation, were not incorporated in this section. Subsection (2) made this unnecessary.

2. Subsection (2), a revised version of the provisions of Section 9-503, allows the lessor, on a Section 2A-523(1) or 2A-523(3)(a) [Section 2-1523(1) or Section 2-1523(3)(a)] default by the lessee, the right to take possession of or reclaim the goods. Also, the lessor can contract for the right to take possession of the goods for other defaults by the lessee. Therefore, since the lessee's insolvency is an event of default in a standard lease agreement, subsection (2) is the functional equivalent of Section 2-702(2). Further, subsection (2) sanctions the classic crate and delivery clause obligating the lessee to assemble the goods and to make them available to the lessor. Finally, the lessor may leave the goods in place, render them unusable (if they are goods employed in trade or business), and dispose of them on the lessee's premises.

3. Subsection (3), a revised version of the provisions of Section 9-503, allows the lessor to proceed under subsection (2) without judicial process, absent breach of the peace, or by action. Sections 2A-501(3) [Section 2-1501(3)], 2A-103(4) [Section 2-1103(4)] and 1-201(1). In the appropriate case action includes injunctive relief. Clark Equip. Co. v. Armstrong Equip. Co., 431 F.2d 54 (5th Cir. 1970), cert. denied, 402 U.S. 909 (1971). This Section, as well as a number of other Sections in

this Part, are included in the Article to codify the lessor's common law right to protect the lessor's reversionary interest in the goods. Section 2A-103(1)(g) [Section 2-1103(1)(g)]. These Sections are intended to supplement and not displace principles of law and equity with respect to the protection of such interest. Sections 2A-103(4) [Section 2-1103(4)] and 1-103. Such principles apply in many instances, e.g., loss or damage to goods if risk of loss passes to the lessee, failure of the lessee to return goods to the lessor in the condition stipulated in the lease, and refusal of the lessee to return goods to the lessor after termination or cancellation of the lease. See also Section 2A-532 [Section 2-1532].

Cross References:

Sections 1-106(2), 2-702(1), 2-702(2), 2A-103(4) [Section 2-1103(4)], 2A-501(3) [Section 2-1501(3)], 2A-532 [Section 2-1532] and 9-503.

Definitional Cross References:

"Action". Section 1-201(1).
"Delivery". Section 1-201(14).
"Discover". Section 1-201(25).
"Goods". Section 2A-103(1)(h) [Section 2-1103(1)(h)].
"Insolvent". Section 1-201(23).
"Lease contract". Section 2A-103(1)(1) [Section 2-1103(1)(1)].
"Lessee". Section 2A-103(1)(n) [Section 2-1103(1)(n)].
"Lessor". Section 2A-103(1)(p) [Section 2-1103(1)(p)].
"Party". Section 1-201(29).
"Rights". Section 1-201(36).'

Further amend the bill in section 3 by inserting at the end of that part designated "~~§2-1526~~" the following:

UNIFORM COMMENT

Uniform Statutory Source: Section 2-705.

Changes: Revised to reflect leasing practices and terminology.

Definitional Cross References:

"Bill of lading". Section 1-201(6).
"Delivery". Section 1-201(14).
"Discover". Section 1-201(25).
"Goods". Section 2A-103(1)(h) [Section 2-1103(1)(h)].

2 "Insolvent". Section 1-201(23).
 2 "Lease contract". Section 2A-103(1)(1) [Section
 4 2-1103(1)(1)].
 4 "Lessee". Section 2A-103(1)(n) [Section 2-1103(1)(n)].
 6 "Lessor". Section 2A-103(1)(p) [Section 2-1103(1)(p)].
 6 "Notifies" and "Notification". Section 1-201(26).
 8 "Person". Section 1-201(30).
 8 "Receipt". Section 2-103(1)(c).
 10 "Remedy". Section 1-201(34).
 10 "Rights". Section 1-201(36).'

12 Further amend the bill in section 3 by inserting at the end
 of that part designated "~~S2-1527~~," the following:

14 **UNIFORM COMMENT**

16 **Uniform Statutory Source:** Section 2-706(1), (5) and (6).

18 **Changes:** Substantially revised.

20 **Purposes:**

22 1. Subsection (1), a revised version of the first sentence
 24 of subsection 2-706(1), allows the lessor the right to dispose of
 goods after a statutory or other material default by the lessee
 26 (even if the goods remain in the lessee's possession - Section
 2A-525(2) [Section 2-1525(2)]). or after the lessor refuses to
 28 deliver or takes possession of the goods, or, if agreed, after
other contractual default. The lessor's decision to exercise
 30 this right is a function of a commercial judgment, not a
 statutory mandate replete with sanctions for failure to comply.
 32 Cf. Section 9-507. As the owner of the goods, in the case of a
 34 lessor, or as the prime lessee of the goods, in the case of a
 sublessor, compulsory disposition of the goods is inconsistent
 36 with the nature of the interest held by the lessor or the
 sublessor and is not necessary because the interest held by the
 38 lessee or the sublessee is not protected by a right of redemption
 under the common law or this Article. Subsection 2A-527(5)
 [Section 2-1527(5)].

40 2. The rule for determining the measure of damages
 42 recoverable by the lessor against the lessee is a function of
 several variables. If the lessor has elected to effect
 44 disposition under subsection (1) and such disposition is by lease
 that qualifies under subsection (2), the measure of damages set
 46 forth in subsection (2) will apply, absent agreement to the
 contrary. Sections 2A-504 [Section 2-1504], 2A-103(4) [Section
 48 2-1103(4)] and 1-102(3).

2 3. The lessor's damages will be established using the new
 lease agreement as a measure if the following three criteria are
 4 satisfied: (i) the lessor disposed of the goods by lease, (ii)
 the lease agreement is substantially similar to the original
 6 lease agreement, and (iii) such disposition was in good faith,
 and in a commercially reasonable manner. Thus, the lessor will
 8 be entitled to recover from the lessee the accrued and unpaid
 rent as of the date of default commencement of the term of the
 10 new lease, and the present value, as of the same date of default,
 of the difference between the rent reserved under the new lease
 12 and the original lease for the then remaining term less the
 14 present value as of the same date of the rent under the new lease
agreement applicable to the period of the new lease comparable to
 16 the remaining term under the original lease, together with
 incidental damages less expenses saved in consequence of the
 18 lessee's default. If the lessor's disposition does not satisfy
 the criteria of subsection (2), the lessor may calculate its
 20 claim against the lessee pursuant to Section 2A-528 [Section
 2-1528]. Section 2A-523(1)(e) [Section 2-1523(1)(e)]. ~~Note that~~
 22 ~~the reference in Section 2A-527(2)(a) and (b) is to the date of~~
~~default not to the date of an event of default. An event of~~
 24 ~~default under a lease agreement becomes a default under a lease~~
~~agreement only after the expiration of any relevant period of~~
 26 ~~grace and compliance with any notice requirements under this~~
~~Article and the lease agreement. American Bar Foundation,~~
 28 ~~Commentaries on Indentures, 5-1, at 216-217 (1971), Section~~
~~2A-501(1). This conclusion is also a function of whether, as a~~
 30 ~~matter of fact or law, the event of default has been waived,~~
~~suspended or cured. Sections 2A-102(4) and 1-102.~~

32 4. Two of the three criteria to be met by the lessor are
 34 familiar, but the concept of the new lease agreement that is
 substantially similar to the original lease agreement is not.
 36 Given the many variables facing a party who intends to lease
 goods and the rapidity of change in the market place, the policy
 38 decision was made not to draft with specificity. It was thought
 40 unwise to seek to establish certainty at the cost of fairness.
 The decision of whether the new lease agreement is substantially
 similar to the original will be determined case by case.

42 5. While the section does not draw a bright line, it is
 possible to describe some of the factors that should be
 44 considered in a finding that a new lease agreement is
 substantially similar to the original. The various elements of
 46 the new lease agreement should be examined. Those elements
 include ~~the term of the new lease (because the damages are~~
 48 ~~calculated under subsection (2) as the difference between the~~

total rent payable for the entire term of the new lease agreement and the remaining lease term of the original lease); the options to purchase or release; the lessor's representations, warranties and covenants to the lessee as well as those to be provided by the lessee to the lessor; and the services, if any, to be provided by the lessor or by the lessee. All of these factors allocate cost and risk between the lessor and the lessee and thus affect the amount of rent to be paid. These findings should not be made with scientific precision, as they are a function of economics, nor should they be made independently, as it is important that a sense of commercial judgment pervade the finding. See Section 2A-507(2) [Section 2-1507(2)]. To establish the new lease as a proper measure of damage under subsection (2), these various factors, taken as a whole, must result in a finding that the new lease agreement is substantially similar to the original. If the differences between the original lease and the new lease can be easily valued, it would be appropriate for a court to find that the new lease is substantially similar to the old lease, adjust the difference in the rent between the two leases to take account of the differences, and award damages under this section. If, for example, the new lease requires the lessor to insure the goods in the hands of the lessee, while the original lease required the lessee to insure, the usual cost of such insurance could be deducted from rent due under the new lease before the difference in rental between the two leases is determined.

6. The following hypothetical illustrates the difficulty of providing a bright line. Assume that A buys a jumbo tractor for \$1 million and then leases the tractor to B for a term of 36 months. The tractor is delivered to and is accepted by B on May 1. On June 1 B fails to pay the monthly rent to A. B returns the tractor to A, who immediately releases the tractor to C for a term identical to the term remaining under the lease between A and B. All terms and conditions under the lease between A and C are identical to those under the original lease between A and B, except that C does not provide any property damage or other insurance coverage, and B agreed to provide complete coverage. Coverage is expensive and difficult to obtain. ~~The new lease should be viewed as not substantially similar to the original. However, if the lessor seeks a recovery under Section 2A-528 the new lease can be introduced into evidence to establish market rent (Section 2A-507), with a proper allowance for the lessor's cost of replacing the lost insurance coverage. It is a question of fact whether it is so difficult to adjust the recovery to take account of the difference between the two leases as to insurance that the second lease is not substantially similar to the original.~~

7. A new lease can be substantially similar to the original lease even though its term extends beyond the remaining term of the original lease, so long as both (a) the lease terms are commercially comparable (e.g., it is highly unlikely that a one-month rental and a five-year lease would reflect similar realities), and (b) the court can fairly apportion a part of the rental payments under the new lease to that part of the term of the new lease which is comparable to the remaining lease term under the original lease. Also, the lease term of the new lease may be comparable to the remaining term of the original lease even though the beginning and ending dates of the two leases are not the same. For example, a two-month lease of agricultural equipment for the months of August and September may be comparable to a two-month lease running from the 15th of August to the 15th of October if in the particular location two-month leases beginning on August 15th are basically interchangeable with two-month leases beginning August 1st. Similarly, the term of a one-year truck lease beginning on the 15th of January may be comparable to the term of a one-year truck lease beginning January 2d. If the lease terms are found to be comparable, the court may base cover damages on the entire difference between the costs under the two leases.

8. Subsection (3), which is new, provides that if the lessor's disposition is by lease that does not qualify under subsection (2), or is by sale or otherwise, Section 2A-528 [Section 2-1528] governs.

9. Subsection (4), a revised version of subsection 2-706(5), applies to protect a subsequent buyer or lessee who buys or leases from the lessor in good faith and for value, pursuant to a disposition under this section. Note that by its terms, the rule in subsection 2A-304(1) [Section 2-1304(1)], which provides that the subsequent lessee takes subject to the original lease contract, is controlled by the rule stated in this subsection.

10. Subsection (5), a revised version of subsection 2-706(6), provides that the lessor is not accountable to the lessee for any profit made by the lessor on a disposition. This rule follows from the fundamental premise of the bailment for hire that the lessee under a lease of goods has no equity of redemption to protect.

Cross References:

Sections 1-102(3), 2-706(1), 2-706(5), 2-706(6), 2A-103(4) [Section 2-1103(4)], 2A-304(1) [Section 2-1304(1)], 2A-504 [Section 2-1504], 2A-507(2) [Section 2-1507(2)], 2A-523(1)(e) [Section 2-1523(1)(e)], 2A-525(2) [Section 2-1525(2)], 2A-527(5) [Section 2-1527(5)], 2A-528 [Section 2-1528] and 9-507.

Definitional Cross References:

- "Buyer" and "Buying". Section 2-103(1)(a).
"Delivery". Section 1-201(14).
"Good faith". Sections 1-201(19) and 2-103(1)(b).
"Goods". Section 2A-103(1)(h) [Section 2-1103(1)(h)].
"Lease". Section 2A-103(1)(j) [Section 2-1103(1)(j)].
"Lease contract". Section 2A-103(1)(1) [Section 2-1103(1)(1)].
"Lessee". Section 2A-103(1)(n) [Section 2-1103(1)(n)].
"Lessor". Section 2A-103(1)(p) [Section 2-1103(1)(p)].
"Present value". Section 2A-103(1)(u) [Section 2-1103(1)(u)].
"Rights". Section 1-201(36).
"Sale". Section 2-106(1).
"Security interest". Section 1-201(37).
"Value". Section 1-201(44).

Further amend the bill in section 3 by inserting at the end of that part designated "2-1528," the following:

UNIFORM COMMENT

Uniform Statutory Source: Section 2-708.

Changes: Substantially revised.

Purposes:

1. Subsection (1), a substantially revised version of Section 2-708(1), states the basic rule governing the measure of lessor's damages for non-acceptance or repudiation by the lessee; repudiation is defined (Section 2A-402) to include the lessee's post-acceptance default for failure to pay rent and the like, a default described in Section 2A-523(1) or (3)(a) [Section 2-1523(1) or (3)(a)], and, if agreed, for a contractual default. This measure will apply if the lessor elects to retain the goods (whether undelivered, returned by the lessee, or repossessed by the lessor after acceptance and default by the lessee) or if the lessor's disposition does not qualify under subsection 2A-527(2) [Section 2-1527(2)]. Section 2A-527(3) [Section 2-1527(3)]. Note that under some of these conditions, the lessor may recover

damages from the lessee pursuant to the rule set forth in Section 2A-529 [Section 2-1529]. There is no sanction for disposition that does not qualify under subsection 2A-527(2) [Section 2-1527(2)]. Application of the rule set forth in this section is subject to agreement to the contrary. Sections 2A-504 [Section 2-1504], 2A-103(4) [Section 2-1103(4)] and 1-102(3).

2. The If the lessee has never taken possession of the goods, the measure of damage is the accrued and unpaid rent as of the date of default together with the present value, as of the date of default, of the difference between market rent and the original rent for the remaining term of the lease less the present value as of the same date of market rent, and incidental damages, less expenses saved in consequence of the default. Note that the reference in Section 2A-528(1)(a) and (b) 2A-528(1)(i) and (ii) [Section 2-1528(1)(a) and (b)] is to the date of default not to the date of an event of default. An event of default under a lease agreement becomes a default under a lease agreement only after the expiration of any relevant period of grace and compliance with any notice requirements under this Article and the lease agreement. American Bar Foundation, Commentaries on Indentures, 5-1, at 216-217 (1971). Section 2A-501(1) [Section 2-1501(1)]. This conclusion is also a function of whether, as a matter of fact or law, the event of default has been waived, suspended or cured. Sections 2A-103(4) [Section 2-1103(4)] and 1-103. If the lessee has taken possession of the goods, the measure of damages is the accrued and unpaid rent as of the earlier of the time the lessor repossesses the goods or the time the lessee tenders the goods to the lessor plus the difference between the present value, as of the same time, of the rent under the lease for the remaining lease term and the present value, as of the same time, of the market rent.

3. Market rent will be computed pursuant to Section 2A-507 [Section 2-1507]. In the case of a default by the lessee, the time for tender should be interpreted as the date of the default. If, as of the date of default, the lessor has attempted and failed to obtain possession of the goods, the lessor has, among various additional rights and remedies, a cause of action against the lessee for damages due to loss of use of possession of the goods between the date of default and the date the lessor obtains possession of the goods. Sections 2A-525(3), 2A-103(4), 1-201(1). See also Section 2A-530. This conclusion is critical to an important policy decision to protect the lessor's residual interest in the goods. Section 2A-103(1)(g).

4. Subsection (2), a somewhat revised version of the provisions of subsection 2-708(2) [Section 2-708(2)], states a

measure of damages which applies in each case that subsection (1) applies but if the measure of damages in subsection (1) is inadequate to put the lessor in as good a position as performance would have. The measure of damage is the lessor's profit, including overhead, together with incidental damages, with allowance for costs reasonably incurred and credit for payments or proceeds of disposition. In determining the amount of due credit with respect to proceeds of disposition a proper value should be attributed to the lessor's residual interest in the goods. Sections 2A-103(1)(q) [Section 2-1103(1)(q)] and 2A-507(4) [Section 2-1507(4)].

5. In calculating profit, a court should include any expected appreciation of the goods, e.g. the foal of a leased brood mare. Because this subsection is intended to give the lessor the benefit of the bargain, a court should consider any reasonable benefit or profit expected by the lessor from the performance of the lease agreement. See Honeywell, Inc. v. Lithonia Lighting, Inc., 317 F. Supp. 406, 413 (N.D. Ga. 1970); Locks v. Wade, 36 N.J. Super. 128, 131, 114 A.2d 875, 877 (Super. Ct. App. Div. 1955). Further, in calculating profit the concept of present value should must be given effect. Taylor v. Commercial Credit Equip. Corp., 170 Ga. App. 322, 316 S.E.2d 788 (Ct. App. 1984). See generally Section 2A-103(1)(u) [Section 2-1103(1)(u)].

Cross References:

Sections 1-102(3), 2-708, 2A-103(1)(u) [Section 2-1103(1)(u)], 2A-402 [Section 2-1402], 2A-504 [Section 2-1504], 2A-507 [Section 2-1507], 2A-527(2) [Section 2-1527(2)] and 2A-529 [Section 2-1529].

Definitional Cross References:

"Agreement". Section 1-201(3).
"Goods". Section 2A-103(1)(h) [Section 2-1103(1)(h)].
"Lease". Section 2A-103(1)(j) [Section 2-1103(1)(j)].
"Lease agreement". Section 2A-103(1)(k) [Section 2-1103(1)(k)].
"Lessee". Section 2A-103(1)(n) [Section 2-1103(1)(n)].
"Lessor". Section 2A-103(1)(p) [Section 2-1103(1)(p)].
"Party". Section 1-201(29).
"Present value". Section 2A-103(1)(u) [Section 2-1103(1)(u)].
"Sale". Section 2-106(1).

Further amend the bill in section 3 in that part designated "S2-1529." in subsection 1 in paragraph (a) in subparagraph (iii) in the last line (page 51, line 3 in L.D.) by striking out the following: "default." and inserting in its place the following: "default; and"

Further amend the bill in section 3 by inserting at the end of that part designated "S2-1529." the following:

'UNIFORM COMMENT

Uniform Statutory Source: Section 2-709.

Changes: Substantially revised.

Purposes: Subsection (1) provides another method of determining the measure of lessor's damages after default by the lessee. Absent agreement to the contrary (Section 2A-504), this Article provides the lessor, in this section and the two preceding sections, three alternate methods of computing damages recoverable from the defaulting lessee (Section 2A-523(1)(e)). This section, as well as the two preceding sections, applies to goods subject to the lease, even if such goods have been repossessed from the lessee or otherwise (Section 2A-525(3)). This is a departure from Section 2-709, the statutory analogue. The departure is not surprising given the essential difference between a sale and a lease.

Absent the right to repossess the goods, the recovery stated in subsection (1)(a) would not compensate the lessor for his or her loss. Consider a lease of a carpet cleaner by A to B for a term of two days. A purchased the carpet cleaner for \$500.00. The rent for the two day term is \$75.00. If B defaulted by not paying the rent and refusing to return the carpet cleaner and A was not allowed to repossess the carpet cleaner, the measure of damage stated in this section would allow a recovery of not more than \$75.00, together with incidental damages. The rule stated in this Article, which allows the lessor the right to repossess the goods from the lessee and to recover damages, is consistent with the lessor's ownership of the goods. DeKoven, Proceedings After Default by the Lessee Under a True Lease of Equipment, in 16 P. Coogan, W. Hogan, D. Vagts, Secured Transactions Under the Uniform Commercial Code, 39B.06[4] (1986). The statutory analogue, Section 2-709, only provides an action for the price of the goods sold, which is consistent with the seller's agreement to dispose of all of his or her right, title and interest in the goods to the buyer. That measure of damage would not have been appropriate here as the lessor's agreement is to dispose of

possession and use of the goods for a term; the bargain includes the return of the goods at the end of the term, it would be anomalous to allow the lessee to improve on the bargain, i.e., retain the goods, solely by virtue of his or her default, even if that had been balanced by allowing the lessor to sue to recover the price or value of the goods.

The measure of the lessor's damages under this section is a function of a two-part rule. First, subparagraph (1)(a) establishes a rule of recovery with respect to goods accepted by the lessee (even if repossessed by the lessor) and with respect to conforming goods lost or damaged within a commercially reasonable time after risk of loss passed to the lessee. Thus, reading subsections (1), (2) and (3) together, if accepted goods are repossessed by the lessor and the lessor holds the goods for the lessee for the balance of the term, lessor's damages will be calculated pursuant to subsection (1)(a); if the lessor leases, sells or otherwise disposes of the goods, subsection (1)(a) is inapplicable and the lessor's damages will be calculated pursuant to Section 2A-528, unless the lessor's disposition was by a substantially similar lease, in which case Section 2A-527(2) applies. Second, subparagraph (1)(b) establishes a rule of recovery with respect to goods identified to the lease contract (but not accepted by the lessee -- see subparagraph (1)(a)) only if the lessor is unable, after reasonable effort, to dispose of them at a reasonable price, or if circumstances indicate the effort would be unavailing.

As a condition to the lessor's election to employ the method to measure the lessor's claim against the lessee set forth in subsection (1), the lessor must comply with subsection (2), which provides that, with one exception, goods identified to the lease contract and in the lessor's control (whether as a result of repossession or otherwise) must be held for the lessee for the balance of the lease term. This eliminates the possibility of a double recovery by the lessor and preserves the value of the leasehold estate to the lessee.

1. Absent a lease contract provision to the contrary, an action for the full unpaid rent (discounted to present value as of the time of entry of judgment as to rent due after that time) is available as to goods not lost or damaged only if the lessee retains possession of the goods or the lessor is or apparently will be unable to dispose of them at a reasonable price after reasonable effort. There is no general right in a lessor to recover the full rent from the lessee upon holding the goods for the lessee. If the lessee tenders goods back to the lessor, and the lessor refuses to accept the tender, the lessor will be

limited to the damages it would have suffered had it taken back the goods. The rule in Article 2 that the seller can recover the price of accepted goods is rejected here. In a lease, the lessor always has a residual interest in the goods which the lessor usually realizes upon at the end of a lease term by either sale or a new lease. Therefore, it is not a substantial imposition on the lessor to require it to take back and dispose of the goods if the lessee chooses to tender them back before the end of the lease term; the lessor will merely do earlier what it would have done anyway, sell or relet the goods. Further, the lessee will frequently encounter substantial difficulties if the lessee attempts to sublet the goods for the remainder of the lease term. In contrast to the buyer who owns the entire interest in goods and can easily dispose of them, the lessee is selling only the right to use the goods under the terms of the lease and the sublessee must assume a relationship with the lessor. In that situation, it is usually more efficient to eliminate the original lessee as a middleman by allowing the lessee to return the goods to the lessor who can then redispense of them.

2. In some situations even where possession of the goods is reacquired, a lessor will be able to recover as damages the present value of the full rent due, not under this section, but under 2A-528(2) [Section 2-1528(2)] which allows a lost profit recovery if necessary to put the lessor in the position it would have been in had the lessee performed. Following is an example of such a case. A is a lessor of construction equipment and maintains a substantial inventory. B leases from A a backhoe for a period of two weeks at a rental of \$1,000. After three days, B returns the backhoe and refuses to pay the rent. A has five backhoes in inventory, including the one returned by B. During the next 11 days after the return by B of the backhoe, A rents no more than three backhoes at any one time and, therefore, always has two on hand. If B had kept the backhoe for the full rental period, A would have earned the full rental on that backhoe, plus the rental on the other backhoes it actually did rent during that period. Getting this backhoe back before the end of the lease term did not enable A to make any leases it would not otherwise have made. The only way to put A in the position it would have been in had the lessee fully performed is to give the lessor the full rentals. A realized no savings at all because the backhoe was returned early and might even have incurred additional expense if it was paying for parking space for equipment in inventory. A has no obligation to relet the backhoe for the benefit of B rather than leasing that backhoe or any other in inventory for its own benefit. Further, it is probably not reasonable to expect A to dispose of the backhoe by sale when it is returned in an effort to reduce damages suffered by B.

Ordinarily, the loss of a two-week rental would not require A to reduce the size of its backhoe inventory. Whether A would similarly be entitled to full rentals as lost profit in a one-year lease of a backhoe is a question of fact; in any event the lessor, subject to mitigation of damages rules, is entitled to be put in as good a position as it would have been had the lessee fully performed the lease contract.

3. Under subsection (2) a lessor who is able and elects to sue for the rent due under a lease must hold goods not lost or damaged for the lessee. Subsection (3) creates an exception to the subsection (2) requirement set forth as a condition to subsection (1), that goods identified to the contract and in the lessor's control be held by the lessor (Section 2A-529(2)). If the lessor disposes of those goods prior to collection of the judgment (whether as a matter of law or agreement), the lessor's recovery is governed by the measure of damages in Section 2A-527 [Section 2-1527] if the disposition is by lease that is substantially similar to the original lease, or otherwise by the measure of damages in Section 2A-528 [Section 2-1528]. Section 2A-523 [Section 2-1523] official comment Number 11.

~~The relationship between subsections (3) and (4) is best stated by examining a hypothetical. Assume the lease is for a term of two years and after default by the lessee the lessor recovers the goods from the lessee and obtains judgment against the lessee for damages pursuant to subsection (1). If the lessor holds the goods so recovered until the end of the two-year term, any subsequent disposition will have no effect on the lessor's judgment. If, however, the lessor determines that the lessee is judgment proof, the lessor might be wise to dispose of the goods before the end of the remaining lease term, even though the amount that the lessor then will be allowed to recover from the lessee, as determined by the provisions of Section 2A-527 or 2A-528, is less than the judgment. Subsection (3) allows the lessor to make this election at any time before collection of the judgment.~~

4. Subsection (4), which is new, further reinforces the requisites of Subsection (2). In the event the judgment for damages obtained by the lessor against the lessee pursuant to subsection (1) is satisfied, the lessee regains the right to use and possession of the remaining goods for the balance of the original lease term; a partial satisfaction of the judgment creates no right in the lessee to use and possession of the goods.

5. The relationship between subsections (2) and (4) is important to understand. Subsection (2) requires the lessor to

hold for the lessee identified goods in the lessor's possession. Absent agreement to the contrary, whether in the lease or otherwise, under most circumstances the requirement that the lessor hold the goods for the lessee for the term will mean that the lessor is not allowed to use them. Sections 2A-103(4) [Section 2-1103(4)] and 1-203. Further, the lessor's use of the goods could be viewed as a disposition of the goods that would bar the lessor from recovery under this section, remitting the lessor to the two preceding sections for a determination of the lessor's claim for damages against the lessee.

6. Subsection (5), the analogue of subsection 2-709(3), further reinforces the thrust of subsection (3) by stating that a lessor who is held not entitled to rent under this section has not elected a remedy; the lessor must be awarded damages under Sections 2A-527 and 2A-528 [Sections 2-1527 and 2-1528]. This is a function of two significant policies of this Article - that resort to a remedy is optional, unless expressly agreed to be exclusive (Section 2A-503(2) [Section 2-1503(2)]) and that rights and remedies provided in this Article generally are cumulative. (Section 2A-501(2) and (4) [Section 2-1501(2) and (4)]).

Cross References:

Sections 1-203, 2-709, 2-709(3), 2A-103(4) [Section 2-1103(4)], 2A-501(2) [Section 2-1501(2)], 2A-501(4) [Section 2-1501(4)], 2A-503(2) [Section 2-1503(2)], 2A-504 [Section 2-1504], 2A-523(1)(e) [Section 2-1523(1)(e)], 2A-525(2) [Section 2-1525(2)], 2A-527 [Section 2-1527], 2A-528 [Section 2-1528] and 2A-529(2) [Section 2-1529(2)].

Definitional Cross References:

"Action". Section 1-201(1).
 "Conforming". Section 2A-103(1)(d) [Section 2-1103(1)(d)].
 "Goods". Section 2A-103(1)(h) [Section 2-1103(1)(h)].
 "Lease". Section 2A-103(1)(j) [Section 2-1103(1)(j)].
 "Lease agreement". Section 2A-103(1)(k) [Section 2-1103(1)(k)].
 "Lease contract". Section 2A-103(1)(l) [Section 2-1103(1)(l)].
 "Lessee". Section 2A-103(1)(n) [Section 2-1103(1)(n)].
 "Lessor". Section 2A-103(1)(p) [Section 2-1103(1)(p)].
 "Present value". Section 2A-103(1)(u) [Section 2-1103(1)(u)].
 "Reasonable time". Section 1-204(1) and (2)."

Further amend the bill in section 3 by inserting at the end of that part designated "~~S2-1530~~," the following:

UNIFORM COMMENT

Uniform Statutory Source: Section 2-710.

Changes: Revised to reflect leasing practices and terminology.

Definitional Cross References:

- "Aggrieved party". Section 1-201(2).
- "Delivery". Section 1-201(14).
- "Goods". Section 2A-103(1)(h) [Section 2-1103(1)(h)].
- "Lessee". Section 2A-103(1)(n) [Section 2-1103(1)(n)].
- "Lessor". Section 2A-103(1)(p) [Section 2-1103(1)(p)].

Further amend the bill in section 3 by inserting at the end of that part designated "~~S2-1531~~," the following:

UNIFORM COMMENT

Uniform Statutory Source: Section 2-722.

Changes: Revised to reflect leasing practices and terminology.

Definitional Cross References:

- "Action". Section 1-201(1).
- "Goods". Section 2A-103(1)(h) [Section 2-1103(1)(h)].
- "Lease contract". Section 2A-103(1)(1) [Section 2-1103(1)(1)].
- "Lessee". Section 2A-103(1)(n) [Section 2-1103(1)(n)].
- "Lessor". Section 2A-103(1)(p) [Section 2-1103(1)(p)].
- "Party". Section 1-201(29).
- "Rights". Section 1-201(36).
- "Security interest". Section 1-201(37).

Further amend the bill in section 3 by inserting at the end of that part designated "~~S2-1532~~," the following:

UNIFORM COMMENT

Uniform Statutory Source: None.

Purposes: This section recognizes the right of the lessor to recover under this Article (as well as under other law) from the lessee for failure to comply with the lease obligations as to the

condition of leased goods when returned to the lessor, for failure to return the goods at the end of the lease, or for any other default which causes loss or injury to the lessor's residual interest in the goods.

Further amend the bill in section 4 in that part designated "~~S9-113~~," in the first paragraph in the last line (page 52, line 47 in L.D.) by inserting at the end the following: '2'

Further amend the bill in section 4 in that part designated "~~S9-113~~," in subsection (1) in the last line (page 52, line 50 in L.D.) by striking out the following: "and" and inserting in its place the following: 'and'

Further amend the bill by renumbering the sections to read consecutively.

STATEMENT OF FACT

This amendment makes the following changes from the original bill.

In section 2-1103, subsection (1), paragraph (h) mobile homes are included within the definition of "goods."

Section 2-1104 is amended to specify that "consumer protection statute of this State" includes, but is not limited to, the Maine Unfair Trade Practices Act, Title 5, chapter 10; the Maine Consumer Credit Code, Title 9-A; consumer loan and lease agreement laws, Title 10, chapter 202; used car information laws, Title 10, chapter 217; and warranties on new motor vehicles, Title 10, chapter 203-A.

Section 2-1209 is amended to provide that in finance leases that are consumer leases the supplier's ability to disclaim, exclude or modify implied warranties and remedies for breach of warranty is governed by section 2-316, subsection (5).

Section 2-1214 is amended to provide that in a consumer lease that is not a finance lease the lessor's ability to disclaim, exclude or modify implied warranties or remedies for breach of those warranties is governed by section 2-316, subsection (5).

Section 2-1221 is amended to add an additional protection for lessees when leased property is destroyed. It permits a lessee who is not in default to substitute goods satisfactory to

COMMITTEE AMENDMENT "A" to S.P. 680, L.D. 1802

2 the lessor. It also permits the use of insurance to purchase
3 substitute goods or, at the consumer's option, insurance proceeds
4 may be paid to the lessor with the lessee remaining liable for
5 only the insurance deductible plus any amounts owed because of a
6 prior default.

8 Section 2-1303, subsection (8) is amended to clarify that a
9 lessor's remedies with regard to a prohibited transfer or a
10 transfer that results in default is subject to the duty of the
11 lessor to mitigate damages.

12 Section 2-1516 is amended to permit a lessee in a consumer
13 lease to preserve remedies by notifying either the lessor or any
14 assignee of the lessor of any default.

16 The amendment also adds the Uniform Comments that apply to
17 each section and Maine Comments as appropriate.
18

Reported by Senator Gauvreau for the Committee on Judiciary.
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COMMITTEE AMENDMENT