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974.901 New Jersey. Law Revision Commn.
L446 Annual report...February 1, 1990
1989

Enclosed:

- Projects and Recommendations, p. 5
- Appendix C, Report...New Article 2A

HEARINGS:

No

NEWSPAPER ARTICLES:

No

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- Projects and Recommendations, p. 3
- Appendix A, Report...Repeal of Art. 6
- Appendix A-1, ALI - NCCUSL...Repealer of Art. 6, 1989. Official Text with Comments

HEARINGS:

No

NEWSPAPER ARTICLES:

No

P.L.1994, CHAPTER 114, approved October 12, 1994

1994 Senate No. 572

1 AN ACT concerning commercial transactions, enacting Chapters
2 2A and 4A of Title 12A of the New Jersey Statutes, amending
3 various parts of the statutory law and repealing Chapter 6 of
4 Title 12A of the New Jersey Statutes and N.J.S.12A:9-111.

5

6 BE IT ENACTED by the Senate and General Assembly of the
7 State of New Jersey:

8 1.

9

TITLE 12A
CHAPTER 2A
LEASES

10

11

12

13

SUBCHAPTER 1. GENERAL PROVISIONS

14

12A:2A-101. Short title.

15

12A:2A-102. Scope.

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12A:2A-103. Definitions and index of definitions.

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12A:2A-104. Leases subject to other law.

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12A:2A-105. Territorial application of chapter to goods covered
by certificate of title.

19

20

12A:2A-106. Limitation on power of parties to consumer lease to
choose applicable law and judicial forum.

21

22

12A:2A-107. Waiver or renunciation of claim or right after
default.

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12A:2A-108. Unconscionability.

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12A:2A-109. Option to accelerate at will.

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SUBCHAPTER 2. FORMATION AND CONSTRUCTION
OF LEASE CONTRACT

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12A:2A-201. Statute of frauds.

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12A:2A-202. Final written expression: parole or extrinsic
evidence.

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12A:2A-203. Seals inoperative.

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12A:2A-204. Formation in general.

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12A:2A-205. Firm offers.

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12A:2A-206. Offer and acceptance in formation of lease
contract.

36

37

12A:2A-207. Course of performance or practical construction.

38

12A:2A-208. Modification, rescission and waiver.

39

12A:2A-209. Lessee under finance lease as beneficiary of supply
contract.

40

41

12A:2A-210. Express warranties.

42

12A:2A-211. Warranties against interference and against

EXPLANATION—Matter enclosed in bold-faced brackets [thus] in the
above bill is not enacted and is intended to be omitted in the law.

Matter underlined thus is new matter.

- 1 infringement; lessee's obligation against
2 infringement.
3 12A:2A-212. Implied warranty of merchantability.
4 12A:2A-213. Implied warranty of fitness for particular purpose.
5 12A:2A-214. Exclusion or modification of warranties.
6 12A:2A-215. Cumulation and conflict of warranties express or
7 implied.
8 12A:2A-216. Third-party beneficiaries of express and implied
9 warranties.
10 12A:2A-217. Identification.
11 12A:2A-218. Insurance and proceeds.
12 12A:2A-219. Risk of loss.
13 12A:2A-220. Effect of default on risk of loss.
14 12A:2A-221. Casualty to identified goods.
15

16 SUBCHAPTER 3. EFFECT OF LEASE CONTRACT

- 17 12A:2A-301. Enforceability of lease contract.
18 12A:2A-302. Title to and possession of goods.
19 12A:2A-303. Alienability of party's interest under lease contract
20 or of lessor's residual interest in goods; delegation
21 of performance; transfer of rights.
22 12A:2A-304. Subsequent lease of goods by lessor.
23 12A:2A-305. Sale or sublease of goods by lessee.
24 12A:2A-306. Priority of certain liens arising by operation of law.
25 12A:2A-307. Priority of liens arising by attachment or levy on,
26 security interests in, and other claims to goods.
27 12A:2A-308. Special rights of creditors.
28 12A:2A-309. Lessor's and lessee's rights when goods become
29 fixtures.
30 12A:2A-310. Lessor's and lessee's rights when goods become
31 accessions.
32 12A:2A-311. Priority subject to subordination.
33

34 SUBCHAPTER 4. PERFORMANCE OF LEASE CONTRACT: 35 REPUDIATED, SUBSTITUTED AND EXCUSED

- 36 12A:2A-401. Insecurity: adequate assurance of performance.
37 12A:2A-402. Anticipatory repudiation.
38 12A:2A-403. Retraction of anticipatory repudiation.
39 12A:2A-404. Substituted performance.
40 12A:2A-405. Excused performance.
41 12A:2A-406. Procedure on excused performance.
42 12A:2A-407. Irrevocable promises: finance leases.
43

44 SUBCHAPTER 5. DEFAULT

45 A. IN GENERAL

- 46 12A:2A-501. Default: procedure.
47 12A:2A-502. Notice after default.
48 12A:2A-503. Modification or impairment of rights and remedies.
49 12A:2A-504. Liquidation of damages.
50 12A:2A-505. Cancellation and termination and effect of
51 cancellation, termination, rescission, or fraud on
52 rights and remedies.
53 12A:2A-506. Statute of limitations.
54 12A:2A-507. Proof of market rent: time and place.

- 1 **B. DEFAULT BY LESSOR**
2 12A:2A-508. Lessee's remedies.
3 12A:2A-509. Lessee's rights on improper delivery; rightful
4 rejection.
5 12A:2A-510. Installment lease contracts: rejection and default.
6 12A:2A-511. Merchant lessee's duties as to rightfully rejected
7 goods.
8 12A:2A-512. Lessee's duties as to rightfully rejected goods.
9 12A:2A-513. Cure by lessor of improper tender or delivery;
10 replacement.
11 12A:2A-514. Waiver of lessee's objections.
12 12A:2A-515. Acceptance of goods.
13 12A:2A-516. Effect of acceptance of goods; notice of default;
14 burden of establishing default after acceptance;
15 notice of claim or litigation to person answerable
16 over.
17 12A:2A-517. Revocation of acceptance of goods.
18 12A:2A-518. Cover; substitute goods.
19 12A:2A-519. Lessee's damages for non-delivery, repudiation,
20 default, and breach of warranty in regard to
21 accepted goods.
22 12A:2A-520. Lessee's incidental and consequential damages.
23 12A:2A-521. Lessee's right to specific performance or replevin.
24 12A:2A-522. Lessee's right to goods on lessor's insolvency.

- 25
26 **C. DEFAULT BY LESSEE**
27 12A:2A-523. Lessor's remedies.
28 12A:2A-524. Lessor's right to identify goods to lease contract.
29 12A:2A-525. Lessor's right to possession of goods.
30 12A:2A-526. Lessor's stoppage of delivery in transit or
31 otherwise.
32 12A:2A-527. Lessor's rights to dispose of goods.
33 12A:2A-528. Lessor's damages for nonacceptance, failure to
34 pay, repudiation or other default.
35 12A:2A-529. Lessor's action for the rent.
36 12A:2A-530. Lessor's incidental damages.
37 12A:2A-531. Standing to sue third parties for injury to goods.
38 12A:2A-532. Lessor's rights to residual interest.

- 39
40
41 **SUBCHAPTER 1. GENERAL PROVISIONS**
42 12A:2A-101. Short title.
43 This chapter shall be known and may be cited as the "Uniform
44 Commercial Code - Leases."
45 12A:2A-102. Scope.
46 This chapter applies to any transaction, regardless of form,
47 that creates a lease.
48 12A:2A-103. Definitions and index of definitions.
49 (1) In this chapter unless the context otherwise requires:
50 (a) "Buyer in ordinary course of business" means a person who
51 in good faith and without knowledge that the sale to the person is
52 in violation of the ownership rights or security interest or
53 leasehold interest of a third party in the goods buys in ordinary
54 course from a person in the business of selling goods of that kind

1 but does not include a pawnbroker. "Buying" may be for cash or
2 by exchange of other property or on secured or unsecured credit
3 and includes receiving goods or documents of title under a
4 pre-existing contract for sale but does not include a transfer in
5 bulk or as security for or in total or partial satisfaction of a
6 money debt.

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

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

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

19 (e) "Consumer lease" means a lease that a lessor regularly
20 engaged in the business of leasing or selling makes to a lessee
21 who is a natural person and who takes under the lease primarily
22 for a personal, family, or household purpose.

23 (f) "Fault" means wrongful act, omission, breach, or default.

24 (g) "Finance lease" means a lease with respect to which:

25 (i) the lessor does not select, manufacture, or supply the
26 goods;

27 (ii) the lessor acquires the goods or the right to
28 possession and use of the goods in connection with the
29 lease; and

30 (iii) one of the following occurs:

31 (A) the lessee receives a copy of the contract by
32 which the lessor acquired the goods or the right to
33 possession and use of the goods before signing the
34 lease contract;

35 (B) the lessee's approval of the contract by which
36 the lessor acquired the goods or the right to
37 possession and use of the goods is a condition to
38 effectiveness of the lease contract;

39 (C) the lessee, before signing the lease contract,
40 receives an accurate and complete statement
41 designating the promises and warranties, and any
42 disclaimers of warranties, limitations or modifications
43 of remedies, or liquidated damages, including those of
44 a third party, such as the manufacturer of the goods,
45 provided to the lessor by the person supplying the
46 goods in connection with or as part of the contract by
47 which the lessor acquired the goods or the right to
48 possession and use of the goods; or

49 (D) if the lease is not a consumer lease, the lessor,
50 before the lessee signs the lease contract, informs the
51 lessee in writing (a) of the identity of the person
52 supplying the goods to the lessor, unless the lessee has
53 selected that person and directed the lessor to acquire
54 the goods or the right to possession and use of the

1 goods from that person, (b) that the lessee is entitled
2 under this chapter to the promises and warranties,
3 including those of any third party, provided to the
4 lessor by the person supplying the goods in connection
5 with or as part of the contract by which the lessor
6 acquired the goods or the right to possession and use
7 of the goods, and (c) that the lessee may communicate
8 with the person supplying the goods to the lessor and
9 receive an accurate and complete statement of those
10 promises and warranties, including any disclaimers
11 and limitations of them or of remedies.

12 (h) "Goods" means all things that are movable at the time of
13 identification to the lease contract, or are fixtures (12A:2A-309),
14 but the term does not include money, documents, instruments,
15 accounts, chattel paper, general intangibles, or minerals or the
16 like, including oil and gas, before extraction. The term also
17 includes the unborn young of animals.

18 (i) "Installment lease contract" means a lease contract that
19 authorizes or requires the delivery of goods in separate lots to be
20 separately accepted, even though the lease contract contains a
21 clause "each delivery is a separate lease" or its equivalent.

22 (j) "Lease" means a transfer of the right to possession and use
23 of goods for a term in return for consideration, but a sale,
24 including a sale on approval or a sale or return, or retention or
25 creation of a security interest is not a lease. Unless the context
26 clearly indicates otherwise, the term includes a sublease.

27 (k) "Lease agreement" means the bargain, with respect to the
28 lease, of the lessor and the lessee in fact as found in their
29 language or by implication from other circumstances including
30 course of dealing or usage of trade or course of performance as
31 provided in this chapter. Unless the context clearly indicates
32 otherwise, the term includes a sublease agreement.

33 (l) "Lease contract" means the total legal obligation that
34 results from the lease agreement as affected by this chapter and
35 any other applicable rules of law. Unless the context clearly
36 indicates otherwise, the term includes a sublease contract.

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

39 (n) "Lessee" means a person who acquires the right to
40 possession and use of goods under a lease. Unless the context
41 clearly indicates otherwise, the term includes a sublessee.

42 (o) "Lessee in ordinary course of business" means a person who
43 in good faith and without knowledge that the lease to the person
44 is in violation of the ownership rights or security interest or
45 leasehold interest of a third party in the goods leases in ordinary
46 course from a person in the business of selling or leasing goods of
47 that kind but does not include a pawnbroker. "Leasing" may be
48 for cash or by exchange of other property or on secured or
49 unsecured credit and includes receiving goods or documents of
50 title under a pre-existing lease contract but does not include a
51 transfer in bulk or as security for or in total or partial
52 satisfaction of a money debt.

53 (p) "Lessor" means a person who transfers the right to
54 possession and use of goods under a lease. Unless the context

1 clearly indicates otherwise, the term includes a sublessor.

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

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

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

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

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

21 (v) "Purchase" includes taking by sale, lease, mortgage,
22 security interest, pledge, gift, or any other voluntary transaction
23 creating an interest in goods.

24 (w) "Sublease" means a lease of goods the right to possession
25 and use of which was acquired by the lessor as a lessee under an
26 existing lease.

27 (x) "Supplier" means a person from whom a lessor buys or
28 leases goods to be leased under a finance lease.

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

31 (z) "Termination" occurs when either party pursuant to a
32 power created by agreement or law puts an end to the lease
33 contract otherwise than for default.

34 (2) Other definitions applying to this chapter and the sections
35 in which they appear are:

36 "Accessions" 12A:2A-310(1).

37 "Construction mortgage" 12A:2A-309(1)(d).

38 "Encumbrance" 12A:2A-309(1)(e).

39 "Fixtures" 12A:2A-309(1)(a).

40 "Fixture filing" 12A:2A-309(1)(b).

41 "Purchase money lease" 12A:2A-309(1)(c).

42 (3) The following definitions in other chapters apply to this
43 chapter:

44 "Account" 12A:9-106.

45 "Between merchants" 12A:2-104(3).

46 "Buyer" 12A:2-103(1)(a).

47 "Chattel paper" 12A:9-105(1)(b).

48 "Consumer goods" 12A:9-109(1).

49 "Document" 12A:9-105(1)(f).

50 "Entrusting" 12A:2-403(3).

51 "General intangibles" 12A:9-106.

52 "Good faith" 12A:2-103(1)(b).

53 "Instrument" 12A:9-105(1)(i).

54 "Merchant" 12A:2-104(1).

- 1 "Mortgage" 12A:9-105(1)(j).
2 "Pursuant to commitment" 12A:9-105(1)(k).
3 "Receipt" 12A:2-103(1)(c).
4 "Sale" 12A:2-106(1).
5 "Sale on approval" 12A:2-326.
6 "Sale or return" 12A:2-326.
7 "Seller" 12A:2-103(1)(d).

8 (4) In addition chapter 1 contains general definitions and
9 principles of construction and interpretation applicable
10 throughout this chapter.

11 12A:2A-104. Leases subject to other law.

12 (1) A lease, although subject to this chapter, is also subject to
13 any applicable:

14 (a) certificate of title statute of this State:

15 R.S.39:10-1 to R.S.39:10-9 both inclusive;

16 P.L.1971, c.311 (C.39:10-9.1 and C.39:10-9.2);

17 R.S.39:10-10 to R.S.39:10-16 both inclusive;

18 R.S.39:10-18 to R.S.39:10-25 both inclusive;

19 P.L.1984, c.152 (C.12:7A-1 to C.12:7A-29 both inclusive);

20 (b) certificate of title statute of another jurisdiction
21 (12A:2A-105); or

22 (c) consumer law of this State, both decisional and statutory.

23 (2) In case of conflict between the provisions of this chapter,
24 other than sections 12A:2A-105, 12A:2A-304(3), and
25 12A:2A-305(3), and any law referred to in subsection (1), the
26 provisions of that law control.

27 (3) Failure to comply with an applicable law has only the
28 effect specified therein.

29 12A:2A-105. Territorial application of chapter to goods
30 covered by certificate of title.

31 Subject to the provisions of sections 12A:2A-304(3) and
32 12A:2A-305(3), with respect to goods covered by a certificate of
33 title issued under a statute of this State or of another
34 jurisdiction, compliance and the effect of compliance or
35 noncompliance with a certificate of title statute are governed by
36 the law (including the conflict of laws rules) of the jurisdiction
37 issuing the certificate until the earlier of (a) surrender of the
38 certificate, or (b) four months after the goods are removed from
39 that jurisdiction and thereafter until a new certificate of title is
40 issued by another jurisdiction.

41 12A:2A-106. Limitation on power of parties to consumer lease
42 to choose applicable law and judicial forum.

43 (1) If the law chosen by the parties to a consumer lease is that
44 of a jurisdiction other than a jurisdiction in which the lessee
45 resides at the time the lease agreement becomes enforceable or
46 within 30 days thereafter or in which the goods are to be used, or
47 if the goods are to be used in more than one jurisdiction none of
48 which is the residence of the lessee, in which the lease is
49 executed by the lessee, the choice is not enforceable.

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

53 12A:2A-107. Waiver or renunciation of claim or right after
54 default.

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

5 12A:2A-108. Unconscionability.

6 (1) If the court as a matter of law finds a lease contract or any
7 clause of a lease contract to have been unconscionable at the
8 time it was made the court may refuse to enforce the lease
9 contract, or it may enforce the remainder of the lease contract
10 without the unconscionable clause, or it may so limit the
11 application of any unconscionable clause as to avoid any
12 unconscionable result.

13 (2) With respect to a consumer lease, if the court as a matter
14 of law finds that a lease contract or any clause of a lease
15 contract has been induced by unconscionable conduct or that
16 unconscionable conduct has occurred in the collection of a claim
17 arising from a lease contract, the court may grant appropriate
18 relief.

19 (3) Before making a finding of unconscionability under
20 subsection (1) or (2), the court, on its own motion or that of a
21 party, shall afford the parties a reasonable opportunity to present
22 evidence as to the setting, purpose, and effect of the lease
23 contract or clause thereof, or of the conduct.

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

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

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

33 (c) In determining attorney's fees, the amount of the recovery
34 on behalf of the claimant under subsections (1) and (2) is not
35 controlling.

36 12A:2A-109. Option to accelerate at will.

37 (1) A term providing that one party or the party's successor in
38 interest may accelerate payment or performance or require
39 collateral or additional collateral "at will" or "when the party
40 deems himself or herself insecure" or in words of similar import
41 must be construed to mean that the party has power to do so only
42 if the party in good faith believes that the prospect of payment
43 or performance is impaired.

44 (2) With respect to a consumer lease, the burden of
45 establishing good faith under subsection (1) is on the party who
46 exercised the power; otherwise the burden of establishing lack of
47 good faith is on the party against whom the power has been
48 exercised.

49
50 SUBCHAPTER 2. FORMATION AND CONSTRUCTION
51 OF LEASE CONTRACT

52 12A:2A-201. Statute of frauds.

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

1 (a) the total payments to be made under the lease contract,
2 excluding payments for options to renew or buy, are less than
3 \$1,000; or

4 (b) there is a writing, signed by the party against whom
5 enforcement is sought or by that party's authorized agent,
6 sufficient to indicate that a lease contract has been made
7 between the parties and to describe the goods leased and the
8 lease term.

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

12 (3) A writing is not insufficient because it omits or incorrectly
13 states a term agreed upon, but the lease contract is not
14 enforceable under subsection (1)(b) beyond the lease term and the
15 quantity of goods shown in the writing.

16 (4) A lease contract that does not satisfy the requirements of
17 subsection (1), but which is valid in other respects, is enforceable:

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

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

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

32 (5) The lease term under a lease contract referred to in
33 subsection (4) is:

34 (a) if there is a writing signed by the party against whom
35 enforcement is sought or by that party's authorized agent
36 specifying the lease term, the term so specified;

37 (b) if the party against whom enforcement is sought admits in
38 that party's pleading, testimony, or otherwise in court a lease
39 term, the term so admitted; or

40 (c) a reasonable lease term.

41 12A:2A-202. Final written expression: parol or extrinsic
42 evidence.

43 Terms with respect to which the confirmatory memoranda of
44 the parties agree or which are otherwise set forth in a writing
45 intended by the parties as a final expression of their agreement
46 with respect to such terms as are included therein may not be
47 contradicted by evidence of any prior agreement or of a
48 contemporaneous oral agreement but may be explained or
49 supplemented:

50 (1) by course of dealing or usage of trade or by course of
51 performance; and

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

1 12A:2A-203. Seals inoperative.

2 The affixing of a seal to a writing evidencing a lease contract
3 or an offer to enter into a lease contract does not render the
4 writing a sealed instrument and the law with respect to sealed
5 instruments does not apply to the lease contract or offer.

6 12A:2A-204. Formation in general.

7 (1) A lease contract may be made in any manner sufficient to
8 show agreement, including conduct by both parties which
9 recognizes the existence of a lease contract.

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

12 (3) Although one or more terms are left open, a lease contract
13 does not fail for indefiniteness if the parties have intended to
14 make a lease contract and there is a reasonably certain basis for
15 giving an appropriate remedy.

16 12A:2A-205. Firm offers.

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

24 12A:2A-206. Offer and acceptance in formation of lease
25 contract.

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

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

34 12A:2A-207. Course of performance or practical construction.

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

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

48 (3) Subject to the provisions of 12A:2A-208 on modification
49 and waiver, course of performance is relevant to show a waiver
50 or modification of any term inconsistent with the course of
51 performance.

52 12A:2A-208. Modification, rescission and waiver.

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

1 (2) A signed lease agreement that excludes modification or
2 rescission except by a signed writing may not be otherwise
3 modified or rescinded, but, except as between merchants, such a
4 requirement on a form supplied by a merchant must be separately
5 signed by the other party.

6 (3) Although an attempt at modification or rescission does not
7 satisfy the requirements of subsection (2), it may operate as a
8 waiver.

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

15 **12A:2A-209. Lessee under finance lease as beneficiary of**
16 **supply contract.**

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

25 (2) The extension of the benefit of a supplier's promises and of
26 warranties to the lessee (12A:2A-209(1)) does not: (i) modify the
27 rights and obligations of the parties to the supply contract,
28 whether arising therefrom or otherwise, or (ii) impose any duty or
29 liability under the supply contract on the lessee.

30 (3) Any modification or rescission of the supply contract by
31 the supplier and the lessor is effective between the supplier and
32 the lessee unless, before the modification or rescission, the
33 supplier has received notice that the lessee has entered into a
34 finance lease related to the supply contract. If the modification
35 or rescission is effective between the supplier and the lessee, the
36 lessor is deemed to have assumed, in addition to the obligations
37 of the lessor to the lessee under the lease contract, promises of
38 the supplier to the lessor and warranties that were so modified or
39 rescinded as they existed and were available to the lessee before
40 modification or rescission.

41 (4) In addition to the extension of the benefit of the supplier's
42 promises and of warranties to the lessee under subsection (1), the
43 lessee retains all rights that the lessee may have against the
44 supplier, which arise from an agreement between the lessee and
45 the supplier or under other law.

46 **12A:2A-210. Express warranties.**

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

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

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

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

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

10 12A:2A-211. Warranties against interference and against
11 infringement; lessee's obligation against infringement.

12 (1) There is in a lease contract a warranty that for the lease
13 term no person holds a claim to or interest in the goods that
14 arose from an act or omission of the lessor, other than a claim by
15 way of infringement or the like, which will interfere with the
16 lessee's enjoyment of its leasehold interest.

17 (2) Except in a finance lease there is in a lease contract by a
18 lessor who is a merchant regularly dealing in goods of the kind a
19 warranty that the goods are delivered free of the rightful claim
20 of any person by way of infringement or the like.

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

25 12A:2A-212. Implied warranty of merchantability.

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

29 (2) Goods to be merchantable must be at least such as

30 (a) pass without objection in the trade under the description in
31 the lease agreement;

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

34 (c) are fit for the ordinary purposes for which goods of that
35 type are used;

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

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

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

43 (3) Other implied warranties may arise from course of dealing
44 or usage of trade.

45 12A:2A-213. Implied warranty of fitness for particular purpose.

46 Except in a finance lease, if the lessor at the time the lease
47 contract is made has reason to know of any particular purpose for
48 which the goods are required and that the lessee is relying on the
49 lessor's skill or judgment to select or furnish suitable goods,
50 there is in the lease contract an implied warranty that the goods
51 will be fit for that purpose.

52 12A:2A-214. Exclusion or modification of warranties.

53 (1) Words or conduct relevant to the creation of an express
54 warranty and words or conduct tending to negate or limit a

1 warranty must be construed wherever reasonable as consistent
2 with each other; but, subject to the provisions of 12A:2A-202 on
3 parol or extrinsic evidence, negation or limitation is inoperative
4 to the extent that the construction is unreasonable.

5 (2) Subject to subsection (3), to exclude or modify the implied
6 warranty of merchantability or any part of it the language must
7 mention "merchantability", be by a writing, and be conspicuous.
8 Subject to subsection (3), to exclude or modify any implied
9 warranty of fitness the exclusion must be by a writing and be
10 conspicuous. Language to exclude all implied warranties of
11 fitness is sufficient if it is in writing, is conspicuous and states,
12 for example, "There is no warranty that the goods will be fit for
13 a particular purpose".

14 (3) Notwithstanding subsection (2), but subject to subsection
15 (4),

16 (a) unless the circumstances indicate otherwise, all implied
17 warranties are excluded by expressions like "as is," or "with all
18 faults," or by other language that in common understanding calls
19 the lessee's attention to the exclusion of warranties and makes
20 plain that there is no implied warranty, if in writing and
21 conspicuous;

22 (b) if the lessee before entering into the lease contract has
23 examined the goods or the sample or model as fully as desired or
24 has refused to examine the goods, there is no implied warranty
25 with regard to defects that an examination ought in the
26 circumstances to have revealed; and

27 (c) an implied warranty may also be excluded or modified by
28 course of dealing, course of performance, or usage of trade.

29 (4) To exclude or modify a warranty against interference or
30 against infringement (12A:2A-211) or any part of it, the language
31 must be specific, be by a writing, and be conspicuous, unless the
32 circumstances, including course of performance, course of
33 dealing, or usage of trade, give the lessee reason to know that the
34 goods are being leased subject to a claim or interest of any
35 person.

36 12A:2A-215. Cumulation and conflict of warranties express or
37 implied.

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

43 (1) Exact or technical specifications displace an inconsistent
44 sample or model or general language of description.

45 (2) A sample from an existing bulk displaces inconsistent
46 general language of description.

47 (3) Express warranties displace inconsistent implied warranties
48 other than an implied warranty of fitness for a particular purpose.

49 12A:2A-216. Third-party beneficiaries of express and implied
50 warranties.

51 A warranty to or for the benefit of a lessee under this chapter,
52 whether express or implied, extends to any natural person who is
53 in the family or household of the lessee or who is a guest in the
54 lessee's home if it is reasonable to expect that the person may

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

10 **12A:2A-217. Identification.**

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

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

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

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

23 **12A:2A-218. Insurance and proceeds.**

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

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

32 (3) Notwithstanding a lessee's insurable interest under
33 subsections (1) and (2), the lessor retains an insurable interest
34 until an option to buy has been exercised by the lessee and risk of
35 loss has passed to the lessee.

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

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

42 **12A:2A-219. Risk of loss.**

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

46 (2) Subject to the provisions of this chapter on the effect of
47 default on risk of loss (12A:2A-220), if risk of loss is to pass to
48 the lessee and the time of passage is not stated, the following
49 rules apply:

50 (a) If the lease contract requires or authorizes the goods to be
51 shipped by carrier

52 (i) and it does not require delivery at a particular
53 destination, the risk of loss passes to the lessee when the
54 goods are duly delivered to the carrier; but

1 (ii) if it does require delivery at a particular destination
2 and the goods are there duly tendered while in the
3 possession of the carrier, the risk of loss passes to the
4 lessee when the goods are there duly so tendered as to
5 enable the lessee to take delivery.

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

10 (c) In any case not within subsection (a) or (b), the risk of loss
11 passes to the lessee on the lessee's receipt of the goods if the
12 lessor, or, in the case of a finance lease, the supplier, is a
13 merchant; otherwise the risk passes to the lessee on tender of
14 delivery.

15 **12A:2A-220. Effect of default on risk of loss.**

16 (1) Where risk of loss is to pass to the lessee and the time of
17 passage is not stated:

18 (a) If a tender or delivery of goods so fails to conform to the
19 lease contract as to give a right of rejection, the risk of their loss
20 remains with the lessor, or, in the case of a finance lease, the
21 supplier, until cure or acceptance.

22 (b) If the lessee rightfully revokes acceptance, the lessee, to
23 the extent of any deficiency in the lessee's effective insurance
24 coverage, may treat the risk of loss as having remained with the
25 lessor from the beginning.

26 (2) Whether or not risk of loss is to pass to the lessee, if the
27 lessee as to conforming goods already identified to a lease
28 contract repudiates or is otherwise in default under the lease
29 contract, the lessor, or, in the case of a finance lease, the
30 supplier, to the extent of any deficiency in the lessor's or
31 supplier's effective insurance coverage may treat the risk of loss
32 as resting on the lessee for a commercially reasonable time.

33 **12A:2A-221. Casualty to identified goods.**

34 If a lease contract requires goods identified when the lease
35 contract is made, and the goods suffer casualty without fault of
36 the lessee, the lessor or the supplier before delivery, or the goods
37 suffer casualty before risk of loss passes to the lessee pursuant to
38 the lease agreement or 12A:2A-219, then:

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

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

48
49 **SUBCHAPTER 3. EFFECT OF LEASE CONTRACT**

50 **12A:2A-301. Enforceability of lease contract.**

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

1 12A:2A-302. Title to and possession of goods.

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

7 12A:2A-303. Alienability of party's interest under lease
8 contract or of lessor's residual interest in goods; delegation of
9 performance; transfer of rights.

10 (1) As used in this section, "creation of a security interest"
11 includes the sale of a lease contract that is subject to Chapter 9,
12 Secured Transactions, by reason of section 12A:9-102(1)(b).

13 (2) Except as provided in subsections (3) and (4), a provision in
14 a lease agreement which (i) prohibits the voluntary or involuntary
15 transfer, including a transfer by sale, sublease, creation or
16 enforcement of a security interest, or attachment, levy, or other
17 judicial process, of an interest of a party under the lease contract
18 or of the lessor's residual interest in the goods, or (ii) makes such
19 a transfer an event of default, gives rise to the rights and
20 remedies provided in subsection (5), but a transfer that is
21 prohibited or is an event of default under the lease agreement is
22 otherwise effective.

23 (3) A provision in a lease agreement which (i) prohibits the
24 creation or enforcement of a security interest in an interest of a
25 party under the lease contract or in the lessor's residual interest
26 in the goods, or (ii) makes such a transfer an event of default, is
27 not enforceable unless, and then only to the extent that, there is
28 an actual transfer by the lessee of the lessee's right of possession
29 or use of the goods in violation of the provision or an actual
30 delegation of a material performance of either party to the lease
31 contract in violation of the provision. Neither the granting nor
32 the enforcement of a security interest in (i) the lessor's interest
33 under the lease contract or (ii) the lessor's residual interest in
34 the goods is a transfer that materially impairs the prospect of
35 obtaining return performance by, materially changes the duty of,
36 or materially increases the burden or risk imposed on, the lessee
37 within the purview of subsection (5) unless, and then only to the
38 extent that, there is an actual delegation of a material
39 performance of the lessor.

40 (4) A provision in a lease agreement which (i) prohibits a
41 transfer of a right to damages for default with respect to the
42 whole lease contract or of a right to payment arising out of the
43 transferor's due performance of the transferor's entire
44 obligation, or (ii) makes such a transfer an event of default, is not
45 enforceable, and such a transfer is not a transfer that materially
46 impairs the prospect of obtaining return performance by,
47 materially changes the duty of, or materially increases the
48 burden or risk imposed on, the other party to the lease contract
49 within the purview of subsection (5).

50 (5) Subject to subsections (3) and (4):

51 (a) if a transfer is made which is made an event of default
52 under a lease agreement, the party to the lease contract not
53 making the transfer, unless that party waives the default or
54 otherwise agrees, has the rights and remedies described in
55 12A:2A-501(2);

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

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

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

26 (8) In a consumer lease, to prohibit the transfer of an interest
27 of a party under the lease contract or to make a transfer an
28 event of default, the language must be specific, by a writing, and
29 conspicuous.

30 12A:2A-304. Subsequent lease of goods by lessor.

31 (1) Subject to 12A:2A-303, a subsequent lessee from a lessor
32 of goods under an existing lease contract obtains, to the extent of
33 the leasehold interest transferred, the leasehold interest in the
34 goods that the lessor had or has power to transfer, and except as
35 provided in subsection (2) and 12A:2A-527(4), takes subject to the
36 existing lease contract. A lessor with voidable title has power to
37 transfer a good leasehold interest to a good faith subsequent
38 lessee for value, but only to the extent set forth in the preceding
39 sentence. If goods have been delivered under a transaction of
40 purchase, the lessor has that power even though:

41 (a) the lessor's transferor was deceived as to the identity of
42 the lessor;

43 (b) the delivery was in exchange for a check which is later
44 dishonored;

45 (c) it was agreed that the transaction was to be a "cash sale";
46 or

47 (d) the delivery was procured through theft under the criminal
48 law.

49 (2) A subsequent lessee in the ordinary course of business from
50 a lessor who is a merchant dealing in goods of that kind to whom
51 the goods were entrusted by the existing lessee of that lessor
52 before the interest of the subsequent lessee became enforceable
53 against that lessor obtains, to the extent of the leasehold interest
54 transferred, all of that lessor's and the existing lessee's rights to

1 the goods, and takes free of the existing lease contract.

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

7 **12A:2A-305. Sale or sublease of goods by lessee.**

8 (1) Subject to the provisions of 12A:2A-303, a buyer or
9 sublessee from the lessee of goods under an existing lease
10 contract obtains, to the extent of the interest transferred, the
11 leasehold interest in the goods that the lessee had or had power
12 to transfer, and except as provided in subsection (2) and
13 12A:2A-511(4), takes subject to the existing lease contract. A
14 lessee with a voidable leasehold interest has power to transfer a
15 good leasehold interest to a good faith buyer for value or a good
16 faith sublessee for value, but only to the extent set forth in the
17 preceding sentence. When goods have been delivered under a
18 transaction of lease the lessee has that power even though:

19 (a) the lessor was deceived as to the identity of the lessee;

20 (b) the delivery was in exchange for a check which is later
21 dishonored; or

22 (c) the delivery was procured through theft under the criminal
23 law.

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

30 (3) A buyer or sublessee from the lessee of goods that are
31 subject to an existing lease contract and are covered by a
32 certificate of title issued under a statute of this State or of
33 another jurisdiction takes no greater rights than those provided
34 both by this section and by the certificate of title statute.

35 **12A:2A-306. Priority of certain liens arising by operation of
36 law.**

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

45 **12A:2A-307. Priority of liens arising by attachment or levy on,
46 security interests in, and other claims to goods.**

47 (1) Except as otherwise provided in 12A:2A-308, a creditor of
48 a lessee takes subject to the lease contract.

49 (2) Except as otherwise provided in subsections (3) and (4) and
50 in sections 12A:2A-306 and 12A:2A-308, a creditor of a lessor
51 takes subject to the lease contract unless:

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

54 (b) the creditor holds a security interest in the goods and the

1 lessee did not give value and receive delivery of the goods
2 without knowledge of the security interest; or

3 (c) the creditor holds a security interest in the goods which
4 was perfected (12A:9-303) before the lease contract became
5 enforceable.

6 (3) A lessee in the ordinary course of business takes the
7 leasehold interest free of a security interest in the goods created
8 by the lessor even though the security interest is perfected
9 (12A:9-303) and the lessee knows of its existence.

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

18 **12A:2A-308. Special rights of creditors.**

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

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

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

41 **12A:2A-309. Lessor's and lessee's rights when goods become
42 fixtures.**

43 (1) In this section:

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

47 (b) a "fixture filing" is the filing, in the office where a
48 mortgage on the real estate would be filed or recorded, of a
49 financing statement covering goods that are or are to become
50 fixtures and conforming to the requirements of 12A:9-402(9);

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

54 (d) a mortgage is a "construction mortgage" to the extent it

1 secures an obligation incurred for the construction of an
2 improvement on land including the acquisition cost of the land, if
3 the recorded writing so indicates; and

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

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

11 (3) This chapter does not prevent creation of a lease of
12 fixtures pursuant to real estate law.

13 (4) The perfected interest of a lessor of fixtures has priority
14 over a conflicting interest of an encumbrancer or owner of the
15 real estate if:

16 (a) the lease is a purchase money lease, the conflicting
17 interest of the encumbrancer or owner arises before the goods
18 become fixtures, the interest of the lessor is perfected by a
19 fixture filing before the goods become fixtures or within 10 days
20 thereafter, and the lessee has an interest of record in the real
21 estate or is in possession of the real estate; or

22 (b) the interest of the lessor is perfected by a fixture filing
23 before the interest of the encumbrancer or owner is of record,
24 the lessor's interest has priority over any conflicting interest of
25 a predecessor in title of the encumbrancer or owner, and the
26 lessee has an interest of record in the real estate or is in
27 possession of the real estate.

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

31 (a) the fixtures are readily removable factory or office
32 machines, readily removable equipment that is not primarily used
33 or leased for use in the operation of the real estate, or readily
34 removable replacements of domestic appliances that are goods
35 subject to a consumer lease, and before the goods become
36 fixtures the lease contract is enforceable; or

37 (b) the conflicting interest is a lien on the real estate obtained
38 by legal or equitable proceedings after the lease contract is
39 enforceable; or

40 (c) the encumbrancer or owner has consented in writing to the
41 lease or has disclaimed an interest in the goods as fixtures; or

42 (d) the lessee has a right to remove the goods as against the
43 encumbrancer or owner. If the lessee's right to remove
44 terminates, the priority of the interest of the lessor continues for
45 a reasonable time.

46 (6) Notwithstanding subsection (4)(a) but otherwise subject to
47 subsections (4) and (5), the interest of a lessor of fixtures,
48 including the lessor's residual interest, is subordinate to the
49 conflicting interest of an encumbrancer of the real estate under a
50 construction mortgage recorded before the goods become fixtures
51 if the goods become fixtures before the completion of the
52 construction. To the extent given to refinance a construction
53 mortgage, the conflicting interest of an encumbrancer of the real
54 estate under a mortgage has this priority to the same extent as

1 the encumbrancer of the real estate under the construction
2 mortgage.

3 (7) In cases not within the preceding subsections, priority
4 between the interest of a lessor of fixtures, including the lessor's
5 residual interest, and the conflicting interest of an encumbrancer
6 or owner of the real estate who is not the lessee is determined by
7 the priority rules governing conflicting interests in real estate.

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

25 (9) Even though the lease agreement does not create a security
26 interest, the interest of a lessor of fixtures, including the lessor's
27 residual interest, is perfected by filing a financing statement as a
28 fixture filing for leased goods that are or are to become fixtures
29 in accordance with the relevant provisions of the chapter on
30 Secured Transactions (chapter 9).

31 **12A:2A-310. Lessor's and lessee's rights when goods become**
32 **accessions.**

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

35 (2) The interest of a lessor or a lessee under a lease contract
36 entered into before the goods became accessions is superior to all
37 interests in the whole except as stated in subsection (4).

38 (3) The interest of a lessor or a lessee under a lease contract
39 entered into at the time or after the goods became accessions is
40 superior to all subsequently acquired interests in the whole
41 except as stated in subsection (4) but is subordinate to interests
42 in the whole existing at the time the lease contract was made
43 unless the holders of the interests in the whole have in writing
44 consented to the lease or disclaimed an interest in the goods as
45 part of the whole.

46 (4) The interest of a lessor or a lessee under a lease contract
47 described in subsection (2) or (3) is subordinate to the interest of

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

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

1 (5) When under subsections (2) or (3) and (4) a lessor or a lessee
2 of accessions holds an interest that is superior to all interests in
3 the whole, the lessor or the lessee may (a) on default, expiration,
4 termination, or cancellation of the lease contract by the other
5 party but subject to the provisions of the lease contract and this
6 chapter, or (b) if necessary to enforce the lessor's or lessee's
7 other rights and remedies under this chapter, remove the goods
8 from the whole, free and clear of all interests in the whole. but
9 the lessor or lessee shall reimburse any holder of an interest in
10 the whole who is not the lessee and who has not otherwise agreed
11 for the cost of repair of any physical injury but not for any
12 diminution in value of the whole caused by the absence of the
13 goods removed or by any necessity for replacing them. A person
14 entitled to reimbursement may refuse permission to remove until
15 the party seeking removal gives adequate security for the
16 performance of this obligation.

17 12A:2A-311. Priority subject to subordination.

18 Nothing in this chapter prevents subordination by agreement by
19 any person entitled to priority.

20
21 **SUBCHAPTER 4. PERFORMANCE OF LEASE CONTRACT:**
22 **REPUDIATED, SUBSTITUTED AND EXCUSED**

23 12A:2A-401. Insecurity: adequate assurance of performance.

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

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

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

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

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

45 12A:2A-402. Anticipatory repudiation.

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

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

52 (2) make demand pursuant to 12A:2A-401 and await assurance
53 of future performance adequate under the circumstances of the
54 particular case; or

1 (3) resort to any right or remedy upon default under the lease
2 contract or this chapter, even though the aggrieved party has
3 notified the repudiating party that the aggrieved party would
4 await the repudiating party's performance and assurance and has
5 urged retraction. In addition, whether or not the aggrieved party
6 is pursuing one of the foregoing remedies, the aggrieved party
7 may suspend performance or, if the aggrieved party is the lessor,
8 proceed in accordance with the provisions of this chapter on the
9 lessor's right to identify goods to the lease contract
10 notwithstanding default or to salvage unfinished goods
11 (12A:2A-524).

12 **12A:2A-403. Retraction of anticipatory repudiation.**

13 (1) Until the repudiating party's next performance is due, the
14 repudiating party can retract the repudiation unless, since the
15 repudiation, the aggrieved party has cancelled the lease contract
16 or materially changed the aggrieved party's position or otherwise
17 indicated that the aggrieved party considers the repudiation final.

18 (2) Retraction may be by any method that clearly indicates to
19 the aggrieved party that the repudiating party intends to perform
20 under the lease contract and includes any assurance demanded
21 under 12A:2A-401.

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

25 **12A:2A-404. Substituted performance.**

26 (1) If without fault of the lessee, the lessor and the supplier,
27 the agreed berthing, loading, or unloading facilities fail or the
28 agreed type of carrier becomes unavailable or the agreed manner
29 of delivery otherwise becomes commercially impracticable, but a
30 commercially reasonable substitute is available, the substitute
31 performance must be tendered and accepted.

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

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

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

42 **12A:2A-405. Excused performance.**

43 Subject to 12A:2A-404 on substituted performance, the
44 following rules apply:

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

53 (2) If the causes mentioned in subsection (1) affect only part of
54 the lessor's or the supplier's capacity to perform, the lessor or

1 supplier shall allocate production and deliveries among the
2 lessor's or supplier's customers but at the lessor's or supplier's
3 option may include regular customers not then under contract for
4 sale or lease as well as the lessor's or supplier's own
5 requirements for further manufacture. The lessor or supplier
6 may so allocate in any manner that is fair and reasonable.

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

12 **12A:2A-406. Procedure on excused performance.**

13 (1) If the lessee receives notification of a material or
14 indefinite delay or an allocation justified under 12A:2A-405, the
15 lessee may by written notification to the lessor as to any goods
16 involved, and with respect to all of the goods if under an
17 installment lease contract the value of the whole lease contract
18 is substantially impaired (12A:2A-510):

19 (a) terminate the lease contract (12A:2A-505(2)); or

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

25 (2) If, after receipt of a notification from the lessor under
26 12A:2A-405, the lessee fails so to modify the lease agreement
27 within a reasonable time not exceeding 30 days, the lease
28 contract lapses with respect to any deliveries affected.

29 **12A:2A-407. Irrevocable promises: finance leases.**

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

34 (2) A promise that has become irrevocable and independent
35 under subsection (1):

36 (a) is effective and enforceable between the parties, and by or
37 against third parties including assignees of the parties, and

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

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

45
46 **SUBCHAPTER 5. DEFAULT.**

47 **A. IN GENERAL**

48 **12A:2A-501. Default: procedure.**

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

51 (2) If the lessor or the lessee is in default under the lease
52 contract, the party seeking enforcement has rights and remedies
53 as provided in this chapter and, except as limited by this chapter,
54 as provided in the lease agreement.

1 (3) If the lessor or the lessee is in default under the lease
2 contract, the party seeking enforcement may reduce the party's
3 claim to judgment, or otherwise enforce the lease contract by
4 self-help or any available judicial procedure or nonjudicial
5 procedure, including administrative proceeding, arbitration, or
6 the like, in accordance with this chapter.

7 (4) Except as otherwise provided in 12A:1-106(1) or this
8 chapter or the lease agreement, the rights and remedies referred
9 to in subsections (2) and (3) are cumulative.

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

16 **12A:2A-502. Notice after default.**

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

21 **12A:2A-503. Modification or impairment of rights and
22 remedies.**

23 (1) Except as otherwise provided in this chapter, the lease
24 agreement may include rights and remedies for default in
25 addition to or in substitution for those provided in this chapter
26 and may limit or alter the measure of damages recoverable under
27 this chapter.

28 (2) Resort to a remedy provided under this chapter or in the
29 lease agreement is optional unless the remedy is expressly agreed
30 to be exclusive. If circumstances cause an exclusive or limited
31 remedy to fail of its essential purpose, or provision for an
32 exclusive remedy is unconscionable, remedy may be had as
33 provided in this chapter.

34 (3) Consequential damages may be liquidated under
35 12A:2A-504, or may otherwise be limited, altered, or excluded
36 unless the limitation, alteration, or exclusion is unconscionable.
37 Limitation, alteration, or exclusion of consequential damages for
38 injury to the person in the case of consumer goods is prima facie
39 unconscionable but limitation, alteration, or exclusion of damages
40 where the loss is commercial is not prima facie unconscionable.

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

44 **12A:2A-504. Liquidation of damages.**

45 (1) Damages payable by either party for default, or any other
46 act or omission, including indemnity for loss or diminution of
47 anticipated tax benefits or loss or damage to lessor's residual
48 interest, may be liquidated in the lease agreement but only at an
49 amount or by a formula that is reasonable in light of the then
50 anticipated harm caused by the default or other act or omission.

51 (2) If the lease agreement provides for liquidation of damages,
52 and this provision does not comply with subsection (1), or this
53 provision is an exclusive or limited remedy that circumstances
54 cause to fail of its essential purpose, remedy may be had as

1 provided in this chapter.

2 (3) If the lessor justifiably withholds or stops delivery of goods
3 because of the lessee's default or insolvency (12A:2A-525 or
4 12A:2A-526), the lessee is entitled to restitution of any amount
5 by which the sum of the lessee's payments exceeds:

6 (a) the amount to which the lessor is entitled by virtue of
7 terms liquidating the lessor's damages in accordance with
8 subsection (1); or

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

13 (4) A lessee's right to restitution under subsection (3) is
14 subject to offset to the extent the lessor establishes:

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

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

19 12A:2A-505. Cancellation and termination and effect of
20 cancellation, termination, rescission, or fraud on rights and
21 remedies.

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

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

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

34 (4) Rights and remedies for material misrepresentation or
35 fraud include all rights and remedies available under this chapter
36 for default.

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

41 12A:2A-506. Statute of limitations.

42 (1) An action for default under a lease contract, including
43 breach of warranty or indemnity, shall be commenced within 4
44 years after the cause of action accrued. By the original lease
45 contract the parties may reduce the period of limitation to not
46 less than one year.

47 (2) A cause of action for default accrues when the act or
48 omission on which the default or breach of warranty is based is or
49 should have been discovered by the aggrieved party, or when the
50 default occurs, whichever is later. A cause of action for
51 indemnity accrues when the act or omission on which the claim
52 for indemnity is based is or should have been discovered by the
53 indemnified party, whichever is later.

54 (3) If an action commenced within the time limited by

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

8 (4) This section does not alter the law on tolling of the statute
9 of limitations and it does not apply to causes of action that have
10 accrued before this chapter becomes effective.

11 12A:2A-507. Proof of market rent: time and place.

12 (1) Damages based on market rent (12A:2A-519 or
13 12A:2A-528) are determined according to the rent for the use of
14 the goods concerned for a lease term identical to the remaining
15 lease term of the original lease agreement and prevailing at the
16 times specified in sections 12A:2A-519 and 12A:2A-528.

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

27 (3) Evidence of a relevant rent prevailing at a time or place or
28 for a lease term other than the one described in this chapter
29 offered by one party is not admissible unless and until that party
30 has given the other party notice the court finds sufficient to
31 prevent unfair surprise.

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

39 40 B. DEFAULT BY LESSOR

41 12A:2A-508. Lessee's remedies.

42 (1) If a lessor fails to deliver the goods in conformity to the
43 lease contract (12A:2A-509) or repudiates the lease contract
44 (12A:2A-402), or a lessee rightfully rejects the goods
45 (12A:2A-509) or justifiably revokes acceptance of the goods
46 (12A:2A-517), then with respect to any goods involved, and with
47 respect to all of the goods if under an installment lease contract
48 the value of the whole lease contract is substantially impaired
49 (12A:2A-510), the lessor is in default under the lease contract
50 and the lessee may:

51 (a) cancel the lease contract (12A:2A-506(1));

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

54 (c) cover and recover damages as to all goods affected

1 whether or not they have been identified to the lease contract
2 (sections 12A:2A-518 and 12A:2A-520), or recover damages for
3 nondelivery (sections 12A:2A-519 and 12A:2A-520);

4 (d) exercise any other rights or pursue any other remedies
5 provided in the lease contract.

6 (2) If a lessor fails to deliver the goods in conformity to the
7 lease contract or repudiates the lease contract, the lessee may
8 also:

9 (a) if the goods have been identified, recover them
10 (12A:2A-522); or

11 (b) in a proper case, obtain specific performance or replevy
12 the goods (12A:2A-521).

13 (3) If a lessor is otherwise in default under a lease contract,
14 the lessee may exercise the rights and pursue the remedies
15 provided in the lease contract, which may include a right to
16 cancel the lease, and in 12A:2A-519(3).

17 (4) If a lessor has breached a warranty, whether express or
18 implied, the lessee may recover damages (12A:2A-519(4)).

19 (5) On rightful rejection or justifiable revocation of
20 acceptance, a lessee has a security interest in goods in the
21 lessee's possession or control for any rent and security that has
22 been paid and any expenses reasonably incurred in their
23 inspection, receipt, transportation, and care and custody and may
24 hold those goods and dispose of them in good faith and in a
25 commercially reasonable manner, subject to 12A:2A-527(5).

26 (6) Subject to the provisions of 12A:2A-407, a lessee, on
27 notifying the lessor of the lessee's intention to do so, may deduct
28 all or any part of the damages resulting from any default under
29 the lease contract from any part of the rent still due under the
30 same lease contract.

31 12A:2A-509. Lessee's rights on improper delivery; rightful
32 rejection.

33 (1) Subject to the provisions of 12A:2A-510 on default in
34 installment lease contracts, if the goods or the tender or delivery
35 fail in any respect to conform to the lease contract, the lessee
36 may reject or accept the goods or accept any commercial unit or
37 units and reject the rest of the goods.

38 (2) Rejection of goods is ineffective unless it is within a
39 reasonable time after tender or delivery of the goods and the
40 lessee seasonably notifies the lessor.

41 12A:2A-510. Installment lease contracts: rejection and
42 default.

43 (1) Under an installment lease contract a lessee may reject
44 any delivery that is nonconforming if the nonconformity
45 substantially impairs the value of that delivery and cannot be
46 cured or the nonconformity is a defect in the required
4 documents; but if the nonconformity does not fall within
48 subsection (2) and the lessor or the supplier gives adequate
49 assurance of its cure, the lessee shall accept that delivery.

50 (2) Whenever nonconformity or default with respect to one or
51 more deliveries substantially impairs the value of the installment
52 lease contract as a whole there is a default with respect to the
53 whole. But, the aggrieved party reinstates the installment lease
54 contract as a whole if the aggrieved party accepts a

1 nonconforming delivery without seasonably notifying of
2 cancellation or brings an action with respect only to past
3 deliveries or demands performance as to future deliveries.

4 12A:2A-511. Merchant lessee's duties as to rightfully rejected
5 goods.

6 (1) Subject to any security interest of a lessee
7 (12A:2A-508(5)), if a lessor or a supplier has no agent or place of
8 business at the market of rejection, a merchant lessee, after
9 rejection of goods in the merchant lessee's possession or control,
10 shall follow any reasonable instructions received from the lessor
11 or the supplier with respect to the goods. In the absence of those
12 instructions, a merchant lessee shall make reasonable efforts to
13 sell, lease, or otherwise dispose of the goods for the lessor's
14 account if they threaten to decline in value speedily. Instructions
15 are not reasonable if on demand indemnity for expenses is not
16 forthcoming.

17 (2) If a merchant lessee (subsection (1)) or any other lessee
18 (12A:2A-512) disposes of goods, the lessee is entitled to
19 reimbursement either from the lessor or the supplier or out of the
20 proceeds for reasonable expenses of caring for and disposing of
21 the goods and, if the expenses include no disposition commission,
22 to such commission as is usual in the trade, or if there is none, to
23 a reasonable sum not exceeding 10 percent of the gross proceeds.

24 (3) In complying with this section or 12A:2A-512, the lessee is
25 held only to good faith. Good faith conduct hereunder is neither
26 acceptance or conversion or the basis of an action for damages.

27 (4) A purchaser who purchases in good faith from a lessee
28 pursuant to this section or 12A:2A-512 takes the goods free of
29 any rights of the lessor and the supplier even though the lessee
30 fails to comply with one or more of the requirements of this
31 chapter.

32 12A:2A-512. Lessee's duties as to rightfully rejected goods.

33 (1) Except as otherwise provided with respect to goods that
34 threaten to decline in value speedily (12A:2A-511) and subject to
35 any security interest of a lessee (12A:2A-508(5)):

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

40 (b) if the lessor or the supplier gives no instructions within a
41 reasonable time after notification of rejection, the lessee may
42 store the rejected goods for the lessor's or the supplier's account
43 or ship them to the lessor or the supplier or dispose of them for
44 the lessor's or the supplier's account with reimbursement in the
45 manner provided in 12A:2A-511; but

46 (c) the lessee has no further obligations with regard to goods
47 rightfully rejected.

48 (2) Action by the lessee pursuant to subsection (1) is not
49 acceptance or conversion.

50 12A:2A-513. Cure by lessor of improper tender or delivery;
51 replacement.

52 (1) If any tender or delivery by the lessor or the supplier is
53 rejected because nonconforming and the time for performance

1 has not yet expired, the lessor or the supplier may seasonably
2 notify the lessee of the lessor's or the supplier's intention to
3 cure and may then make a conforming delivery within the time
4 provided in the lease contract.

5 (2) If the lessee rejects a nonconforming tender that the lessor
6 or the supplier had reasonable grounds to believe would be
7 acceptable with or without money allowance, the lessor or the
8 supplier may have a further reasonable time to substitute a
9 conforming tender if the lessor or supplier seasonably notifies the
10 lessee.

11 12A:2A-514. Waiver of lessee's objections.

12 (1) In rejecting goods, a lessee's failure to state a particular
13 defect that is ascertainable by reasonable inspection precludes
14 the lessee from relying on the defect to justify rejection or to
15 establish default:

16 (a) if, stated seasonably, the lessor or the supplier could have
17 cured it (12A:2A-513); or

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

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

25 12A:2A-515. Acceptance of goods.

26 (1) Acceptance of goods occurs after the lessee has had a
27 reasonable opportunity to inspect the goods and

28 (a) the lessee signifies or acts with respect to the goods in a
29 manner that signifies to the lessor or the supplier that the goods
30 are conforming or that the lessee will take or retain them in spite
31 of their nonconformity; or

32 (b) the lessee fails to make an effective rejection of the goods
33 (12A:2A-509(2)).

34 (2) Acceptance of a part of any commercial unit is acceptance
35 of that entire unit.

36 12A:2A-516. Effect of acceptance of goods; notice of default;
37 burden of establishing default after acceptance; notice of claim
38 or litigation to person answerable over.

39 (1) A lessee shall pay rent for any goods accepted in
40 accordance with the lease contract, with due allowance for goods
41 rightfully rejected or not delivered.

42 (2) A lessee's acceptance of goods precludes rejection of the
43 goods accepted. In the case of a finance lease, if made with
44 knowledge of a nonconformity, acceptance cannot be revoked
45 because of it. In any other case, if made with knowledge of a
46 nonconformity, acceptance cannot be revoked because of it
47 unless the acceptance was on the reasonable assumption that the
48 nonconformity would be seasonably cured. Acceptance does not
49 of itself impair any other remedy provided by this chapter or the
50 lease agreement for nonconformity.

51 (3) If a tender has been accepted:

52 (a) within a reasonable time after the lessee discovers or
53 should have discovered any default, the lessee shall notify the
54 lessor and the supplier, if any, or be barred from any remedy

- 1 against the party not notified;
- 2 (b) except in the case of a consumer lease, within a reasonable
3 time after the lessee receives notice of litigation for
4 infringement or the like (12A:2A-211) the lessee shall notify the
5 lessor or be barred from any remedy over for liability established
6 by the litigation; and
- 7 (c) the burden is on the lessee to establish any default.
- 8 (4) If a lessee is sued for breach of a warranty or other
9 obligation for which a lessor or a supplier is answerable over the
10 following apply:
- 11 (a) The lessee may give the lessor or the supplier, or both,
12 written notice of the litigation. If the notice states that the
13 person notified may come in and defend and that if the person
14 notified does not do so that person will be bound in any action
15 against that person by the lessee by any determination of fact
16 common to the two litigations, then unless the person notified
17 after reasonable receipt of the notice does come in and defend
18 that person is so bound.
- 19 (b) The lessor or the supplier may demand in writing that the
20 lessee turn over control of the litigation including settlement if
21 the claim is one for infringement or the like (12A:2A-211) or else
22 be barred from any remedy over. If the demand states that the
23 lessor or the supplier agrees to bear all expense and to satisfy any
24 adverse judgment, then unless the lessee after reasonable receipt
25 of the demand does turn over control the lessee is so barred.
- 26 (5) Subsections (3) and (4) apply to any obligation of a lessee to
27 hold the lessor or the supplier harmless against infringement or
28 the like (12A:2A-211).
- 29 12A:2A-517. Revocation of acceptance of goods.
- 30 (1) A lessee may revoke acceptance of a lot or commercial
31 unit whose nonconformity substantially impairs its value to the
32 lessee if the lessee has accepted it:
- 33 (a) except in the case of a finance lease, on the reasonable
34 assumption that its nonconformity would be cured and it has not
35 been seasonably cured; or
- 36 (b) without discovery of the nonconformity if the lessee's
37 acceptance was reasonably induced either by the lessor's
38 assurances or, except in the case of a finance lease, by the
39 difficulty of discovery before acceptance.
- 40 (2) Except in the case of a finance lease that is not a consumer
41 lease, a lessee may revoke acceptance of a lot or commercial
42 unit if the lessor defaults under the lease contract and the
43 default substantially impairs the value of that lot or commercial
44 unit to the lessee.
- 45 (3) If the lease agreement so provides, the lessee may revoke
46 acceptance of a lot or commercial unit because of other defaults
47 by the lessor.
- 48 (4) Revocation of acceptance shall occur within a reasonable
49 time after the lessee discovers or should have discovered the
50 ground for it and before any substantial change in condition of
51 the goods which is not caused by the nonconformity. Revocation
52 is not effective until the lessee notifies the lessor.
- 53 (5) A lessee who so revokes has the same rights and duties with
54 regard to the goods involved as if the lessee had rejected them.

1 12A:2A-518. Cover; substitute goods.

2 (1) After a default by a lessor under the lease contract of the
3 type described in 12A:2A-508(1), or, if agreed, after other
4 default by the lessor, the lessee may cover by making any
5 purchase or lease of or contract to purchase or lease goods in
6 substitution for those due from the lessor.

7 (2) Except as otherwise provided with respect to damages
8 liquidated in the lease agreement (12A:2A-504) or otherwise
9 determined pursuant to agreement of the parties (sections
10 12A:1-102(3) and 12A:2A-503), if a lessee's cover is by a lease
11 agreement substantially similar to the original lease agreement
12 and the new lease agreement is made in good faith and in a
13 commercially reasonable manner, the lessee may recover from
14 the lessor as damages (i) the present value, as of the date of the
15 commencement of the term of the new lease agreement, of the
16 rent under the new lease agreement applicable to that period of
17 the new lease term which is comparable to the then remaining
18 term of the original lease agreement minus the present value as
19 of the same date of the total rent for the then remaining lease
20 term of the original lease agreement, and (ii) any incidental or
21 consequential damages, less expenses saved in consequence of the
22 lessor's default.

23 (3) If a lessee's cover is by lease agreement that for any
24 reason does not qualify for treatment under subsection (2), or is
25 by purchase or otherwise, the lessee may recover from the lessor
26 as if the lessee had elected not to cover and 12A:2A-519 governs.

27 12A:2A-519. Lessee's damages for non-delivery, repudiation,
28 default, and breach of warranty in regard to accepted goods.

29 (1) Except as otherwise provided with respect to damages
30 liquidated in the lease agreement (12A:2A-504) or otherwise
31 determined pursuant to agreement of the parties (sections
32 12A:1-102(3) and 12A:2A-503), if a lessee elects not to cover or a
33 lessee elects to cover and the cover is by lease agreement that
34 for any reason does not qualify for treatment under
35 12A:2A-518(2), or is by purchase or otherwise, the measure of
36 damages for non-delivery or repudiation by the lessor or for
37 rejection or revocation of acceptance by the lessee is the present
38 value, as of the date of the default, of the then market rent
39 minus the present value as of the same date of the original rent,
40 computed for the remaining lease term of the original lease
41 agreement, together with incidental and consequential damages,
42 less expenses saved in consequence of the lessor's default.

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

46 (3) Except as otherwise agreed, if the lessee has accepted
47 goods and given notification (12A:2A-516(3)), the measure of
48 damages for non-conforming tender or delivery or other default
49 by a lessor is the loss resulting in the ordinary course of events
50 from the lessor's default as determined in any manner that is
51 reasonable together with incidental and consequential damages,
52 less expenses saved in consequence of the lessor's default.

53 (4) Except as otherwise agreed, the measure of damages for
54 breach of warranty is the present value at the time and place of

1 acceptance of the difference between the value of the use of the
2 goods accepted and the value if they had been as warranted for
3 the lease term, unless special circumstances show proximate
4 damages of a different amount, together with incidental and
5 consequential damages, less expenses saved in consequence of the
6 lessor's default or breach of warranty.

7 **12A:2A-520. Lessee's incidental and consequential damages.**

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

15 (2) Consequential damages resulting from a lessor's default
16 include:

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

21 (b) injury to person or property proximately resulting from any
22 breach of warranty.

23 **12A:2A-521. Lessee's right to specific performance or**
24 **replevin.**

25 (1) Specific performance may be decreed if the goods are
26 unique or in other proper circumstances.

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

30 (3) A lessee has a right of replevin, detinue, sequestration,
31 claim and delivery, or the like for goods identified to the lease
32 contract if after reasonable effort the lessee is unable to effect
33 cover for those goods or the circumstances reasonably indicate
34 that the effort will be unavailing.

35 **12A:2A-522. Lessee's right to goods on lessor's insolvency.**

36 (1) Subject to subsection (2) and even though the goods have
37 not been shipped, a lessee who has paid a part or all of the rent
38 and security for goods identified to a lease contract (12A:2A-217)
39 on making and keeping good a tender of any unpaid portion of the
40 rent and security due under the lease contract may recover the
41 goods identified from the lessor if the lessor becomes insolvent
42 within 10 days after receipt of the first installment of rent and
43 security.

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

46 47 **C. DEFAULT BY LESSEE**

48 **12A:2A-523. Lessor's remedies.**

49 (1) If a lessee wrongfully rejects or revokes acceptance of
50 goods or fails to make a payment when due or repudiates with
51 respect to a part or the whole, then, with respect to any goods
52 involved, and with respect to all of the goods if under an
53 installment lease contract the value of the whole lease contract
54 is substantially impaired (12A:2A-510), the lessee is in default

1 under the lease contract and the lessor may:

2 (a) cancel the lease contract (12A:2A-505(1));

3 (b) proceed respecting goods not identified to the lease
4 contract (12A:2A-524);

5 (c) withhold delivery of the goods and take possession of goods
6 previously delivered (12A:2A-525);

7 (d) stop delivery of the goods by any bailee (12A:2A-526);

8 (e) dispose of the goods and recover damages (12A:2A-527), or
9 retain the goods and recover damages (12A:2A-528), or in a
10 proper case recover rent (12A:2A-529);

11 (f) exercise any other rights or pursue any other remedies
12 provided in the lease contract.

13 (2) If a lessor does not fully exercise a right or obtain a
14 remedy to which the lessor is entitled under subsection (1), the
15 lessor may recover the loss resulting in the ordinary course of
16 events from the lessee's default as determined in any reasonable
17 manner, together with incidental damages, less expenses saved in
18 consequence of the lessee's default.

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

24 (a) if the default substantially impairs the value of the lease
25 contract to the lessor, the lessor may exercise the rights and
26 pursue the remedies provided in subsections (1) or (2); or

27 (b) if the default does not substantially impair the value of the
28 lease contract to the lessor, the lessor may recover as provided in
29 subsection (2).

30 12A:2A-524. Lessor's right to identify goods to lease contract.

31 (1) After default by the lessee under the lease contract of the
32 type described in 12A:2A-523(1) or 12A:2A-523(3)(a) or, if
33 agreed, after other default by the lessee, the lessor may:

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

37 (b) dispose of goods (12A:2A-527(1)) that demonstrably have
38 been intended for the particular lease contract even though those
39 goods are unfinished.

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

47 12A:2A-525. Lessor's right to possession of goods.

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

50 (2) After a default by the lessee under the lease contract of
51 the type described in 12A:2A-523(1) or 12A:2A-523(3)(a) or, if
52 agreed, after other default by the lessee, the lessor has the right
53 to take possession of the goods. If the lease contract so provides,
54 the lessor may require the lessee to assemble the goods and make

1 them available to the lessor at a place to be designated by the
2 lessor which is reasonably convenient to both parties. Without
3 removal, the lessor may render unusable any goods employed in
4 trade or business, and may dispose of goods on the lessee's
5 premises (12A:2A-527).

6 (3) The lessor may proceed under subsection (2) without
7 judicial process if it can be done without breach of the peace or
8 the lessor may proceed by action.

9 12A:2A-526. Lessor's stoppage of delivery in transit or
10 otherwise.

11 (1) A lessor may stop delivery of goods in the possession of a
12 carrier or other bailee if the lessor discovers the lessee to be
13 insolvent and may stop delivery of carload, truckload, planeload,
14 or larger shipments of express or freight if the lessee repudiates
15 or fails to make a payment due before delivery, whether for rent,
16 security or otherwise under the lease contract, or for any other
17 reason the lessor has a right to withhold or take possession of the
18 goods.

19 (2) In pursuing its remedies under subsection (1), the lessor
20 may stop delivery until

21 (a) receipt of the goods by the lessee;

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

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

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

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

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

34 12A:2A-527. Lessor's rights to dispose of goods.

35 (1) After a default by a lessee under the lease contract of the
36 type described in 12A:2A-523(1) or 12A:2A-523(3)(a) or after the
37 lessor refuses to deliver or takes possession of goods (12A:2A-525
38 or 12A:2A-526), or, if agreed, after other default by a lessee, the
39 lessor may dispose of the goods concerned or the undelivered
40 balance thereof by lease, sale or otherwise.

41 (2) Except as otherwise provided with respect to damages
42 liquidated in the lease agreement (12A:2A-504) or otherwise
43 determined pursuant to agreement of the parties (sections
44 12A:1-102(3) and 12A:2A-503), if the disposition is by lease
45 agreement substantially similar to the original lease agreement
46 and the new lease agreement is made in good faith and in a
47 commercially reasonable manner, the lessor may recover from
48 the lessee as damages (i) accrued and unpaid rent as of the date
49 of the commencement of the term of the new lease agreement,
50 (ii) the present value, as of the same date, of the total rent for
51 the then remaining lease term of the original lease agreement
52 minus the present value, as of the same date, of the rent under
53 the new lease agreement applicable to that period of the new

1 lease term which is comparable to the then remaining term of the
2 original lease agreement, and (iii) any incidental damages allowed
3 under 12A:2A-530, less expenses saved in consequence of the
4 lessee's default.

5 (3) If the lessor's disposition is by lease agreement that for
6 any reason does not qualify for treatment under subsection (2), or
7 is by sale or otherwise, the lessor may recover from the lessee as
8 if the lessor had elected not to dispose of the goods and
9 12A:2A-528 governs.

10 (4) A subsequent buyer or lessee who buys or leases from the
11 lessor in good faith for value as a result of a disposition under
12 this section takes the goods free of the original lease contract
13 and any rights of the original lessee even though the lessor fails
14 to comply with one or more of the requirements of this chapter.

15 (5) The lessor is not accountable to the lessee for any profit
16 made on any disposition. A lessee who has rightfully rejected or
17 justifiably revoked acceptance shall account to the lessor for any
18 excess over the amount of the lessee's security interest
19 (12A:2A-508(5)).

20 12A:2A-528. Lessor's damages for nonacceptance, failure to
21 pay, repudiation, or other default.

22 (1) Except as otherwise provided with respect to damages
23 liquidated in the lease agreement (12A:2A-504) or otherwise
24 determined pursuant to agreement of the parties (sections
25 12A:1-102(3) and 12A:2A-503), if a lessor elects to retain the
26 goods or a lessor elects to dispose of the goods and the disposition
27 is by lease agreement that for any reason does not qualify for
28 treatment under 12A:2A-527(2), or is by sale or otherwise, the
29 lessor may recover from the lessee as damages for a default of
30 the type described in 12A:2A-523(1) or 12A:2A-523(3)(a), or, if
31 agreed, for other default of the lessee, (i) accrued and unpaid
32 rent as of the date of default if the lessee has never taken
33 possession of the goods, or, if the lessee has taken possession of
34 the goods, as of the date the lessor repossesses the goods or an
35 earlier date on which the lessee makes a tender of the goods to
36 the lessor, (ii) the present value as of the date determined under
37 clause (i) of the total rent for the then remaining lease term of
38 the original lease agreement minus the present value as of the
39 same date of the market rent at the place where the goods are
40 located computed for the same lease term, and (iii) any incidental
41 damages allowed under 12A:2A-530, less expenses saved in
42 consequence of the lessee's default.

43 (2) If the measure of damages provided in subsection (1) is
44 inadequate to put a lessor in as good a position as performance
45 would have, the measure of damages is the present value of the
46 profit, including reasonable overhead, the lessor would have made
47 from full performance by the lessee, together with any incidental
48 damages allowed under 12A:2A-530, due allowance for costs
49 reasonably incurred and due credit for payments or proceeds of
50 disposition.

51 12A:2A-529. Lessor's action for the rent.

52 (1) After default by the lessee under the lease contract of the
53 type described in 12A:2A-523(1) or 12A:2A-523(3)(a) or, if
54 agreed, after other default by the lessee, if the lessor complies

1 with subsection (2), the lessor may recover from the lessee as
2 damages:

3 (a) for goods accepted by the lessee and not repossessed by or
4 tendered to the lessor, and for conforming goods lost or damaged
5 within a commercially reasonable time after risk of loss passes to
6 the lessee (12A:2A-219), (i) accrued and unpaid rent as of the
7 date of entry of judgment in favor of the lessor, (ii) the present
8 value as of the same date of the rent for the then remaining lease
9 term of the lease agreement, and (iii) any incidental damages
10 allowed under 12A:2A-530, less expenses saved in consequence of
11 the lessee's default; and

12 (b) for goods identified to the lease contract if the lessor is
13 unable after reasonable effort to dispose of them at a reasonable
14 price or the circumstances reasonably indicate that effort will be
15 unavailing, (i) accrued and unpaid rent as of the date of entry of
16 judgment in favor of the lessor, (ii) the present value as of the
17 same date of the rent for the then remaining lease term of the
18 lease agreement, and (iii) any incidental damages allowed under
19 12A:2A-530, less expenses saved in consequence of the lessee's
20 default.

21 (2) Except as provided in subsection (3), the lessor shall hold
22 for the lessee for the remaining lease term of the lease
23 agreement any goods that have been identified to the lease
24 contract and are in the lessor's control.

25 (3) The lessor may dispose of the goods at any time before
26 collection of the judgment for damages obtained pursuant to
27 subsection (1). If the disposition is before the end of the
28 remaining lease term of the lease agreement, the lessor's
29 recovery against the lessee for damages is governed by
30 12A:2A-527 or 12A:2A-528, and the lessor will cause an
31 appropriate credit to be provided against a judgment for damages
32 to the extent that the amount of the judgment exceeds the
33 recovery available pursuant to 12A:2A-527 or 12A:2A-528.

34 (4) Payment of the judgment for damages obtained pursuant to
35 subsection (1) entitles the lessee to the use and possession of the
36 goods not then disposed of for the remaining lease term of and in
37 accordance with the lease agreement.

38 (5) After default by the lessee under the lease contract of the
39 type described in 12A:2A-523(1) or 12A:2A-523(3)(a) or, if
40 agreed, after other default by the lessee, a lessor who is held not
41 entitled to rent under this section must nevertheless be awarded
42 damages for nonacceptance under 12A:2A-527 or 12A:2A-528.

43 12A:2A-530. Lessor's incidental damages.

44 Incidental damages to an aggrieved lessor include any
45 commercially reasonable charges, expenses, or commissions
46 incurred in stopping delivery, in the transportation, care and
47 custody of goods after the lessee's default, in connection with
48 return or disposition of the goods, or otherwise resulting from the
49 default.

50 12A:2A-531. Standing to sue third parties for injury to goods.

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

1 action against the third party if the lessee:

- 2 (i) has a security interest in the goods;
 3 (ii) has an insurable interest in the goods; or
 4 (iii) bears the risk of loss under the lease contract or
 5 has since the injury assumed that risk as against the lessor
 6 and the goods have been converted or destroyed.

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

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

15 12A:2A-532. Lessor's rights to residual interest.

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

21
 22 2.

23 TITLE 12A
 24 CHAPTER 4A
 25 FUNDS TRANSFERS

26
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37
 38 SUBCHAPTER 2. ISSUE AND ACCEPTANCE OF PAYMENT
 39 ORDER

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49 12A:4A-208. Misdescription of intermediary bank or
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51 12A:4A-209. Acceptance of payment order.

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53 12A:4A-211. Cancellation and amendment of payment order.

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11
12 **SUBCHAPTER 4. PAYMENT**

- 13 12A:4A-401. Payment date.
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15 12A:4A-403. Payment by sender to receiving bank.
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18 12A:4A-405. Payment by beneficiary's bank to beneficiary.
19 12A:4A-406. Payment by originator to beneficiary; discharge of
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21
22 **SUBCHAPTER 5. MISCELLANEOUS PROVISIONS**

- 23 12A:4A-501. Variation by agreement and effect of funds-
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25 12A:4A-502. Creditor process served on receiving bank; set-off
26 by beneficiary's bank.
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28 transfer.
29 12A:4A-504. Order in which items and payment orders may be
30 charged to account; order of withdrawals from
31 account.
32 12A:4A-505. Preclusion of objection to debit of customer's
33 account.
34 12A:4A-506. Rate of interest.
35 12A:4A-507. Choice of law.

36
37 **SUBCHAPTER 1. SUBJECT MATTER AND DEFINITIONS**

38 12A:4A-101. Short title.

39 This chapter shall be known and may be cited as the "Uniform
40 Commercial Code--Funds Transfers."

41 12A:4A-102. Subject matter.

42 Except as otherwise provided in section 12A:4A-108, this
43 chapter applies to funds transfers defined in section 12A:4A-104.

44 12A:4A-103. Payment order - definitions.

45 (1) In this chapter:

46 (a) "Payment order" means an instruction of a sender to a
47 receiving bank, transmitted orally, electronically, or in writing,
48 to pay, or to cause another bank to pay, a fixed or determinable
49 amount of money to a beneficiary if:

50 (i) the instruction does not state a condition to payment to
51 the beneficiary other than time of payment,

52 (ii) the receiving bank is to be reimbursed by debiting an
53 account of, or otherwise receiving payment from, the sender, and

54 (iii) the instruction is transmitted by the sender directly to

1 the receiving bank or to an agent, funds-transfer system, or
2 communication system for transmittal to the receiving bank.

3 (b) "Beneficiary" means the person to be paid by the
4 beneficiary's bank.

5 (c) "Beneficiary's bank" means the bank identified in a
6 payment order in which an account of the beneficiary is to be
7 credited pursuant to the order or which otherwise is to make
8 payment to the beneficiary if the order does not provide for
9 payment to an account.

10 (d) "Receiving bank" means the bank to which the sender's
11 instruction is addressed.

12 (e) "Sender" means the person giving the instruction to the
13 receiving bank.

14 (2) If an instruction complying with subsection (1)(a) is to make
15 more than one payment to a beneficiary, the instruction is a
16 separate payment order with respect to each payment.

17 (3) A payment order is issued when it is sent to the receiving
18 bank.

19 **12A:4A-104. Funds transfer - definitions.**

20 **In this chapter:**

21 (1) "Funds transfer" means the series of transactions, beginning
22 with the originator's payment order, made for the purpose of
23 making payment to the beneficiary of the order. The term
24 includes any payment order issued by the originator's bank or an
25 intermediary bank intended to carry out the originator's payment
26 order. A funds transfer is completed by acceptance by the
27 beneficiary's bank of a payment order for the benefit of the
28 beneficiary of the originator's payment order.

29 (2) "Intermediary bank" means a receiving bank other than the
30 originator's bank or the beneficiary's bank.

31 (3) "Originator" means the sender of the first payment order in
32 a funds transfer.

33 (4) "Originator's bank" means (i) the receiving bank to which
34 the payment order of the originator is issued if the originator is
35 not a bank, or (ii) the originator if the originator is a bank.

36 **12A:4A-105. Other definitions.**

37 **(1) In this chapter:**

38 (a) "Authorized account" means a deposit account of a
39 customer in a bank designated by the customer as a source of
40 payment of payment orders issued by the customer to the bank.
41 If a customer does not so designate an account, any account of
42 the customer is an authorized account if payment of a payment
43 order from that account is not inconsistent with a restriction on
44 the use of that account.

45 (b) "Bank" means a person engaged in the business of banking
46 and includes a savings bank, savings and loan association, credit
47 union, and trust company. A branch or separate office of a bank
48 is a separate bank for purposes of this chapter.

49 (c) "Customer" means a person, including a bank, having an
50 account with a bank or from whom a bank has agreed to receive
51 payment orders.

52 (d) "Funds-transfer business day" of a receiving bank means
53 the part of a day during which the receiving bank is open for the
54 receipt, processing, and transmittal of payment orders and

1 cancellations and amendments of payment orders.

2 (e) "Funds-transfer system" means a wire transfer network,
3 automated clearing house, or other communication system of a
4 clearing house or other association of banks through which a
5 payment order by a bank may be transmitted to the bank to which
6 the order is addressed.

7 (f) "Good faith" means honesty in fact and the observance of
8 reasonable commercial standards of fair dealing.

9 (g) "Prove" with respect to a fact means to meet the burden of
10 establishing the fact (section 12A:1-201(8)).

11 (2) Other definitions applying to this chapter and the sections
12 in which they appear are:

13	"Acceptance"	Section 12A:4A-209
14	"Beneficiary"	Section 12A:4A-103
15	"Beneficiary's bank"	Section 12A:4A-103
16	"Executed"	Section 12A:4A-301
17	"Execution date"	Section 12ij:4A-301
18	"Funds transfer"	Section 12A:4A-104
19	"Funds-transfer system rule"	Section 12A:4A-501
20	"Intermediary bank"	Section 12A:4A-104
21	"Originator"	Section 12A:4A-104
22	"Originator's bank"	Section 12A:4A-104
23	"Payment by beneficiary's 24 bank to beneficiary"	Section 12A:4A-405
25	"Payment by originator to 26 beneficiary"	Section 12A:4A-406
27	"Payment by sender 28 to receiving bank"	Section 12A:4A-403
29	"Payment date"	Section 12A:4A-401
30	"Payment order"	Section 12A:4A-103
31	"Receiving bank"	Section 12A:4A-103
32	"Security procedure"	Section 12A:4A-201
33	"Sender"	Section 12A:4A-103

34 (3) The following definitions in chapter 4 apply to
35 this chapter:

36	"Clearing house"	Section 12A:4-104
37	"Item"	Section 12A:4-104
38	"Suspends payments"	Section 12A:4-104

39 (4) In addition, chapter 1 contains general definitions and
40 principles of construction and interpretation applicable
41 throughout this chapter.

42 12A:4A-106. Time payment order is received.

43 (1) The time of receipt of a payment order or communication
44 cancelling or amending a payment order is determined by the
45 rules applicable to receipt of a notice stated in section
46 12A:1-201(27). A receiving bank may fix a cut-off time or times
47 on a funds-transfer business day for the receipt and processing of
48 payment orders and communications cancelling or amending
49 payment orders. Different cut-off times may apply to payment
50 orders, cancellations, or amendments, or to different categories
51 of payment orders, cancellations, or amendments. A cut-off
52 time may apply to senders generally or different cut-off times
53 may apply to different senders or categories of payment orders.
54 If a payment order or communication cancelling or amending a
55 payment order is received after the close of a funds-transfer

1 business day or after the appropriate cut-off time on a
2 funds-transfer business day, the receiving bank may treat the
3 payment order or communication as received at the opening of
4 the next funds-transfer business day.

5 (2) If this chapter refers to an execution date or payment date
6 or states a day on which a receiving bank is required to take
7 action, and the date or day does not fall on a funds-transfer
8 business day, the next day that is a funds-transfer business day is
9 treated as the date or day stated, unless the contrary is stated in
10 this chapter.

11 12A:4A-107. Federal Reserve regulations and operating
12 circulars.

13 Regulations of the Board of Governors of the Federal Reserve
14 System and operating circulars of the Federal Reserve Banks
15 supersede any inconsistent provision of this chapter to the extent
16 of the inconsistency.

17 12A:4A-108. Exclusion of consumer transactions governed by
18 federal law.

19 This chapter does not apply to a funds transfer any part of
20 which is governed by the Electronic Fund Transfer Act of 1978
21 (Title XX, Pub. Law 95-630, 92 Stat. 3728, 15 U.S.C. §1693 et
22 seq.) as amended from time to time.

23 24 SUBCHAPTER 2. ISSUE AND ACCEPTANCE OF PAYMENT 25 ORDER

26 12A:4A-201. Security procedure.

27 "Security procedure" means a procedure established by
28 agreement of a customer and a receiving bank for the purpose of
29 (i) verifying that a payment order or communication amending or
30 cancelling a payment order is that of the customer, or (ii)
31 detecting error in the transmission or the content of the payment
32 order or communication. A security procedure may require the
33 use of algorithms or other codes, identifying words or numbers,
34 encryption, callback procedures, or similar security devices.
35 Comparison of a signature on a payment order or communication
36 with an authorized specimen signature of the customer is not by
37 itself a security procedure.

38 12A:4A-202. Authorized and verified payment orders.

39 (1) A payment order received by the receiving bank is the
40 authorized order of the person identified as sender if that person
41 authorizes the order or is otherwise bound by it under the law of
42 agency.

43 (2) If a bank and its customer have agreed that the
44 authenticity of payment orders issued to the bank in the name of
45 the customer as sender will be verified pursuant to a security
46 procedure, a payment order received by the receiving bank is
47 effective as the order of the customer, whether or not
48 authorized, if (i) the security procedure is a commercially
49 reasonable method of providing security against unauthorized
50 payment orders, and (ii) the bank proves that it accepted the
51 payment order in good faith and in compliance with the security
52 procedure and any written agreement or instruction of the
53 customer restricting acceptance of payment orders issued in the
54 name of the customer. The bank is not required to follow an

1 instruction that violates a written agreement with the customer
2 or notice of which is not received at a time and in a manner
3 affording the bank a reasonable opportunity to act on it before
4 the payment order is accepted.

5 (3) Commercial reasonableness of a security procedure is a
6 question of law to be determined by considering the wishes of the
7 customer expressed to the bank, the circumstances of the
8 customer known to the bank, including the size, type, and
9 frequency of payment orders normally issued by the customer to
10 the bank, alternative security procedures offered to the
11 customer, and security procedures in general use by customers
12 and receiving banks similarly situated. A security procedure is
13 deemed to be commercially reasonable if (i) the security
14 procedure was chosen by the customer after the bank offered,
15 and the customer refused, a security procedure that was
16 commercially reasonable for that customer, and (ii) the customer
17 expressly agreed in writing to be bound by any payment order,
18 whether or not authorized, issued in its name and accepted by the
19 bank in compliance with the security procedure chosen by the
20 customer.

21 (4) The term "sender" in this chapter includes the customer in
22 whose name a payment order is issued if the order is the
23 authorized order of the customer under subsection (1), or it is
24 effective as the order of the customer under subsection (2).

25 (5) This section applies to amendments and cancellations of
26 payment orders to the same extent it applies to payment orders.

27 (6) Except as provided in this section and in section
28 12A:4A-203(1)(a), rights and obligations arising under this section
29 or section 12A:4A-203 may not be varied by agreement.

30 12A:4A-203. Unenforceability of certain verified payment
31 orders.

32 (1) If an accepted payment order is not, under section
33 12A:4A-202(1), an authorized order of a customer identified as
34 sender, but is effective as an order of the customer pursuant to
35 section 12A:4A-202(2), the following rules apply:

36 (a) By express written agreement, the receiving bank may
37 limit the extent to which it is entitled to enforce or retain
38 payment of the payment order.

39 (b) The receiving bank is not entitled to enforce or retain
40 payment of the payment order if the customer proves that the
41 order was not caused, directly or indirectly, by a person (i)
42 entrusted at any time with duties to act for the customer with
43 respect to payment orders or the security procedure, or (ii) who
44 obtained access to transmitting facilities of the customer or who
45 obtained, from a source controlled by the customer and without
46 authority of the receiving bank, information facilitating breach
47 of the security procedure, regardless of how the information was
48 obtained or whether the customer was at fault. Information
49 includes any access device, computer software, or the like.

50 (2) This section applies to amendments of payment orders to
51 the same extent it applies to payment orders.

52 12A:4A-204. Refund of payment and duty of customer to
53 report with respect to unauthorized payment order.

54 (1) If a receiving bank accepts a payment order issued in the

1 name of its customer as sender which is (i) not authorized and not
2 effective as the order of the customer under section 12A:4A-202,
3 or (ii) not enforceable, in whole or in part, against the customer
4 under section 12A:4A-203, the bank shall refund any payment of
5 the payment order received from the customer to the extent the
6 bank is not entitled to enforce payment and shall pay interest on
7 the refundable amount calculated from the date the bank
8 received payment to the date of the refund. However, the
9 customer is not entitled to interest from the bank on the amount
10 to be refunded if the customer fails to exercise ordinary care to
11 determine that the order was not authorized by the customer and
12 to notify the bank of the relevant facts within a reasonable time
13 not exceeding 90 days after the date the customer received
14 notification from the bank that the order was accepted or that
15 the customer's account was debited with respect to the order.
16 The bank is not entitled to any recovery from the customer on
17 account of a failure by the customer to give notification as
18 stated in this section.

19 (2) Reasonable time under subsection (1) may be fixed by
20 agreement as stated in section 12A:1-204(1), but the obligation of
21 a receiving bank to refund payment as stated in subsection (1)
22 may not otherwise be varied by agreement.

23 12A:4A-205. Erroneous payment orders.

24 (1) If an accepted payment order was transmitted pursuant to a
25 security procedure for the detection of error and the payment
26 order (i) erroneously instructed payment to a beneficiary not
27 intended by the sender, (ii) erroneously instructed payment in an
28 amount greater than the amount intended by the sender, or (iii)
29 was an erroneously transmitted duplicate of a payment order
30 previously sent by the sender, the following rules apply:

31 (a) If the sender proves that the sender or a person acting on
32 behalf of the sender pursuant to section 12A:4A-206 complied
33 with the security procedure and that the error would have been
34 detected if the receiving bank had also complied, the sender is
35 not obliged to pay the order to the extent stated in paragraphs (b)
36 and (c).

37 (b) If the funds transfer is completed on the basis of an
38 erroneous payment order described in clause (i) or (iii) of
39 subsection (1), the sender is not obliged to pay the order and the
40 receiving bank is entitled to recover from the beneficiary any
41 amount paid to the beneficiary to the extent allowed by the law
42 governing mistake and restitution.

43 (c) If the funds transfer is completed on the basis of a payment
44 order described in clause (ii) of subsection (1), the sender is not
45 obliged to pay the order to the extent the amount received by the
46 beneficiary is greater than the amount intended by the sender. In
47 that case, the receiving bank is entitled to recover from the
48 beneficiary the excess amount received to the extent allowed by
49 the law governing mistake and restitution.

50 (2) If (i) the sender of an erroneous payment order described in
51 subsection (1) is not obliged to pay all or part of the order, and
52 (ii) the sender receives notification from the receiving bank that
53 the order was accepted by the bank or that the sender's account
54 was debited with respect to the order, the sender has a duty to

1 exercise ordinary care, on the basis of information available to
2 the sender, to discover the error with respect to the order and to
3 advise the bank of the relevant facts within a reasonable time,
4 not exceeding 90 days, after the bank's notification was received
5 by the sender. If the bank proves that the sender failed to
6 perform that duty, the sender is liable to the bank for the loss the
7 bank proves it incurred as a result of the failure, but the liability
8 of the sender may not exceed the amount of the sender's order.

9 (3) This section applies to amendments to payment orders to
10 the same extent it applies to payment orders.

11 12A:4A-206. Transmission of payment order through
12 funds-transfer or other communication system.

13 (1) If a payment order addressed to a receiving bank is
14 transmitted to a funds-transfer system or other third-party
15 communication system for transmittal to the bank, the system is
16 deemed to be an agent of the sender for the purpose of
17 transmitting the payment order to the bank. If there is a
18 discrepancy between the terms of the payment order transmitted
19 to the system and the terms of the payment order transmitted by
20 the system to the bank, the terms of the payment order of the
21 sender are those transmitted by the system. This section does
22 not apply to a funds-transfer system of the Federal Reserve
23 Banks.

24 (2) This section applies to cancellations and amendments of
25 payment orders to the same extent it applies to payment orders.

26 12A:4A-207. Misdescription of beneficiary.

27 (1) Subject to subsection (2), if, in a payment order received by
28 the beneficiary's bank, the name, bank account number, or other
29 identification of the beneficiary refers to a nonexistent or
30 unidentifiable person or account, no person has rights as a
31 beneficiary of the order and acceptance of the order cannot
32 occur.

33 (2) If a payment order received by the beneficiary's bank
34 identifies the beneficiary both by name and by an identifying or
35 bank account number and the name and number identify different
36 persons, the following rules apply:

37 (a) Except as otherwise provided in subsection (3), if the
38 beneficiary's bank does not know that the name and number refer
39 to different persons, it may rely on the number as the proper
40 identification of the beneficiary of the order. The beneficiary's
41 bank need not determine whether the name and number refer to
42 the same person.

43 (b) If the beneficiary's bank pays the person identified by name
44 or knows that the name and number identify different persons, no
45 person has rights as beneficiary except the person paid by the
46 beneficiary's bank if that person was entitled to receive payment
47 from the originator of the funds transfer. If no person has rights
48 as beneficiary, acceptance of the order cannot occur.

49 (3) If (i) a payment order described in subsection (2) is
50 accepted, (ii) the originator's payment order described the
51 beneficiary inconsistently by name and number, and (iii) the
52 beneficiary's bank pays the person identified by number as
53 permitted by subsection (2)(a), the following rules apply:

54 (a) If the originator is a bank, the originator is obliged to pay

1 its order.

2 (b) If the originator is not a bank and proves that the person
3 identified by number was not entitled to receive payment from
4 the originator, the originator is not obliged to pay its order unless
5 the originator's bank proves that the originator, before
6 acceptance of the originator's order, had notice that payment of
7 a payment order issued by the originator might be made by the
8 beneficiary's bank on the basis of an identifying or bank account
9 number even if it identifies a person different from the named
10 beneficiary. Proof of notice may be made by any admissible
11 evidence. The originator's bank satisfies the burden of proof if it
12 proves that the originator, before the payment order was
13 accepted, signed a writing stating the information to which the
14 notice relates.

15 (4) In a case governed by subsection (2)(a), if the beneficiary's
16 bank rightfully pays the person identified by number and that
17 person was not entitled to receive payment from the originator,
18 the amount paid may be recovered from that person to the extent
19 allowed by the law governing mistake and restitution as follows:

20 (a) If the originator is obliged to pay its payment order as
21 stated in subsection (3), the originator has the right to recover.

22 (b) If the originator is not a bank and is not obliged to pay its
23 payment order, the originator's bank has the right to recover.

24 12A:4A-208. Misdescription of intermediary bank or
25 beneficiary's bank.

26 (1) This subsection applies to a payment order identifying an
27 intermediary bank or the beneficiary's bank only by an
28 identifying number.

29 (a) The receiving bank may rely on the number as the proper
30 identification of the intermediary or beneficiary's bank and need
31 not determine whether the number identifies a bank.

32 (b) The sender is obliged to compensate the receiving bank for
33 any loss and expenses incurred by the receiving bank as a result
34 of its reliance on the number in executing or attempting to
35 execute the order.

36 (2) This subsection applies to a payment order identifying an
37 intermediary bank or the beneficiary's bank both by name and an
38 identifying number if the name and number identify different
39 persons.

40 (a) If the sender is a bank, the receiving bank may rely on the
41 number as the proper identification of the intermediary or
42 beneficiary's bank if the receiving bank, when it executes the
43 sender's order, does not know that the name and number identify
44 different persons. The receiving bank need not determine
45 whether the name and number refer to the same person or
46 whether the number refers to a bank. The sender is obliged to
47 compensate the receiving bank for any loss and expenses incurred
48 by the receiving bank as a result of its reliance on the number in
49 executing or attempting to execute the order.

50 (b) If the sender is not a bank and the receiving bank proves
51 that the sender, before the payment order was accepted, had
52 notice that the receiving bank might rely on the number as the
53 proper identification of the intermediary or beneficiary's bank
54 even if it identifies a person different from the bank identified by

1 name, the rights and obligations of the sender and the receiving
2 bank are governed by subsection (2)(a), as though the sender were
3 a bank. Proof of notice may be made by any admissible
4 evidence. The receiving bank satisfies the burden of proof if it
5 proves that the sender, before the payment order was accepted,
6 signed a writing stating the information to which the notice
7 relates.

8 (c) Regardless of whether the sender is a bank, the receiving
9 bank may rely on the name as the proper identification of the
10 intermediary or beneficiary's bank if the receiving bank, at the
11 time it executes the sender's order, does not know that the name
12 and number identify different persons. The receiving bank need
13 not determine whether the name and number refer to the same
14 person.

15 (d) If the receiving bank knows that the name and number
16 identify different persons, reliance on either the name or the
17 number in executing the sender's payment order is a breach of
18 the obligation stated in section 12A:4A-302(1)(a).

19 12A:4A-209. Acceptance of payment order.

20 (1) Subject to subsection (4), a receiving bank other than the
21 beneficiary's bank accepts a payment order when it executes the
22 order.

23 (2) Subject to subsections (3) and (4), a beneficiary's bank
24 accepts a payment order at the earliest of the following times:

25 (a) when the bank (i) pays the beneficiary as stated in section
26 12A:4A-405(1) or 12A:4A-405(2), or (ii) notifies the beneficiary
27 of receipt of the order or that the account of the beneficiary has
28 been credited with respect to the order unless the notice
29 indicates that the bank is rejecting the order or that funds with
30 respect to the order may not be withdrawn or used until receipt
31 of payment from the sender of the order;

32 (b) when the bank receives payment of the entire amount of the
33 sender's order pursuant to section 12A:4A-403(1)(a) or
34 12A:4A-403(1)(b); or

35 (c) the opening of the next funds-transfer business day of the
36 bank following the payment date of the order if, at that time, the
37 amount of the sender's order is fully covered by a withdrawable
38 credit balance in an authorized account of the sender or the bank
39 has otherwise received full payment from the sender, unless the
40 order was rejected before that time or is rejected within (i) one
41 hour after that time, or (ii) one hour after the opening of the next
42 business day of the sender following the payment date if that
43 time is later. If notice of rejection is received by the sender
44 after the payment date and the authorized account of the sender
45 does not bear interest, the bank is obliged to pay interest to the
46 sender on the amount of the order for the number of days
47 elapsing after the payment date to the day the sender receives
48 notice or learns that the order was not accepted, counting that
49 day as an elapsed day. If the withdrawable credit balance during
50 that period falls below the amount of the order, the amount of
51 interest payable is reduced accordingly.

52 (3) Acceptance of a payment order cannot occur before the
53 order is received by the receiving bank. Acceptance does not
54 occur under subsection (2)(b) or (2)(c) if the beneficiary of the

1 payment order does not have an account with the receiving bank,
2 the account has been closed, or the receiving bank is not
3 permitted by law to receive credits for the beneficiary's account.

4 (4) A payment order issued to the originator's bank cannot be
5 accepted until the payment date if the bank is the beneficiary's
6 bank, or the execution date if the bank is not the beneficiary's
7 bank. If the originator's bank executes the originator's payment
8 order before the execution date or pays the beneficiary of the
9 originator's payment order before the payment date and the
10 payment order is subsequently canceled pursuant to section
11 12A:4A-211(2), the bank may recover from the beneficiary any
12 payment received to the extent allowed by the law governing
13 mistake and restitution.

14 12A:4A-210. Rejection of payment order.

15 (1) A payment order is rejected by the receiving bank by a
16 notice of rejection transmitted to the sender orally,
17 electronically, or in writing. A notice of rejection need not use
18 any particular words and is sufficient if it indicates that the
19 receiving bank is rejecting the order or will not execute or pay
20 the order. Rejection is effective when the notice is given if
21 transmission is by a means that is reasonable in the
22 circumstances. If notice of rejection is given by a means that is
23 not reasonable, rejection is effective when the notice is
24 received. If an agreement of the sender and receiving bank
25 establishes the means to be used to reject a payment order, (i)
26 any means complying with the agreement is reasonable and (ii)
27 any means not complying is not reasonable unless no significant
28 delay in receipt of the notice resulted from the use of the
29 noncomplying means.

30 (2) This subsection applies if a receiving bank other than the
31 beneficiary's bank fails to execute a payment order despite the
32 existence on the execution date of a withdrawable credit balance
33 in an authorized account of the sender sufficient to cover the
34 order. If the sender does not receive notice of rejection of the
35 order on the execution date and the authorized account of the
36 sender does not bear interest, the bank is obliged to pay interest
37 to the sender on the amount of the order for the number of days
38 elapsing after the execution date to the earlier of the day the
39 order is canceled pursuant to section 12A:4A-211(4) or the day
40 the sender receives notice or learns that the order was not
41 executed, counting the final day of the period as an elapsed day.
42 If the withdrawable credit balance during that period falls below
43 the amount of the order, the amount of interest is reduced
44 accordingly.

45 (3) If a receiving bank suspends payments, all unaccepted
46 payment orders issued to it are deemed rejected at the time the
47 bank suspends payments.

48 (4) Acceptance of a payment order precludes a later rejection
49 of the order. Rejection of a payment order precludes a later
50 acceptance of the order.

51 12A:4A-211. Cancellation and amendment of payment order.

52 (1) A communication of the sender of a payment order
53 cancelling or amending the order may be transmitted to the
54 receiving bank orally, electronically, or in writing. If a security

1 procedure is in effect between the sender and the receiving bank,
2 the communication is not effective to cancel or amend the order
3 unless the communication is verified pursuant to the security
4 procedure or the bank agrees to the cancellation or amendment.

5 (2) Subject to subsection (1), a communication by the sender
6 cancelling or amending a payment order is effective to cancel or
7 amend the order if notice of the communication is received at a
8 time and in a manner affording the receiving bank a reasonable
9 opportunity to act on the communication before the bank accepts
10 the payment order.

11 (3) After a payment order has been accepted, cancellation or
12 amendment of the order is not effective unless the receiving bank
13 agrees or a funds-transfer system rule allows cancellation or
14 amendment without agreement of the bank.

15 (a) With respect to a payment order accepted by a receiving
16 bank other than the beneficiary's bank, cancellation or
17 amendment is not effective unless a conforming cancellation or
18 amendment of the payment order issued by the receiving bank is
19 also made.

20 (b) With respect to a payment order accepted by the
21 beneficiary's bank, cancellation or amendment is not effective
22 unless the order was issued in execution of an unauthorized
23 payment order, or because of a mistake by a sender in the funds
24 transfer which resulted in the issuance of a payment order (i) that
25 is a duplicate of a payment order previously issued by the sender,
26 (ii) that orders payment to a beneficiary not entitled to receive
27 payment from the originator, or (iii) that orders payment in an
28 amount greater than the amount the beneficiary was entitled to
29 receive from the originator. If the payment order is canceled or
30 amended, the beneficiary's bank is entitled to recover from the
31 beneficiary any amount paid to the beneficiary to the extent
32 allowed by the law governing mistake and restitution.

33 (4) An unaccepted payment order is canceled by operation of
34 law at the close of the fifth funds-transfer business day of the
35 receiving bank after the execution date or payment date of the
36 order.

37 (5) A canceled payment order cannot be accepted. If an
38 accepted payment order is canceled, the acceptance is nullified
39 and no person has any right or obligation based on the
40 acceptance. Amendment of a payment order is deemed to be
41 cancellation of the original order at the time of amendment and
42 issue of a new payment order in the amended form at the same
43 time.

44 (6) Unless otherwise provided in an agreement of the parties or
45 in a funds-transfer system rule, if the receiving bank, after
46 accepting a payment order, agrees to cancellation or amendment
47 of the order by the sender or is bound by a funds-transfer system
48 rule allowing cancellation or amendment without the bank's
49 agreement, the sender, whether or not cancellation or
50 amendment is effective, is liable to the bank for any loss and
51 expenses, including reasonable attorney's fees, incurred by the
52 bank as a result of the cancellation or amendment or attempted
53 cancellation or amendment.

54 (7) A payment order is not revoked by the death or legal

1 incapacity of the sender unless the receiving bank knows of the
2 death or of an adjudication of incapacity by a court of competent
3 jurisdiction and has reasonable opportunity to act before
4 acceptance of the order.

5 (8) A funds-transfer system rule is not effective to the extent
6 it conflicts with subsection (3)(b).

7 12A:4A-212. Liability and duty of receiving bank regarding
8 unaccepted payment order.

9 If a receiving bank fails to accept a payment order that it is
10 obliged by express agreement to accept, the bank is liable for
11 breach of the agreement to the extent provided in the agreement
12 or in this chapter, but does not otherwise have any duty to accept
13 a payment order or, before acceptance, to take any action, or
14 refrain from taking action, with respect to the order except as
15 provided in this chapter or by express agreement. Liability based
16 on acceptance arises only when acceptance occurs as stated in
17 section 12A:4A-209, and liability is limited to that provided in
18 this chapter. A receiving bank is not the agent of the sender or
19 beneficiary of the payment order it accepts, or of any other party
20 to the funds transfer, and the bank owes no duty to any party to
21 the funds transfer except as provided in this chapter or by
22 express agreement.

23
24 **SUBCHAPTER 3. EXECUTION OF SENDER'S PAYMENT**
25 **ORDER BY RECEIVING BANK**

26 12A:4A-301. Execution and execution date.

27 (1) A payment order is "executed" by the receiving bank when
28 it issues a payment order intended to carry out the payment order
29 received by the bank. A payment order received by the
30 beneficiary's bank can be accepted but cannot be executed.

31 (2) "Execution date" of a payment order means the day on
32 which the receiving bank may properly issue a payment order in
33 execution of the sender's order. The execution date may be
34 determined by instruction of the sender but cannot be earlier
35 than the day the order is received and, unless otherwise
36 determined, is the day the order is received. If the sender's
37 instruction states a payment date, the execution date is the
38 payment date or an earlier date on which execution is reasonably
39 necessary to allow payment to the beneficiary on the payment
40 date.

41 12A:4A-302. Obligations of receiving bank in execution of
42 payment order.

43 (1) Except as provided in subsections (2) through (4), if the
44 receiving bank accepts a payment order pursuant to section
45 12A:4A-209(1), the bank has the following obligations in
46 executing the order:

47 (a) The receiving bank is obliged to issue, on the execution
48 date, a payment order complying with the sender's order and to
49 follow the sender's instructions concerning (i) any intermediary
50 bank or funds-transfer system to be used in carrying out the
51 funds transfer, or (ii) the means by which payment orders are to
52 be transmitted in the funds transfer. If the originator's bank
53 issues a payment order to an intermediary bank, the originator's
54 bank is obliged to instruct the intermediary bank according to the

1 instruction of the originator. An intermediary bank in the funds
2 transfer is similarly bound by an instruction given to it by the
3 sender of the payment order it accepts.

4 (b) If the sender's instruction states that the funds transfer is
5 to be carried out telephonically or by wire transfer or otherwise
6 indicates that the funds transfer is to be carried out by the most
7 expeditious means, the receiving bank is obliged to transmit its
8 payment order by the most expeditious available means, and to
9 instruct any intermediary bank accordingly. If a sender's
10 instruction states a payment date, the receiving bank is obliged
11 to transmit its payment order at a time and by means reasonably
12 necessary to allow payment to the beneficiary on the payment
13 date or as soon thereafter as is feasible.

14 (2) Unless otherwise instructed, a receiving bank executing a
15 payment order may (i) use any funds-transfer system if use of
16 that system is reasonable in the circumstances, and (ii) issue a
17 payment order to the beneficiary's bank or to an intermediary
18 bank through which a payment order conforming to the sender's
19 order can expeditiously be issued to the beneficiary's bank if the
20 receiving bank exercises ordinary care in the selection of the
21 intermediary bank. A receiving bank is not required to follow an
22 instruction of the sender designating a funds-transfer system to
23 be used in carrying out the funds transfer if the receiving bank, in
24 good faith, determines that it is not feasible to follow the
25 instruction or that following the instruction would unduly delay
26 completion of the funds transfer.

27 (3) Unless subsection (1)(b) applies or the receiving bank is
28 otherwise instructed, the bank may execute a payment order by
29 transmitting its payment order by first class mail or by any
30 means reasonable in the circumstances. If the receiving bank is
31 instructed to execute the sender's order by transmitting its
32 payment order by a particular means, the receiving bank may
33 issue its payment order by the means stated or by any means as
34 expeditious as the means stated.

35 (4) Unless instructed by the sender, (i) the receiving bank may
36 not obtain payment of its charges for services and expenses in
37 connection with the execution of the sender's order by issuing a
38 payment order in an amount equal to the amount of the sender's
39 order less the amount of the charges, and (ii) may not instruct a
40 subsequent receiving bank to obtain payment of its charges in the
41 same manner.

42 12A:4A-303. Erroneous execution of payment order.

43 (1) A receiving bank that (i) executes the payment order of the
44 sender by issuing a payment order in an amount greater than the
45 amount of the sender's order, or (ii) issues a payment order in
46 execution of the sender's order and then issues a duplicate order,
47 is entitled to payment of the amount of the sender's order under
48 section 12A:4A-402(3) if that subsection is otherwise satisfied.
49 The bank is entitled to recover from the beneficiary of the
50 erroneous order the excess payment received to the extent
51 allowed by the law governing mistake and restitution.

52 (2) A receiving bank that executes the payment order of the
53 sender by issuing a payment order in an amount less than the
54 amount of the sender's order is entitled to payment of the

1 amount of the sender's order under section 12A:4A-402(3) if (i)
2 that subsection is otherwise satisfied and (ii) the bank corrects its
3 mistake by issuing an additional payment order for the benefit of
4 the beneficiary of the sender's order. If the error is not
5 corrected, the issuer of the erroneous order is entitled to receive
6 or retain payment from the sender of the order it accepted only
7 to the extent of the amount of the erroneous order. This
8 subsection does not apply if the receiving bank executes the
9 sender's payment order by issuing a payment order in an amount
10 less than the amount of the sender's order for the purpose of
11 obtaining payment of its charges for services and expenses
12 pursuant to instruction of the sender.

13 (3) If a receiving bank executes the payment order of the
14 sender by issuing a payment order to a beneficiary different from
15 the beneficiary of the sender's order and the funds transfer is
16 completed on the basis of that error, the sender of the payment
17 order that was erroneously executed and all previous senders in
18 the funds transfer are not obliged to pay the payment orders they
19 issued. The issuer of the erroneous order is entitled to recover
20 from the beneficiary of the order the payment received to the
21 extent allowed by the law governing mistake and restitution.

22 **12A:4A-304. Duty of sender to report erroneously executed**
23 **payment order.**

24 If the sender of a payment order that is erroneously executed
25 as stated in section 12A:4A-303 receives notification from the
26 receiving bank that the order was executed or that the sender's
27 account was debited with respect to the order, the sender has a
28 duty to exercise ordinary care to determine, on the basis of
29 information available to the sender, that the order was
30 erroneously executed and to notify the bank of the relevant facts
31 within a reasonable time not exceeding 90 days after the
32 notification from the bank was received by the sender. If the
33 sender fails to perform that duty, the bank is not obliged to pay
34 interest on any amount refundable to the sender under section
35 12A:4A-402(4) for the period before the bank learns of the
36 execution error. The bank is not entitled to any recovery from
37 the sender on account of a failure by the sender to perform the
38 duty stated in this section.

39 **12A:4A-305. Liability for late or improper execution or failure**
40 **to execute payment order.**

41 (1) If a funds transfer is completed but execution of a payment
42 order by the receiving bank in breach of section 12A:4A-302
43 results in delay in payment to the beneficiary, the bank is obliged
44 to pay interest to either the originator or the beneficiary of the
45 funds transfer for the period of delay caused by the improper
46 execution. Except as provided in subsection (3), additional
47 damages are not recoverable.

48 (2) If execution of a payment order by a receiving bank in
49 breach of section 12A:4A-302 results in (i) noncompletion of the
50 funds transfer, (ii) failure to use an intermediary bank designated
51 by the originator, or (iii) issuance of a payment order that does
52 not comply with the terms of the payment order of the
53 originator, the bank is liable to the originator for its expenses in
54 the funds transfer and for incidental expenses and interest losses,

1 to the extent not covered by subsection (1), resulting from the
2 improper execution. Except as provided in subsection (3),
3 additional damages are not recoverable.

4 (3) In addition to the amounts payable under subsections (1) and
5 (2), damages, including consequential damages, are recoverable to
6 the extent provided in an express written agreement of the
7 receiving bank.

8 (4) If a receiving bank fails to execute a payment order it was
9 obliged by express agreement to execute, the receiving bank is
10 liable to the sender for its expenses in the transaction and for
11 incidental expenses and interest losses resulting from the failure
12 to execute. Additional damages, including consequential
13 damages, are recoverable to the extent provided in an express
14 written agreement of the receiving bank, but are not otherwise
15 recoverable.

16 (5) Reasonable attorney's fees are recoverable if demand for
17 compensation under subsection (1) or (2) is made and refused
18 before an action is brought on the claim. If a claim is made for
19 breach of an agreement under subsection (4) and the agreement
20 does not provide for damages, reasonable attorney's fees are
21 recoverable if demand for compensation under subsection (4) is
22 made and refused before an action is brought on the claim.

23 (6) Except as stated in this section, the liability of a receiving
24 bank under subsections (1) and (2) may not be varied by
25 agreement.

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SUBCHAPTER 4. PAYMENT

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12A:4A-401. Payment date.

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12A:4A-402. Obligation of sender to pay receiving bank.

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(1) This section is subject to sections 12A:4A-205 and
12A:4A-207.

(2) With respect to a payment order issued to the beneficiary's
bank, acceptance of the order by the bank obliges the sender to
pay the bank the amount of the order, but payment is not due
until the payment date of the order.

(3) This subsection is subject to subsection (5) and to section
12A:4A-303. With respect to a payment order issued to a
receiving bank other than the beneficiary's bank, acceptance of
the order by the receiving bank obliges the sender to pay the bank
the amount of the sender's order. Payment by the sender is not
due until the execution date of the sender's order. The
obligation of that sender to pay its payment order is excused if
the funds transfer is not completed by acceptance by the
beneficiary's bank of a payment order instructing payment to the
beneficiary of that sender's payment order.

(4) If the sender of a payment order pays the order and was not
obliged to pay all or part of the amount paid, the bank receiving

1 payment is obliged to refund payment to the extent the sender
2 was not obliged to pay. Except as provided in sections
3 12A:4A-204 and 12A:4A-304, interest is payable on the
4 refundable amount from the date of payment.

5 (5) If a funds transfer is not completed as stated in subsection
6 (3) and an intermediary bank is obliged to refund payment as
7 stated in subsection (4) but is unable to do so because not
8 permitted by applicable law or because the bank suspends
9 payments, a sender in the funds transfer that executed a payment
10 order in compliance with an instruction, as stated in section
11 12A:4A-302(1)(a), to route the funds transfer through that
12 intermediary bank is entitled to receive or retain payment from
13 the sender of the payment order that it accepted. The first
14 sender in the funds transfer that issued an instruction requiring
15 routing through that intermediary bank is subrogated to the right
16 of the bank that paid the intermediary bank to refund as stated in
17 subsection (4).

18 (6) The right of the sender of a payment order to be excused
19 from the obligation to pay the order as stated in subsection (3) or
20 to receive refund under subsection (4) may not be varied by
21 agreement.

22 12A:4A-403. Payment by sender to receiving bank.

23 (1) Payment of the sender's obligation under section
24 12A:4A-402 to pay the receiving bank occurs as follows:

25 (a) If the sender is a bank, payment occurs when the receiving
26 bank receives final settlement of the obligation through a Federal
27 Reserve Bank or through a funds-transfer system.

28 (b) If the sender is a bank and the sender (i) credited an account
29 of the receiving bank with the sender, or (ii) caused an account of
30 the receiving bank in another bank to be credited, payment
31 occurs when the credit is withdrawn or, if not withdrawn, at
32 midnight of the day on which the credit is withdrawable and the
33 receiving bank learns of that fact.

34 (c) If the receiving bank debits an account of the sender with
35 the receiving bank, payment occurs when the debit is made to the
36 extent the debit is covered by a withdrawable credit balance in
37 the account.

38 (2) If the sender and receiving bank are members of a
39 funds-transfer system that nets obligations multilaterally among
40 participants, the receiving bank receives final settlement when
41 settlement is complete in accordance with the rules of the
42 system. The obligation of the sender to pay the amount of a
43 payment order transmitted through the funds-transfer system
44 may be satisfied, to the extent permitted by the rules of the
45 system, by setting off and applying against the sender's
46 obligation the right of the sender to receive payment from the
47 receiving bank of the amount of any other payment order
48 transmitted to the sender by the receiving bank through the
49 funds-transfer system. The aggregate balance of obligations
50 owed by each sender to each receiving bank in the funds-transfer
51 system may be satisfied, to the extent permitted by the rules of
52 the system, by setting off and applying against that balance the
53 aggregate balance of obligations owed to the sender by other
54 members of the system. The aggregate balance is determined

1 after the right of setoff stated in the second sentence of this
2 subsection has been exercised.

3 (3) If two banks transmit payment orders to each other under
4 an agreement that settlement of the obligations of each bank to
5 the other under section 12A:4A-402 will be made at the end of
6 the day or other period, the total amount owed with respect to all
7 orders transmitted by one bank shall be set off against the total
8 amount owed with respect to all orders transmitted by the other
9 bank. To the extent of the setoff, each bank has made payment
10 to the other.

11 (4) In a case not covered by subsection (1), the time when
12 payment of the sender's obligation under section 12A:4A-402(2)
13 or 12A:4A-402(3) occurs is governed by applicable principles of
14 law that determine when an obligation is satisfied.

15 12A:4A-404. Obligation of beneficiary's bank to pay and give
16 notice to beneficiary.

17 (1) Subject to sections 12A:4A-211(5), 12A:4A-405(4), and
18 12A:4A-405(5), if a beneficiary's bank accepts a payment order,
19 the bank is obliged to pay the amount of the order to the
20 beneficiary of the order. Payment is due on the payment date of
21 the order, but if acceptance occurs on the payment date after the
22 close of the funds-transfer business day of the bank, payment is
23 due on the next funds-transfer business day. If the bank refuses
24 to pay after demand by the beneficiary and receipt of notice of
25 particular circumstances that will give rise to consequential
26 damages as a result of nonpayment, the beneficiary may recover
27 damages resulting from the refusal to pay to the extent the bank
28 had notice of the damages, unless the bank proves that it did not
29 pay because of a reasonable doubt concerning the right of the
30 beneficiary to payment.

31 (2) If a payment order accepted by the beneficiary's bank
32 instructs payment to an account of the beneficiary, the bank is
33 obliged to notify the beneficiary of receipt of the order before
34 midnight of the next funds-transfer business day following the
35 payment date. If the payment order does not instruct payment to
36 an account of the beneficiary, the bank is required to notify the
37 beneficiary only if notice is required by the order. Notice may be
38 given by first class mail or any other means reasonable in the
39 circumstances. If the bank fails to give the required notice, the
40 bank is obliged to pay interest to the beneficiary on the amount
41 of the payment order from the day notice should have been given
42 until the day the beneficiary learned of receipt of the payment
43 order by the bank. No other damages are recoverable.
44 Reasonable attorney's fees are also recoverable if demand for
45 interest is made and refused before an action is brought on the
46 claim.

47 (3) The right of a beneficiary to receive payment and damages
48 as stated in subsection (1) may not be varied by agreement or a
49 funds-transfer system rule. The right of a beneficiary to be
50 notified as stated in subsection (2) may be varied by agreement of
51 the beneficiary or by a funds-transfer system rule if the
52 beneficiary is notified of the rule before initiation of the funds
53 transfer.

54 12A:4A-405. Payment by beneficiary's bank to beneficiary.

1 (1) If the beneficiary's bank credits an account of the
2 beneficiary of a payment order, payment of the bank's obligation
3 under section 12A:4A-404(1) occurs when and to the extent (i) the
4 beneficiary is notified of the right to withdraw the credit, (ii) the
5 bank lawfully applies the credit to a debt of the beneficiary, or
6 (iii) funds with respect to the order are otherwise made available
7 to the beneficiary by the bank.

8 (2) If the beneficiary's bank does not credit an account of the
9 beneficiary of a payment order, the time when payment of the
10 bank's obligation under section 12A:4A-404(1) occurs is governed
11 by principles of law that determine when an obligation is satisfied.

12 (3) Except as stated in subsections (4) and (5), if the
13 beneficiary's bank pays the beneficiary of a payment order under
14 a condition to payment or agreement of the beneficiary giving
15 the bank the right to recover payment from the beneficiary if the
16 bank does not receive payment of the order, the condition to
17 payment or agreement is not enforceable.

18 (4) A funds-transfer system rule may provide that payments
19 made to beneficiaries of funds transfers made through the system
20 are provisional until receipt of payment by the beneficiary's bank
21 of the payment order it accepted. A beneficiary's bank that
22 makes a payment that is provisional under the rule is entitled to
23 refund from the beneficiary if (i) the rule requires that both the
24 beneficiary and the originator be given notice of the provisional
25 nature of the payment before the funds transfer is initiated, (ii)
26 the beneficiary, the beneficiary's bank and the originator's bank
27 agreed to be bound by the rule, and (iii) the beneficiary's bank
28 did not receive payment of the payment order that it accepted.
29 If the beneficiary is obliged to refund payment to the
30 beneficiary's bank, acceptance of the payment order by the
31 beneficiary's bank is nullified and no payment by the originator
32 of the funds transfer to the beneficiary occurs under section
33 12A:4A-406.

34 (5) This subsection applies to a funds transfer that includes a
35 payment order transmitted over a funds-transfer system that (i)
36 nets obligations multilaterally among participants, and (ii) has in
37 effect a loss-sharing agreement among participants for the
38 purpose of providing funds necessary to complete settlement of
39 the obligations of one or more participants that do not meet their
40 settlement obligations. If the beneficiary's bank in the funds
41 transfer accepts a payment order and the system fails to
42 complete settlement pursuant to its rules with respect to any
43 payment order in the funds transfer, (i) the acceptance by the
44 beneficiary's bank is nullified and no person has any right or
45 obligation based on the acceptance, (ii) the beneficiary's bank is
46 entitled to recover payment from the beneficiary, (iii) no
47 payment by the originator to the beneficiary occurs under section
48 12A:4A-406, and (iv) subject to section 12A:4A-402(5), each
49 sender in the funds transfer is excused from its obligation to pay
50 its payment order under section 12A:4A-402(3) because the funds
51 transfer has not been completed.

52 12A:4A-406. Payment by originator to beneficiary; discharge
53 of underlying obligation.

54 (1) Subject to sections 12A:4A-211(5), 12A:4A-405(4), and

1 12A:4A-405(5), the originator of a funds transfer pays the
2 beneficiary of the originator's payment order (i) at the time a
3 payment order for the benefit of the beneficiary is accepted by
4 the beneficiary's bank in the funds transfer and (ii) in an amount
5 equal to the amount of the order accepted by the beneficiary's
6 bank, but not more than the amount of the originator's order.

7 (2) If payment under subsection (1) is made to satisfy an
8 obligation, the obligation is discharged to the same extent
9 discharge would result from payment to the beneficiary of the
10 same amount in money, unless (i) the payment under subsection
11 (1) was made by a means prohibited by the contract of the
12 beneficiary with respect to the obligation, (ii) the beneficiary,
13 within a reasonable time after receiving notice of receipt of the
14 order by the beneficiary's bank, notified the originator of the
15 beneficiary's refusal of the payment, (iii) funds with respect to
16 the order were not withdrawn by the beneficiary or applied to a
17 debt of the beneficiary, and (iv) the beneficiary would suffer a
18 loss that could reasonably have been avoided if payment had been
19 made by a means complying with the contract. If payment by the
20 originator does not result in discharge under this section, the
21 originator is subrogated to the rights of the beneficiary to
22 receive payment from the beneficiary's bank under section
23 12A:4A-404(1).

24 (3) For the purpose of determining whether discharge of an
25 obligation occurs under subsection (2), if the beneficiary's bank
26 accepts a payment order in an amount equal to the amount of the
27 originator's payment order less charges of one or more receiving
28 banks in the funds transfer, payment to the beneficiary is deemed
29 to be in the amount of the originator's order unless upon demand
30 by the beneficiary the originator does not pay the beneficiary the
31 amount of the deducted charges.

32 (4) Rights of the originator or of the beneficiary of a funds
33 transfer under this section may be varied only by agreement of
34 the originator and the beneficiary.

35 SUBCHAPTER 5. MISCELLANEOUS PROVISIONS

36 12A:4A-501. Variation by agreement and effect of
37 funds-transfer system rule.

38 (1) Except as otherwise provided in this chapter, the rights and
39 obligations of a party to a funds transfer may be varied by
40 agreement of the affected party.

41 (2) "Funds-transfer system rule" means a rule of an association
42 of banks (i) governing transmission of payment orders by means of
43 a funds-transfer system of the association or rights and
44 obligations with respect to those orders, or (ii) to the extent the
45 rule governs rights and obligations between banks that are parties
46 to a funds transfer in which a Federal Reserve Bank, acting as an
47 intermediary bank, sends a payment order to the beneficiary's
48 bank. Except as otherwise provided in this chapter, a
49 funds-transfer system rule governing rights and obligations
50 between participating banks using the system may be effective
51 even if the rule conflicts with this article and indirectly affects
52 another party to the funds transfer who does not consent to the
53 rule. A funds-transfer system rule may also govern rights and
54

1 obligations of parties other than participating banks using the
2 system to the extent stated in sections 12A:4A-404(3),
3 12A:4A-405(4), and 12A:4A-507(3).

4 12A:4A-502. Creditor process served on receiving bank;
5 set-off by beneficiary's bank.

6 (1) As used in this section, "creditor process" means levy,
7 attachment, garnishment, notice of lien, sequestration, or similar
8 process issued by or on behalf of a creditor or other claimant
9 with respect to an account.

10 (2) This subsection applies to creditor process with respect to
11 an authorized account of the sender of a payment order if the
12 creditor process is served on the receiving bank. For the purpose
13 of determining rights with respect to the creditor process, if the
14 receiving bank accepts the payment order the balance in the
15 authorized account is deemed to be reduced by the amount of the
16 payment order to the extent the bank did not otherwise receive
17 payment of the order, unless the creditor process is served at a
18 time and in a manner affording the bank a reasonable opportunity
19 to act on it before the bank accepts the payment order.

20 (3) If a beneficiary's bank has received a payment order for
21 payment to the beneficiary's account in the bank, the following
22 rules apply:

23 (a) The bank may credit the beneficiary's account. The
24 amount credited may be set off against an obligation owed by the
25 beneficiary to the bank or may be applied to satisfy creditor
26 process served on the bank with respect to the account.

27 (b) The bank may credit the beneficiary's account and allow
28 withdrawal of the amount credited unless creditor process with
29 respect to the account is served at a time and in a manner
30 affording the bank a reasonable opportunity to act to prevent
31 withdrawal.

32 (c) If creditor process with respect to the beneficiary's
33 account has been served and the bank has had a reasonable
34 opportunity to act on it, the bank may not reject the payment
35 order except for a reason unrelated to the service of process.

36 (4) Creditor process with respect to a payment by the
37 originator to the beneficiary pursuant to a funds transfer may be
38 served only on the beneficiary's bank with respect to the debt
39 owed by that bank to the beneficiary. Any other bank served
40 with the creditor process is not obliged to act with respect to the
41 process.

42 12A:4A-503. Injunction or restraining order with respect to
43 funds transfer.

44 For proper cause and in compliance with applicable law, a
45 court may restrain (i) a person from issuing a payment order to
46 initiate a funds transfer, (ii) an originator's bank from executing
47 the payment order of the originator, or (iii) the beneficiary's
48 bank from releasing funds to the beneficiary or the beneficiary
49 from withdrawing the funds. A court may not otherwise restrain
50 a person from issuing a payment order, paying or receiving
51 payment of a payment order, or otherwise acting with respect to
52 a funds transfer.

53 12A:4A-504. Order in which items and payment orders may be
54 charged to account; order of withdrawals from account.

1 (1) If a receiving bank has received more than one payment
2 order of the sender or one or more payment orders and other
3 items that are payable from the sender's account, the bank may
4 charge the sender's account with respect to the various orders
5 and items in any sequence.

6 (2) In determining whether a credit to an account has been
7 withdrawn by the holder of the account or applied to a debt of
8 the holder of the account, credits first made to the account are
9 first withdrawn or applied.

10 12A:4A-505. Preclusion of objection to debit of customer's
11 account.

12 If a receiving bank has received payment from its customer
13 with respect to a payment order issued in the name of the
14 customer as sender and accepted by the bank, and the customer
15 received notification reasonably identifying the order, the
16 customer is precluded from asserting that the bank is not entitled
17 to retain the payment unless the customer notifies the bank of
18 the customer's objection to the payment within one year after
19 the notification was received by the customer.

20 12A:4A-506. Rate of interest.

21 (1) If, under this chapter, a receiving bank is obliged to pay
22 interest with respect to a payment order issued to the bank, the
23 amount payable may be determined (i) by agreement of the
24 sender and receiving bank, or (ii) by a funds-transfer system rule
25 if the payment order is transmitted through a funds-transfer
26 system.

27 (2) If the amount of interest is not determined by an agreement
28 or rule as stated in subsection (1), the amount is calculated by
29 multiplying the applicable federal funds rate by the amount on
30 which interest is payable, and then multiplying the product by the
31 number of days for which interest is payable. The applicable
32 federal funds rate is the average of the federal funds rates
33 published by the Federal Reserve Bank of New York for each of
34 the days for which interest is payable divided by 360. The federal
35 funds rate for any day on which a published rate is not available
36 is the same as the published rate for the next preceding day for
37 which there is a published rate. If a receiving bank that accepted
38 a payment order is required to refund payment to the sender of
39 the order because the funds transfer was not completed, but the
40 failure to complete was not due to any fault by the bank, the
41 interest payable is reduced by a percentage equal to the reserve
42 requirement on deposits of the receiving bank.

43 12A:4A-507. Choice of law.

44 (1) The following rules apply unless the affected parties
45 otherwise agree or subsection (3) applies:

46 (a) The rights and obligations between the sender of a payment
47 order and the receiving bank are governed by the law of the
48 jurisdiction in which the receiving bank is located.

49 (b) The rights and obligations between the beneficiary's bank
50 and the beneficiary are governed by the law of the jurisdiction in
51 which the beneficiary's bank is located.

52 (c) The issue of when payment is made pursuant to a funds
53 transfer by the originator to the beneficiary is governed by the
54 law of the jurisdiction in which the beneficiary's bank is located.

1 (2) If the parties described in each paragraph of subsection (1)
2 have made an agreement selecting the law of a particular
3 jurisdiction to govern rights and obligations between each other,
4 the law of that jurisdiction governs those rights and obligations,
5 whether or not the payment order or the funds transfer bears a
6 reasonable relation to that jurisdiction.

7 (3) A funds-transfer system rule may select the law of a
8 particular jurisdiction to govern (i) rights and obligations between
9 participating banks with respect to payment orders transmitted
10 or processed through the system, or (ii) the rights and obligations
11 of some or all parties to a funds transfer any part of which is
12 carried out by means of the system. A choice of law made
13 pursuant to clause (i) is binding on participating banks. A choice
14 of law made pursuant to clause (ii) is binding on the originator,
15 other sender, or a receiving bank having notice that the
16 funds-transfer system might be used in the funds transfer and of
17 the choice of law by the system when the originator, other
18 sender, or receiving bank issued or accepted a payment order.
19 The beneficiary of a funds transfer is bound by the choice of law
20 if, when the funds transfer is initiated, the beneficiary has notice
21 that the funds-transfer system might be used in the funds
22 transfer and of the choice of law by the system. The law of a
23 jurisdiction selected pursuant to this subsection may govern,
24 whether or not that law bears a reasonable relation to the matter
25 in issue.

26 (4) In the event of inconsistency between an agreement under
27 subsection (2) and a choice-of-law rule under subsection (3), the
28 agreement under subsection (2) prevails.

29 (5) If a funds transfer is made by use of more than one
30 funds-transfer system and there is inconsistency between
31 choice-of-law rules of the systems, the matter in issue is
32 governed by the law of the selected jurisdiction that has the most
33 significant relationship to the matter in issue.

34 3. N.J.S.12A:1-105 is amended to read as follows:

35 12A:1-105. Territorial application of the act; parties' power
36 to choose applicable law.

37 (1) Except as provided hereafter in this section, when a
38 transaction bears a reasonable relation to this State and also to
39 another state or nation the parties may agree that the law either
40 of this State or of such other state or nation shall govern their
41 rights and duties. Failing such agreement this act applies to
42 transactions bearing an appropriate relation to this State.

43 (2) Where one of the following provisions of this act specifies
44 the applicable law, that provision governs and a contrary
45 agreement is effective only to the extent permitted by the law
46 (including the conflict of laws rules) so specified:

47 Rights of creditors against sold goods. 12A:2-402.

48 Applicability of the Chapter on Leases. 12A:2A-105 and
49 12A:2A-106.

50 Applicability of the Chapter on Bank Deposits and Collections.
51 12A:4-102.

52 [Bulk transfers subject to the Chapter on Bulk Transfers.
53 12A:6-102.]

54 Governing law in the Chapter on Funds Transfers. 12A:4A-507.

1 Applicability of the Chapter on Investment Securities.

2 12A:8-106.

3 Perfection provisions of the Chapter on Secured Transactions.

4 12A:9-103.

5 (cf: P.L.1981, c.138, s.1)

6 4. N.J.S.12A:1-201 is amended to read as follows:

7 12A:1-201. General definitions.

8 Subject to additional definitions contained in the subsequent
9 chapters of this act which are applicable to specific chapters or
10 subchapters thereof, and unless the context otherwise requires, in
11 this act:

12 (1) "Action" in the sense of a judicial proceeding includes
13 recoupment, counterclaim, set-off, suit in equity and any other
14 proceedings in which rights are determined.

15 (2) "Aggrieved party" means a party entitled to resort to a
16 remedy.

17 (3) "Agreement" means the bargain of the parties in fact as
18 found in their language or by implication from other
19 circumstances including course of dealing or usage of trade or
20 course of performance as provided in this act (12A:1-205 and
21 12A:2-208). Whether an agreement has legal consequences is
22 determined by the provisions in this act, if applicable; otherwise
23 by the law of contracts (12A:1-103). (Compare "Contract.")

24 (4) "Bank" means any person engaged in the business of
25 banking.

26 (5) "Bearer" means the person in possession of an instrument,
27 document of title, or certificated security payable to bearer or
28 indorsed in blank.

29 (6) "Bill of lading" means a document evidencing the receipt
30 of goods for shipment issued by a person engaged in the business
31 of transporting or forwarding goods, and includes an airbill.

32 "Airbill" means a document serving for air transportation as a
33 bill of lading does for marine or rail transportation, and includes
34 an air consignment note or air waybill.

35 (7) "Branch" includes a separately incorporated foreign branch
36 of a bank.

37 (8) "Burden of establishing" a fact means the burden of
38 persuading the triers of fact that the existence of the fact is
39 more probable than its nonexistence.

40 (9) "Buyer in ordinary course of business" means a person who
41 in good faith and without knowledge that the sale to the buyer is
42 in violation of the ownership rights or security interest of a third
43 party in the goods buys in ordinary course from a person in the
44 business of selling goods of that kind but does not include a
45 pawnbroker. All persons who sell minerals or the like (including
46 oil and gas) at wellhead or minehead shall be deemed to be
47 persons in the business of selling goods of that kind. "Buying"
48 may be for cash or by exchange of other property or on secured
49 or unsecured credit and includes receiving goods or documents of
50 title under a pre-existing contract for sale but does not include a
51 transfer in bulk or as security for or in total or partial
52 satisfaction of a money debt.

53 (10) "Conspicuous": A term or clause is conspicuous when it is
54 so written that a reasonable person against whom it is to operate

1 ought to have noticed it. A printed heading in capitals (as:
2 NON-NEGOTIABLE BILL OF LADING) is conspicuous. Language
3 in the body of a form is "conspicuous" if it is in larger or other
4 contrasting type or color. But in a telegram any stated term is
5 "conspicuous." Whether a term or clause is "conspicuous" or not
6 is for decision by the court.

7 (11) "Contract" means the total legal obligation which results
8 from the parties' agreement as affected by this act and any
9 other applicable rules of law. (Compare "Agreement.")

10 (12) "Creditor" includes a general creditor, a secured creditor,
11 a lien creditor and any representative of creditors, including an
12 assignee for the benefit of creditors, a trustee in bankruptcy, a
13 receiver in equity and an executor or administrator of an
14 insolvent debtor's or assignor's estate.

15 (13) "Defendant" includes a person in the position of defendant
16 in a cross-action or counterclaim.

17 (14) "Delivery" with respect to instruments, documents of
18 title, chattel paper, or certificated securities means voluntary
19 transfer of possession.

20 (15) "Document of title" includes bill of lading, dock warrant,
21 dock receipt, warehouse receipt, or order for the delivery of
22 goods, and also any other document which in the regular course of
23 business or financing is treated as adequately evidencing that the
24 person in possession of it is entitled to receive, hold and dispose
25 of the document and the goods it covers. To be a document of
26 title a document [must] shall purport to be issued by or addressed
27 to a bailee and purport to cover goods in the bailee's possession
28 which are either identified or are fungible portions of an
29 identified mass.

30 (16) "Fault" means wrongful act, omission or breach.

31 (17) "Fungible" with respect to goods or securities means
32 goods or securities of which any unit is, by nature or usage of
33 trade, the equivalent of any other like unit. Goods which are not
34 fungible shall be deemed fungible for the purposes of this act to
35 the extent that under a particular agreement or document unlike
36 units are treated as equivalents.

37 (18) "Genuine" means free of forgery or counterfeiting.

38 (19) "Good faith" means honesty in fact in the conduct or
39 transaction concerned.

40 (20) "Holder" means a person who is in possession of a
41 document of title or an instrument or a certificated investment
42 security drawn, issued, or indorsed to [him] the person or to [his]
43 the person's order or to bearer or in blank.

44 (21) To "honor" is to pay or accept and pay, where a credit so
45 engages to purchase or discount a draft complying with the terms
46 of the credit.

47 (22) "Insolvency proceedings" includes any assignment for the
48 benefit of creditors or other proceedings intended to liquidate or
49 rehabilitate the estate of the person involved.

50 (23) A person is "insolvent" who either has ceased to pay [his]
51 the person's debts in the ordinary course of business or cannot
52 pay [his] the person's debts as they become due or is insolvent
53 within the meaning of the federal bankruptcy law.

54 (24) "Money" means a medium of exchange authorized or

1 adopted by a domestic or foreign government as a part of its
2 currency.

3 (25) A person has "notice" of a fact when:

4 (a) [He] The person has actual knowledge of it; or

5 (b) [He] The person has received a notice or notification of it;

6 or

7 (c) From all the facts and circumstances known to [him] the
8 person at the time in question [he] the person has reason to know
9 that it exists.

10 A person "knows" or has "knowledge" of a fact when [he] the
11 person has actual knowledge of it. "Discover" or "learn" or a
12 word or phrase of similar import refers to knowledge rather than
13 to reason to know. The time and circumstances under which a
14 notice or notification may cease to be effective are not
15 determined by this act.

16 (26) A person "notifies" or "gives" a notice or notification to
17 another by taking such steps as may be reasonably required to
18 inform the other in ordinary course whether or not [such] the
19 other actually comes to know of it. A person "receives" a notice
20 or notification when:

21 (a) It comes to [his] the person's attention; or

22 (b) It is duly delivered at the place of business through which
23 the contract was made or at any other place held out by [him] the
24 person as the place for receipt of such communications.

25 (27) Notice, knowledge or a notice or notification received by
26 an organization is effective for a particular transaction from the
27 time when it is brought to the attention of the individual
28 conducting that transaction, and in any event from the time when
29 it would have been brought to [his] the attention of the individual
30 if the organization had exercised due diligence. An organization
31 exercises due diligence if it maintains reasonable routines for
32 communicating significant information to the person conducting
33 the transaction and there is reasonable compliance with the
34 routines. Due diligence does not require an individual acting for
35 the organization to communicate information unless such
36 communication is part of [his] the individual's regular duties or
37 unless [he] the individual has reason to know of the transaction
38 and that the transaction would be materially affected by the
39 information.

40 (28) "Organization" includes a corporation, government or
41 governmental subdivision or agency, business trust, estate, trust,
42 partnership or association, two or more persons having a joint or
43 common interest, or any other legal or commercial entity.

44 (29) "Party," as distinct from "third party," means a person
45 who has engaged in a transaction or made an agreement within
46 this act.

47 (30) "Person" includes an individual or an organization (See
48 12A:1-102).

49 (31) "Presumption" or "presumed" means that the trier of fact
50 [must] shall find the existence of the fact presumed unless and
51 until evidence is introduced which would support a finding of its
52 nonexistence.

53 (32) "Purchase" includes taking by sale, discount, negotiation,

1 mortgage, pledge, lien, issue or reissue, gift or any other
2 voluntary transaction creating an interest in property.

3 (33) "Purchaser" means a person who takes by purchase.

4 (34) "Remedy" means any remedial right to which an
5 aggrieved party is entitled with or without resort to a tribunal.

6 (35) "Representative" includes an agent, an officer of a
7 corporation or association, and a trustee, executor or
8 administrator of an estate, or any other person empowered to act
9 for another.

10 (36) "Rights" includes remedies.

11 (37) "Security interest" means an interest in personal property
12 or fixtures which secures payment or performance of an
13 obligation. The retention or reservation of title by a seller of
14 goods notwithstanding shipment or delivery to the buyer
15 (12A:2-401) is limited in effect to a reservation of a "security
16 interest." The term also includes any interest of a buyer of
17 accounts or chattel paper which is subject to chapter 9. The
18 special property interest of a buyer of goods on identification of
19 [such] those goods to a contract for sale under 12A:2-401 is not a
20 "security interest," but a buyer may also acquire a "security
21 interest" by complying with chapter 9. Unless a [lease or]
22 consignment is intended as security, reservation of title
23 thereunder is not a "security interest," but a consignment [is] in
24 any event is subject to the provisions on consignment sales
25 (12A:2-326). Whether a lease is intended as security is to be
26 determined by the facts of each case; however, (a) the inclusion
27 of an option to purchase does not of itself make the lease one
28 intended for security, and (b) an agreement that upon compliance
29 with the terms of the lease the lessee shall become or has the
30 option to become the owner of the property for no additional
31 consideration or for a nominal consideration does make the lease
32 one intended for security.

33 Whether a transaction creates a lease or security interest is
34 determined by the facts of each case; however, a transaction
35 creates a security interest if the consideration the lessee is to
36 pay the lessor for the right to possession and use of the goods is
37 an obligation for the term of the lease not subject to termination
38 by the lessee, and

39 (a) the original term of the lease is equal to or greater than
40 the remaining economic life of the goods,

41 (b) the lessee is bound to renew the lease for the remaining
42 economic life of the goods or is bound to become the owner of
43 the goods,

44 (c) the lessee has an option to renew the lease for the
45 remaining economic life of the goods for no additional
46 consideration or nominal additional consideration upon
47 compliance with the lease agreement, or

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

51 A transaction does not create a security interest merely
52 because it provides that

53 (a) the present value of the consideration the lessee is
54 obligated to pay the lessor for the right to possession and use of

1 the goods is substantially equal to or is greater than the fair
2 market value of the goods at the time the lease is entered into,

3 (b) the lessee assumes risk of loss of the goods, or agrees to
4 pay taxes, insurance, filing, recording, or registration fees, or
5 service or maintenance costs with respect to the goods,

6 (c) the lessee has an option to renew the lease or to become
7 the owner of the goods,

8 (d) the lessee has an option to renew the lease for a fixed rent
9 that is equal to or greater than the reasonably predictable fair
10 market rent for the use of the goods for the term of the renewal
11 at the time the option is to be performed, or

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

16 For purposes of this subsection (37):

17 Additional consideration is not nominal if (i) when the option to
18 renew the lease is granted to the lessee the rent is stated to be
19 the fair market rent for the use of the goods for the term of the
20 renewal determined at the time the option is to be performed, or
21 (ii) when the option to become the owner of the goods is granted
22 to the lessee the price is stated to be the fair market value of the
23 goods determined at the time the option is to be performed.

24 Additional consideration is nominal if it is less than the lessee's
25 reasonably predictable cost of performing under the lease
26 agreement if the option is not exercised;

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

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

38 (38) "Send" in connection with any writing or notice means to
39 deposit in the mail or deliver for transmission by any other usual
40 means of communication with postage or cost of transmission
41 provided for and properly addressed and in the case of an
42 instrument to an address specified thereon or otherwise agreed,
43 or if there be none to any address reasonable under the
44 circumstances. The receipt of any writing or notice within the
45 time at which it would have arrived if properly sent has the
46 effect of a proper sending.

47 (39) "Signed" includes any symbol executed or adopted by a
48 party with present intention to authenticate a writing.

49 (40) "Surety" includes guarantor.

50 (41) "Telegram" includes a message transmitted by radio,
51 teletype, cable, any mechanical method of transmission, or the
52 like.

53 (42) "Term" means that portion of an agreement which relates
54 to a particular matter.

1 (43) "Unauthorized" signature or indorsement means one made
2 without actual, implied or apparent authority and includes a
3 forgery.

4 (44) "Value" Except as otherwise provided with respect to
5 negotiable instruments and bank collections (12A:3-303,
6 12A:4-208 and 12A:4-209) a person gives "value" for rights if [he]
7 the person acquires them:

8 (a) In return for a binding commitment to extend credit or for
9 the extension of immediately available credit whether or not
10 drawn upon and whether or not a charge-back is provided for in
11 the event of difficulties in collection; or

12 (b) As security for or in total or partial satisfaction of a
13 pre-existing claim; or

14 (c) By accepting delivery pursuant to a pre-existing contract
15 for purchase; or

16 (d) Generally, in return for any consideration sufficient to
17 support a simple contract.

18 (45) "Warehouse receipt" means a receipt issued by a person
19 engaged in the business of storing goods for hire.

20 (46) "Written" or "writing" includes printing, typewriting, or
21 any other intentional reduction to tangible form.

22 (cf: P.L.1989, c.348, s.1)

23 5. N.J.S.12A:2-403 is amended to read as follows:

24 12A:2-403. Power to transfer; good faith purchase of goods;
25 "entrusting".

26 (1) A purchaser of goods acquires all title which [his] the
27 transferor had or had power to transfer except that a purchaser
28 of a limited interest acquires rights only to the extent of the
29 interest purchased. A person with voidable title has power to
30 transfer a good title to a good faith purchaser for value. When
31 goods have been delivered under a transaction of purchase the
32 purchaser has [such] this power even though

33 (a) the transferor was deceived as to the identity of the
34 purchaser, or

35 (b) the delivery was in exchange for a check which is later
36 dishonored, or

37 (c) it was agreed that the transaction was to be a "cash sale",
38 or

39 (d) the delivery was procured through fraud punishable [as
40 larcenous] under the criminal law.

41 (2) Any entrusting of possession of goods to a merchant who
42 deals in goods of that kind gives [him] the merchant power to
43 transfer all rights of the entruster to a buyer in ordinary course
44 of business.

45 (3) "Entrusting" includes any delivery and any acquiescence in
46 retention of possession regardless of any condition expressed
47 between the parties to the delivery or acquiescence and
48 regardless of whether the procurement of the entrusting or the
49 possessor's disposition of the goods have been such as to be
50 [larcenous] theft under the criminal law.

51 (4) The rights of other purchasers of goods and of lien
52 creditors are governed by the Chapters on Secured Transactions
53 (Chapter 9)[, Bulk Transfers (Chapter 6)] and Documents of Title
54 (Chapter 7).

55 (cf: N.J.S.12A:2-403)

1 6. N.J.S.12A:9-113 is amended to read as follows:
2 12A:9-113. Security interests arising under chapter on
3 sales or under chapter on leases.

4 A security interest arising solely under the Chapter on Sales
5 (Chapter 2) or the Chapter on Leases (Chapter 2A) is subject to
6 the provisions of this Chapter except that to the extent that and
7 so long as the debtor does not have or does not lawfully obtain
8 possession of the goods

9 (a) no security agreement is necessary to make the security
10 interest enforceable; and

11 (b) no filing is required to perfect the security interest; and

12 (c) the rights of the secured party on default by the debtor are
13 governed by (i) the Chapter on Sales (Chapter 2) in the case of a
14 security interest arising solely under that Chapter or (ii) by the
15 Chapter on Leases (Chapter 2A) in the case of a security interest
16 arising solely under that Chapter.

17 (cf: N.J.S.12A:9-113)

18 7. N.J.S.12A:9-302 is amended to read as follows:

19 12A:9-302. When filing is required to perfect security
20 interests; security interests to which filing provisions of this
21 chapter do not apply.

22 (1) A financing statement shall be filed to perfect all security
23 interests except the following:

24 (a) A security interest in collateral in possession of the
25 secured party under 12A:9-305;

26 (b) A security interest temporarily perfected in instruments or
27 documents without delivery under 12A:9-304 or in proceeds for a
28 10-day period under 12A:9-306;

29 (c) A security interest created by an assignment of a
30 beneficial interest in a trust or a decedent's estate;

31 (d) A purchase money security interest in consumer goods; but
32 filing is required for a motor vehicle required to be registered;
33 and fixture filing is required for priority over conflicting
34 interests in fixtures to the extent provided in 12A:9-313;

35 (e) An assignment of accounts which does not alone or in
36 conjunction with other assignments to the same assignee transfer
37 a significant part of the outstanding accounts of the assignor;

38 (f) A security interest of a collecting bank (12A:4-208) or in
39 securities (12A:8-321) or arising under the chapter on sales (see
40 12A:9-113) or covered in subsection (3) of this section;

41 (g) An assignment for the benefit of all the creditors of the
42 transferor, and subsequent transfers by the assignee thereunder.

43 (2) If a secured party assigns a perfected security interest, no
44 filing under this chapter is required in order to continue the
45 perfected status of the security interest against creditors of and
46 transferees from the original debtor.

47 (3) The filing of a financing statement otherwise required by
48 this chapter is not necessary or effective to perfect a security
49 interest in property subject to:

50 (a) A statute or treaty of the United States which provides for
51 a national or international registration or a national or
52 international certificate of title or which specifies a place of
53 filing different from that specified in this chapter for filing of
54 the security interest; or

- 1 (b) The following statutes of this State:
2 R.S.39:10-1 to R.S.39:10-9 both inclusive;
3 P.L.1971, c.311 (C.39:10-9.1 and C.39:10-9.2);
4 R.S.39:10-10 to R.S.39:10-16 both inclusive;
5 R.S.39:10-18 to R.S.39:10-25 both inclusive;
6 P.L.1984, c.152 (C.12:7A-1 to C.12:7A-29 both inclusive);
7 but during any period in which collateral is inventory held for sale
8 by a person who is in the business of selling goods of that kind,
9 the filing provisions of this chapter (subchapter 4) apply to a
10 security interest in that collateral created by [him] the person as
11 debtor; or
- 12 (c) a certificate of title statute of another jurisdiction under
13 the law of which indication of a security interest on the
14 certificate is required as a condition of perfection (subsection (2)
15 of 12A:9-103).
- 16 (4) Compliance with a statute or treaty described in subsection
17 (3) is equivalent to the filing of a financing statement under this
18 chapter, and a security interest in property subject to the statute
19 or treaty can be perfected only by compliance therewith except
20 as provided in 12A:9-103 on multiple state transactions.
21 Duration and renewal of perfection of a security interest
22 perfected by compliance with the statute or treaty are governed
23 by the provisions of the statute or treaty; in other respects the
24 security interest is subject to this chapter.
25 (cf: P.L.1989, c.348, s.51)
- 26 8. N.J.S.12A:9-306 is amended to read as follows:
27 12A:9-306. "Proceeds"; secured party's rights on disposition
28 of collateral.
- 29 (1) "Proceeds" includes whatever is received upon the sale,
30 lease, exchange, collection or other disposition of collateral or
31 proceeds. Insurance payable by reason of loss or damage to the
32 collateral is proceeds, except to the extent that it is payable to a
33 person other than a party to the security agreement. Money,
34 checks, deposit accounts, and the like are "cash proceeds". All
35 other proceeds are "noncash proceeds".
- 36 (2) Except where this chapter or the chapter on leases (2A)
37 otherwise provides, a security interest continues in collateral
38 notwithstanding sale, lease, exchange or other disposition thereof
39 unless the disposition was authorized by the secured party in the
40 security agreement or otherwise, and also continues in any
41 identifiable proceeds including collections received by the debtor.
- 42 (3) The security interest in proceeds is a continuously
43 perfected security interest if the interest in the original
44 collateral was perfected but it ceases to be a perfected security
45 interest and becomes unperfected 10 days after receipt of the
46 proceeds by the debtor unless
- 47 (a) A filed financing statement covers the original collateral
48 and the proceeds are collateral in which a security interest may
49 be perfected by filing in the office or offices where the financing
50 statement has been filed and, if the proceeds are acquired with
51 cash proceeds, the description of collateral in the financing
52 statement indicates the types of property constituting the
53 proceeds; or
- 54 (b) A filed financing statement covers the original collateral

1 and the proceeds are identifiable cash proceeds; or

2 (c) The security interest in the proceeds is perfected before
3 the expiration of the 10-day period.

4 Except as provided in this section, a security interest in
5 proceeds can be perfected only by the methods or under the
6 circumstances permitted in this chapter for original collateral of
7 the same type.

8 (4) In the event of insolvency proceedings instituted by or
9 against a debtor, a secured party with a perfected security
10 interest in proceeds has a perfected security interest only in the
11 following proceeds:

12 (a) In identifiable noncash proceeds and in separate deposit
13 accounts containing only proceeds;

14 (b) In identifiable cash proceeds in the form of money which is
15 neither commingled with other money nor deposited in a deposit
16 account prior to the insolvency proceedings;

17 (c) In identifiable cash proceeds in the form of checks and the
18 like which are not deposited in a deposit account prior to the
19 insolvency proceedings; and

20 (d) In all cash and deposit accounts of the debtor in which
21 proceeds have been commingled with other funds, but the
22 perfected security interest under this paragraph (d) is

23 (i) Subject to any right of set-off; and

24 (ii) Limited to an amount not greater than the amount of
25 any cash proceeds received by the debtor within 10 days
26 before the institution of the insolvency proceedings less
27 the sum of (I) the payments to the secured party on
28 account of cash proceeds received by the debtor during
29 [such] that period and (II) the cash proceeds received by
30 the debtor during [such] that period to which the secured
31 party is entitled under paragraphs (a) through (c) of this
32 subsection (4).

33 (5) If a sale or lease of goods results in an account or chattel
34 paper which is transferred by the seller or lessor to a secured
35 party, and if the goods are returned to or are repossessed by the
36 seller or lessor or the secured party, the following rules
37 determine priorities:

38 (a) If the goods were collateral at the time of sale or lease, for
39 an indebtedness of the seller or lessor which is still unpaid, the
40 original security interest attaches again to the goods covered by
41 the sale or lease and continues as a perfected security interest if
42 it was perfected at the time when the goods were sold or leased.
43 If the security interest was originally perfected by a filing which
44 is still effective, nothing further is required to continue the
45 perfected status; in any other case, the secured party [must] shall
46 take possession of the returned or repossessed goods or [must]
47 shall file.

48 (b) An unpaid transferee of the chattel paper has a security
49 interest in the goods against the transferor. [Such] This security
50 interest is prior to a security interest asserted under paragraph
51 (a) to the extent that the transferee of the chattel paper was
52 entitled to priority under 12A:9-308.

53 (c) An unpaid transferee of the account has a security interest
54 in the goods against the transferor. [Such] This security interest

1 is subordinate to a security interest asserted under paragraph (a).

2 (d) A security interest of an unpaid transferee asserted under
3 paragraph (b) or (c) [must] shall be perfected for protection
4 against creditors of the transferor and purchasers of the returned
5 or repossessed goods.

6 (cf: P.L.1981, c.138, s.19)

7 9. N.J.S.12A:9-318 is amended to read as follows:

8 12A:9-318. Defenses against assignee; modification of
9 contract after notification of assignment; term prohibiting
10 assignment ineffective; identification and proof of assignment.

11 (1) Unless an account debtor has made an enforceable
12 agreement not to assert defenses or claims arising out of a sale
13 as provided in 12A:9-206 the rights of an assignee are subject to

14 (a) All the terms of the contract between the account debtor
15 and assignor and any defense or claim arising therefrom; and

16 (b) Any other defense or claim of the account debtor against
17 the assignor which accrues before the account debtor receives
18 notification of the assignment.

19 (2) So far as the right to payment or a part thereof under an
20 assigned contract has not been fully earned by performance, and
21 notwithstanding notification of the assignment, any modification
22 of or substitution for the contract made in good faith and in
23 accordance with reasonable commercial standards is effective
24 against an assignee unless the account debtor has otherwise
25 agreed but the assignee acquires corresponding rights under the
26 modified or substituted contract. The assignment may provide
27 that [such] the modification or substitution is a breach by the
28 assignor.

29 (3) The account debtor is authorized to pay the assignor until
30 the account debtor receives notification that the amount due or
31 to become due has been assigned and that payment is to be made
32 to the assignee. A notification which does not reasonably
33 identify the rights assigned is ineffective. If requested by the
34 account debtor, the assignee [must] shall seasonably furnish
35 reasonable proof that the assignment has been made and unless
36 [he] the assignee does so the account debtor may pay the assignor.

37 (4) A term in any contract between an account debtor and an
38 assignor is ineffective if it prohibits assignment of an account or
39 prohibits creation of a security interest in chattel paper or a
40 security interest in a general intangible for money due or to
41 become due or requires the account debtor's consent to [such]
42 the assignment or security interest.

43 (cf: P.L.1981, c.138, s.24)

44 10. Section 1 of P.L.1979, c.222 (C.40A:11-40) is amended to
45 read as follows:

46 1. Notwithstanding any provisions of the [act to which this act
47 is a supplement] "Local Public Contracts Law, P.L.1971, c.198
48 (C.40:A11-1 et seq.), to the contrary, the governing body may by
49 resolution authorize the purchasing agent of the contracting unit
50 to purchase specific materials at auction for a price not to
51 exceed 85% of the price of equivalent materials as determined
52 pursuant to this section. Such resolution shall be adopted at least
53 10 days prior to the auction and shall be filed with the Director
54 of the Division of Local Government Services within 3 days of its

1 adoption. Any such auction shall be open to any person to attend
2 and bid on such materials, shall be conducted pursuant to
3 N.J.S.12A:2-328 [or N.J.S.12A:6-108], and shall be conducted by
4 a licensed auctioneer. Prior to adoption of the resolution, the
5 purchasing agent shall solicit at least three written quotations of
6 prices for which new materials equivalent to those to be
7 purchased at auction were actually sold within the previous year.
8 The lowest of the three prices so quoted shall be the determining
9 price quotation for the authorization to purchase at auction for a
10 price not to exceed 85% thereof. The authorizing resolution
11 adopted by the governing body shall set forth the three price
12 quotations so quoted and the sources thereof, and shall state that
13 the expenditure of money for the purchase is not made in
14 violation of N.J.S.40A:4-57, and has been properly certified by
15 the chief finance officer of the local unit.

16 Any purchasing agent who shall purchase materials at auction
17 pursuant to this section shall, within 14 days of the occurrence of
18 such auction, file a report with the clerk of the governing body
19 and the director, setting forth: the nature, quantity and price of
20 the materials so purchased; the three price quotations solicited
21 prior to such auction, and the sources thereof; and, the name and
22 license number of the auctioneer who conducted such auction.

23 (cf: P.L.1979, c.222, s.1)

24 11. Chapter 6 of Title 12A of the New Jersey Statutes and
25 N.J.S.12A:9-111 are repealed.

26 12. This act shall take effect on the 90th day after
27 enactment. Section 2 of this act shall apply to funds transfers
28 begun after the effective date of this act and sections 1 and 3
29 through 10 of this act shall apply to all lease contracts that are
30 first made or that first become effective between the parties on
31 or after the effective date of this act. This act shall not apply to
32 lease contracts first made or that first became effective prior to
33 the effective date of this act.

34 Furthermore, this act shall not apply to any extension,
35 modification, renewal or supplement of or to a lease contract
36 first made, or that first became effective between the parties,
37 prior to the effective date of this act, unless the parties to the
38 lease contract specifically agree in writing that the lease
39 contract as extended, amended, modified, renewed or
40 supplemented, shall be governed by this act.

41 "

42 STATEMENT

43
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14 However, these rules in most cases may be varied by the parties.
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17 within the basic principles of the Uniform Commercial Code:
18 good faith, diligence, reasonableness and care (12A:1-102(3)).

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20 Code closely, but small differences are found in sections 2A:103,
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27 banking system and allocates the risk of loss between the
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29 of large amounts of money normally made by commercial
30 enterprises, and Article 4A is tailored to reflect banking and
31 commercial practices.

32 New Jersey lacks a comprehensive statute or body of case law
33 to establish rules for funds transfers. As a result, adoption of
34 Chapter 4A would not displace existing law and would provide the
35 commercial community with a system of rules to govern a new
36 and popular method of payment.

37 Chapter 6 of the Uniform Commercial Code, repealed by this
38 bill, regulates bulk transfers. The New Jersey Law Revision
39 Commission conducted a study of the chapter and solicited
40 comments from members of the public. Based on the responses
41 and its study of the issue, the Commission determined that
42 Chapter 6 has ceased to protect the interests of creditors in the
43 context of modern commercial transactions. Chapter 6 contains
44 ambiguous terms, is difficult and inefficient to apply, and, in
45 most circumstances, is waived by both parties. Creditors rely on
46 other laws to protect their security interests in merchandise. To
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52 This bill also repeals N.J.S.12A:9-111 of the Uniform
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Adds new chapters to Uniform Commercial Code regulating
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(1994)

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41
42 *Sponsor* STATEMENT to S572
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ASSEMBLY JUDICIARY, LAW AND PUBLIC SAFETY
COMMITTEE

STATEMENT TO

SENATE, No. 572

STATE OF NEW JERSEY

DATED: JUNE 13, 1994

The Assembly Judiciary, Law and Public Safety Committee reports favorably Senate Bill No. 572.

This bill would enact new Chapters 2A and 4A of the Uniform Commercial Code and delete Chapter 6 of the Uniform Commercial Code. All three changes were promulgated by the National Conference of Commissioners on Uniform State Laws and the American Law Institute and studied by the New Jersey Law Revision Commission. The New Jersey Law Revision Commission recommends their enactment.

Chapter 2A regulates leases of goods. There are several reasons for codifying the law with respect to these leases. 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, 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, the lessor is required to file a financing statement or take other action to perfect its interest in the goods against third parties. There is no similar requirement with respect to leases. Second, it should be specified that the express and implied warranties applicable to sales apply to leases. At present, it is unclear what warranties accompany a lease. Third, the remedies available to the lessor upon the lessee's default should be established. Current law gives no clear answer.

Chapter 2A settles these and other issues, providing a comprehensive set of legal rules for leases of personal property. However, these rules in most cases may be varied by the parties. The chapter on leases has a fundamental tenet: freedom of the parties to a lease of goods to establish the terms of the lease within the basic principles of the Uniform Commercial Code: good faith, diligence, reasonableness and care (12A:1-102(3)).

This bill follows the official text of the Uniform Commercial Code closely, but small differences are found in sections 2A:103, 2A:216, 2A:304 and 2A:305. These changes, necessary to reflect specific New Jersey legal context, were recommended by the New Jersey Law Revision Commission. Some conforming amendments are also New Jersey specific: 12A:2-403 and 12A:9-302 and the effective date provisions.

Chapter 4A governs "funds transfers" made through the banking system and allocates the risk of loss between the parties. The chapter primarily governs wholesale funds transfers of large amounts of money normally made by commercial enterprises, and Article 4A is tailored to reflect banking and commercial practices.

New Jersey lacks a comprehensive statute or body of case law to establish rules for funds transfers.

As a result, adoption of Chapter 4A would not displace existing law and would provide the commercial community with a system of rules to govern a new and popular method of payment.

Chapter 6 of the Uniform Commercial Code, repealed by this bill, regulates bulk transfers. The New Jersey Law Revision Commission conducted a study of the chapter and solicited comments from members of the public. Based on the responses and its study of the issue, the Commission determined that Chapter 6 has ceased to protect the interests of creditors in the context of modern commercial transactions. Chapter 6 contains ambiguous terms, is difficult and inefficient to apply, and, in most circumstances, is waived by both parties. Creditors rely on other laws to protect their security interests in merchandise. To the extent that Chapter 6 is currently employed, it is expensive and provides little benefit. Repeal of Chapter 6 will save money for parties transacting business affected by its provisions. Repeal is in accordance with the recommendation of the Permanent Editorial Board of the Uniform Commercial Code.

This bill also repeals N.J.S.12A:9-111 of the Uniform Commercial Code, which provides that the creation of a security interest under that chapter is not a bulk transfer for the purposes of chapter 6; since chapter 6 is being repealed, N.J.S.12A:9-111 will no longer be needed.

SENATE COMMERCE COMMITTEE

STATEMENT TO

SENATE, No. 572

STATE OF NEW JERSEY

DATED: MAY 5, 1994

The Senate Commerce Committee reports favorably Senate, No. 572.

This bill would enact new Chapters 2A and 4A of the Uniform Commercial Code and delete Chapter 6 of the Uniform Commercial Code. All three changes were promulgated by the National Conference of Commissioners on Uniform State Laws and the American Law Institute and studied by the New Jersey Law Revision Commission. The New Jersey Law Revision Commission recommends their enactment.

Chapter 2A regulates leases of goods. There are several reasons for codifying the law with respect to these leases. 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, 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, the lessor is required to file a financing statement or take other action to perfect its interest in the goods against third parties. There is no similar requirement with respect to leases. Second, it should be specified that the express and implied warranties applicable to sales apply to leases. At present, it is unclear what warranties accompany a lease. Third, the remedies available to the lessor upon the lessee's default should be established. Current law gives no clear answer.

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C. Article 2A (Leases) of the Uniform Commercial Code

In 1987, the National Conference of Commissioners on Uniform State Laws promulgated the Uniform Commercial Code Article 2A containing rules governing the leasing of personal property. The Uniform Commercial Code applied to lease transactions only if they could be defined as secured transactions governed by Article 9 or sales of goods governed by Article 2.

In 1989, the Commission examined the comprehensive and lengthy provisions of the new Article and proposed a version of the new Article that is similar to versions enacted in California and pending in other states. The appendix to this report contains the explanatory comments prepared for certain provisions of Article 2A proposed for adoption in this State.

D. Administrative Procedure Act

In 1989, the Commission filed a report recommending amendment of the Administrative Procedure Act. This project was suggested by the opinion in DiMaria v. Board of Trustees of the Public Employees' Retirement System, 225 N.J. Super. 341 (App. Div. 1988), which pointed out a gap in the provisions of the Administrative Procedure Act, C. 52:14B-1 to -15. These provisions govern the issuance of decisions in contested cases decided by administrative agencies. The case held that while there is a strict time limit for the agency to act on a case, there is no time limit for the filing of a final decision. Thus, the time limit requirement is ineffective.

After carefully considering a number of possible statutory amendments providing various systems of time limits and consequences for failure to act within them, the Commission concluded that the agency action and final decision setting forth the reasons for the action should be filed concurrently. The Commission rejected any system of time limits which separates the agency action from the filing of a decision stating its legal basis.

NJ LAW REVISION COMM.
ANNUAL REPORT, 1989

APPENDIX C

**REPORT AND RECOMMENDATIONS
ON
NEW ARTICLE 2A (LEASES); UNIFORM COMMERCIAL
CODE**

**NEW JERSEY LAW REVISION COMMISSION
15 Washington Street
Newark, New Jersey 07102
(201)648-4575
November, 1989**

INTRODUCTION AND SUMMARY

The leasing industry has expanded significantly since the 1950's, and now represents a sizable sector of the economy. Despite the growth of personal property leasing in the United States, statutory and case law related to lease transactions has failed to provide a coherent framework for the regulation of leases. Scholars and practitioners alike urged uniform statutory treatment of personal property leasing to achieve certainty in the law.¹

In response to the need to codify leasing law, the Permanent Editorial Board of the Uniform Commercial Code, together with the National Conference of Commissioners on Uniform State Laws (hereinafter referred to as the Conference) and the American Law Institute, promulgated the official text of Article 2A. The new Article comprehensively governs lease contracts of personal property, a subject not previously covered by the Uniform Commercial Code. Lease transactions do not fall within the coverage of Uniform Commercial Code Article 2 on Sales; Article 9 on Secured Transactions applies only to leases intended to create security interests.

Commercial law experts and scholars found several shortcomings in the official text of Article 2A. See, Symposium: Article 2A of the Uniform Commercial Code, 39 Ala.L.Rev. 669 (1988). The California Bar Association formed a committee to study and comment on the new Article. The Association issued a highly regarded study of the new Article which criticized specific sections and proposed amendments. "Report of the Uniform Commercial Code Committee of the Business Law Section of the State Bar of California on Proposed California Commercial Code Division 10 (Article 2A)(Senate Bill 1580, as amended September 11, 1987)" (hereinafter referred to as "California Report"), 39 Ala.L.Rev. 979 (1988). The State of California enacted an amended version of Article 2A substantially based upon the Bar Association report. The State of Oregon enacted this version of Article 2A with some variations.

Thereafter, the State of Massachusetts prepared a bill similar to the California version of Article 2A.² Massachusetts amended the California statute primarily to clarify language and exclude California specific amendments. The bill is pending before the Massachusetts legislature. New York, Illinois and Delaware are considering adoption of the Massachusetts version of Article 2A. Although Minnesota, Nevada, Oklahoma, and South Dakota have enacted the official text, it appears that the Massachusetts version will become the model to other states.

The Commission examined the official text of Article 2A, the California statute and the Massachusetts bill. Differences among the three versions, and the effect of Article 2A upon New Jersey law, were identified and analyzed. Since the California and Massachusetts amendments both clarified and improved the official text, the Commission found that the

¹ See, Note, Uniform Commercial Code: Article 2A-Leases: Structuring Priorities of Competing Claimants to Leased Property, 73 Minn. L. Rev. 208 (1988).

² Massachusetts House Bill 3341 has passed the Assembly and is pending in the Senate.

Massachusetts bill embodied the best version of Article 2A. The Commission therefore recommends that the Massachusetts version of Article 2A with variations for local law be adopted in New Jersey.³

The adoption of Article 2A in New Jersey would displace existing contract and bailment law applied to lease transactions. The "intent of the parties" test, now used to determine whether a transaction is a true lease or creates a security interest, would be abolished. Compare General Electric Credit Corp. v. Castiglione, 142 N.J. Super. 80 (Law Div. 1976) with U.C.C. 1-201(37). Article 2A would also supplant the lessor's damage formula expressed in Locks v. Wade, 36 N.J. Super. 128 (App. Div. 1955). See U.C.C. 2A-528. However, since New Jersey has very little law specific to commercial lease transactions, adoption of Article 2A would not significantly change state law.

The Commission prepared a proposed version of Article 2A incorporating the California and Massachusetts revisions and containing the New Jersey amendments. This version is recommended for adoption. The Commission also prepared comments for every section of the proposed version which differs from the official text of Article 2A and its conforming amendments. The recommended text and comments are set forth below.

³ The amendments specific to New Jersey are found at:

Subsection 103(3)[list of definition of terms made parallel to similar list found in Article 9];

Section 104 [list of New Jersey Certificate of Title statutes];

Section 216 [warranty provision made to conform with parallel provision of Article 2];

Section 304 and Section 305 [minor language change to reflect vocabulary of New Jersey criminal law]; and

Section 309 [conforms vocabulary on fixture filings to that found in 9-313(1)(b)].

The conforming amendments specific to New Jersey are found at:

2-403 [made to conform with language change in 2A-304 and 2A-305], 9-302 [made to conform with 2A-104(1)(b)]; and

9-306 [term "proceeds" to include rent payments under lease contract].

NEW JERSEY COMMENTS TO ARTICLE 2A
AND CONFORMING AMENDMENTS

SECTION 103

Subsection 103(1)(e):

Subsection 103(1)(e) follows the California amendment to the Official Text.¹ The substitution of the phrase "who is a natural person" for the phrase "lessee, except an organization" is a clarification of the Official Text. The elimination of the \$25,000 limitation on a consumer lease contract is a substantive change, and broadens the definition of that term.

Subsection 103(1)(g):

Subsection 103(1)(g) follows the amendments made to the Official Text by the California statute, as further amended by the Massachusetts bill.² The California amendments expand the definition of a finance lease. The California statute gives the lessor two additional methods by which to create a statutory finance lease: (1) by providing a writing to the lessee containing information specified by the statute, or (2) by providing a lease contract containing terms specified by the statute.

Under the Massachusetts bill, the lessor cannot exercise the options of creating a statutory finance lease through a writing provided to the lessee, or through a lease contract containing a statement of warranties, when the finance lease is a consumer lease. Additionally, the Massachusetts bill makes it clear that, if a lessor elects to create a statutory finance lease by providing a writing pursuant to subsection (d), the disclosure of terms must be made on or before the date the lease contract is executed. This notice requirement is only implied in the California statute.

Subsection 103(3):

With three exceptions, Official Text Section 103(3) is followed. New Jersey uses the singular form of the following terms in Article 9 (Secured Transactions): (1) document (subsection 9-105(1)(f)); (2) instrument (subsection 9-105(1)(i)); and (3) account (subsection 9-106). The amendments to the Official Text 103(3) conform to the article on Secured Transactions. N.J.S. 12A:9-1 et seq.

¹ California's version of Article 2A is codified at Cal. Com. Code §§10101-10532 (West 1989 Supp.)

² The Massachusetts version of Article 2A is found in Massachusetts House Bill 3341. The bill is pending in the Legislature.

SECTION 104

Subsection 104(1)(b):

Subsection 104(1)(b) lists the applicable New Jersey certificate of title statutes, including the Boat Ownership Certificate Act. N.J.S. 12:7A-1 et seq. The list is based primarily upon the parallel list found in subsection 302(3)(b) of Article 9. N.J.S. 12A:9-302(3)(b).

Subsection 104(1)(d):

Subsection 104(1)(d) follows the Massachusetts amendment of the California version of this subsection. The Massachusetts amendment makes leases subject to decisional consumer protection law. The California version refers to specific statutes in addition to decisional law.

Subsection 104(2):

Subsection 104(2) is amended to conform to the amendment made to subsection 104(1)(d) substituting the word "law" for the word "statute." In the Official Text, subsection (1) contained only a list of statutes. Subsection (1)(d), however, was amended to include consumer decisional law. Hence, the term "law" in subsection (2) refers both to statutes and to judicial decisions.

SECTION 106

Section 106:

Section 106 follows the California amendment to the Official Text, as further amended by the Massachusetts bill. Section 106 limits abusive choice of law and choice of forum clauses in consumer leases. The purpose of this provision is to prevent a lessor from inducing a consumer lessee to agree that the applicable law will be that of a jurisdiction that has little effective consumer protection, or to agree that the proper forum for litigation be one that would be inconvenient to the lessee.

Subsection 106(1):

The Massachusetts revision to subsection 106(1) broadened the permissible choice of law clauses in consumer leases to include the law of the place where the consumer executed the lease, providing the goods are to be used in more than one jurisdiction, none of which is the residence of the lessee. For example, a car rental contract executed in Florida by a New Jersey resident for use of the car in several southern states may be governed by Florida law. Otherwise, the place of execution of the lease contract is not an enforceable choice of law. This choice of law limitation is intended to prevent abusive practices of lessors that might defeat the consumer protection purposes of this section.

[4]

SECTION 201

Subsection 201(1)(a):

Subsection 201(1)(a) follows the California amendment which limits the enforceability of oral lease contracts with aggregate payments of less than \$1,000 to non-consumer leases.

SECTION 209

Subsection 209(3):

Subsection 209(3) follows the California amendment to the Official Text. This Official Text subsection provides that, in the event a lessor and supplier modify or rescind the supply contract after the lessee has entered into a finance lease, the lessee has a cause of action against the lessor. The lessee also has a cause of action against the supplier, if the supplier knew the lessee had entered into the finance lease. The California amendment deletes the lessee's cause of action against the supplier, since the supplier cannot effectively modify or rescind the supply contract when the supplier has notice that the lessee has entered into a finance lease. When the modification or rescission is ineffective against the lessee, but the lessee is nevertheless damaged, for example, by non-performance, the lessee has a cause of action against the supplier and lessor under the original supply contract.

In addition, California added a new subsection (4). This subsection clarifies that the lessee retains all rights and remedies that the lessee may have against the supplier arising from any agreement between them or from any other law.

SECTION 216

Section 216 defines the extent of a lessor's warranties to persons injured by the goods as a result of a breach of warranty. The Official Text provides three alternatives. Section 216 is modeled after U.C.C. Section 2-318.

Alternative A was chosen to parallel the choice embodied in Section 318 of Article 2. Alternative A is not intended to displace principles of tort and negligence law that have developed in New Jersey since the enactment of Section 2-318. See, Spring Motors Distributors, Inc. v. Ford Motor Co., 98 N.J. 555 (1985) [claim by corporation under the U.C.C. of economic loss in a breach of warranty action recognized without regard to vertical privity]; Heavner v. Uniroyal, Inc., 63 N.J. 130 (1973); Rosenau v. Cty. of New Brunswick and Worthington Gamon Motor Co., 51 N.J. 130 (1968) [applying strict liability in tort, not the U.C.C., to an action for damages between a consumer and manufacturer not in privity]; Santor v. G. & M. Karagheusian, 44 N.J. 52 (1965) [consumer allowed to recover against manufacturer, though there was no privity between the parties and the action was for economic loss]; Cintrone v. Hertz Truck Leasing, etc., 45 N.J. 434 (1965) [lease agreement for personal property carries an implied warranty of fitness and person injured by product can recover in strict liability in tort]; and

Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358 (1960)[abolished notion of privity of contract from all cases involving the sale of defective goods that cause physical injury]. The common law of New Jersey extends protection to persons other than those identified by Sections 2-318 and 2A-216.

SECTION 303

Section 303:

Section 303 follows the California amendment of the Official Text. Subsection 3(a) makes ineffective any provision in a lease contract prohibiting the "creation or enforcement of a security interest of the lessor under a lease contract or the lessor's residual interest in the goods." This amendment facilitates the lessor's ability to obtain financing.

Further, subsection 3(c) clarifies that the creation of a security interest in "(i)...(A) the interest of the lessor under the lease contract or (B) the lessor's residual interest in the goods or (ii) the exercise of rights as a secured party pursuant to the security interest" does not materially change the duty of or materially increase the burden or risk imposed upon the lessee under subsection (1)(b). However, transfers of a lessor's interest under Section 9-504 or Section 9-505 can be challenged by a lessee as a material alteration of the lease contract.

Subsection 3(d) clarifies that a provision in a lease obligating the lessee to keep its interest in the lease contract and goods free from liens and encumbrances is effective, notwithstanding subsection 303(1)(b).

SECTION 304

Section 304:

The New Jersey Code of Criminal Justice (Title 2C) does not use the term "larceny." Thus, subsection 304(1)(D) is amended by substituting the phrase "fraud punishable under the criminal law" for the phrase "fraud punishable as larcenous under the criminal law." No substantive change is intended.

Subsection 304(2):

Subsection 304(2) follows the Massachusetts amendment to the Official Text. The "entrustee-lessor referred to is the lessor of the existing lessee." D. Rapson and H. Sigman, "Reasons for Revisions," 4 (as set forth in mark-up dated January 24, 1989 of Massachusetts House Bill No. 6269 (February 24, 1989)) (available from Mr. Rapson, The CIT Group, Inc., 650 CIT Drive, Livingston, New Jersey 07039-0490.)

SECTION 305

Section 305:

The New Jersey Code of Criminal Justice (Title 2C) does not use the term "larceny." Thus, subsection 305(1)(c) is amended by substituting the phrase "fraud punishable under the criminal law" for the phrase "fraud punishable as larcenous under the criminal law." No substantive change is intended.

SECTION 307

Subsection (2)(b) and (2)(c) "provide new tests to determine the priority of a security interest in the goods granted by the lessor as against a lessee not in the ordinary course of business. These tests replace the "hypothetical secured party" test in the Official Text of subsection 307(2)(b)." Rapson and Sigman, "Reasons for Revisions," 4-5, supra.

Subsection 307(2)(b):

Subsection 307(2)(b) follows the California amendment to the Official Text. Under subsection (2)(b), the secured party has priority over the lessee when the lessee knows of a pre-existing, unperfected security interest. This is consistent with the result in the case of a buyer not in the ordinary course of business under Section 9-301(1)(c). Official Text 307(2)(b), which makes knowledge irrelevant, results in an inconsistency with Section 9-301(1)(c).

"Under revised subsection (2)(c), the creditor has priority over the lessee if the security interest attached and was perfected before (i) the lease contract became enforceable or (ii) the lessee gave value and received delivery of the goods. In addition, a purchase money security interest will have priority, if the security interest attached and was perfected by the date that is ten days after the lessor or lessee received possession of the goods, whichever is earlier. The 10-day period corresponds to the grace period for perfection of a purchase money security interest under Section 9-312(4)." Rapson and Sigman, "Reasons for Revisions," 5, supra. The revision of subsection (2)(c) also achieves results that are consistent with Section 9-301(1)(c) in the case of buyers not in the ordinary course of business.

SECTION 308

Subsection 308(1):

Subsection 308(1) follows the California amendment of the Official Text, as further amended by the Massachusetts bill. The Massachusetts amendment adding the words "or voids the lease contract" found in the California statute is making only a grammatical change.

Subsection 308(2):

Subsection 308(2) also follows the California statute. California amended subsection 308(2) because the leasing article does not contain any provision analogous to Section 2-402(1), which subsection (2) was intended to limit, thereby rendering 308(2)(a) unnecessary and inappropriate. The California report stated the language was "inappropriate since any lease transaction which is a fraudulent transfer... ought to be avoidable, whether or not it is in the current course of trade." "California Report", 39 Ala.L.Rev. 979, 1025-26 (1988)(emphasis added).

SECTION 309

Subsection 309(1)(b):

Subsection 309(1)(b) amends the Official Text by conforming the section to the definition of "fixture filing" found in Section 9-313(1)(b), which indicates that a "fixture filing" is filed where a mortgage would be "filed or recorded." The word "covering" replaces the word "concerning" since "covering" is used in Section 9-313.

Subsection 309(4)(a):

Subsection (4)(a) conforms substantially to the style of Section 9-313(4)(a) dealing with purchase money security interests in fixtures.

SECTION 406

Section 406:

Section 406 follows the California amendment to the Official Text. Subsection 1(b) "excepts all finance leases from the right of a lessee to modify the lease for excused performance, not just non-consumer finance leases." Rapson and Sigman, "Reasons for Revisions," 6, supra.

SECTION 407

Section 407:

Section 407 follows the California amendment to the Official Text. Subsection (3) clarifies that Section 407 "does not govern the validity under other applicable law of "hell or high water" clauses in lease contracts." Rapson and Sigman, "Reasons for Revisions," 6, supra.

SECTION 506

Subsection 506(1):

Subsection 506(1) follows the California amendment to the Official Text that exempts consumer leases from the provision allowing the parties to reduce the statute of limitations to not less than one year.

Subsection 506(2) also follows the California amendment to the Official Text. The California amendment differentiates the accrual of a cause of action for indemnity from indemnity based upon loss or damage. A cause of action for indemnification accrues upon discovery of the claim; a cause of action based upon loss or damage accrues upon payment.

SECTION 508

Subsection 508(3):

Subsection 508(3) follows the Massachusetts amendment to the Official Text. The amendment clarifies that Article 2A remedies are available to a lessee for any default under the lease contract not identified in subsections (1) and (2), providing the lease contract does not specifically exclude the remedy. The parallel provision for lessors is found at subsection 523(2).

SECTION 513

Subsection 513(1):

The addition of "it is" following the word "because" is a style change.

SECTION 516

Subsection 516(2):

Subsection 516(2) follows the California amendment to the Official Text. Amended subsection (2) allows a consumer lessee to revoke acceptance of non-conforming goods in a finance lease when the supplier assisted in the preparation of the lease contract or negotiated the terms with the lessor.

Subsection 516(3):

Amended subsection (3), which also follows the California amendment, requires the lessee, in the case of a finance lease, to notify the supplier within a reasonable time after the lessee discovers or should have discovered any default. Consumer leases are excepted from this rule under amended subsection (6). Subsection (3)(b) deletes reference to consumer leases because of the broad exception provided consumer leases in subsection (6).

SECTION 518

Section 518 follows the California amendments to the Official Text, as further amended by the Massachusetts bill.

Subsection 518(1):

Subsection (1), following the Massachusetts amendment, deletes the reference to "subsection (1)" of 2A-508 to conform to the Massachusetts revision of subsection 508(3).

[9]

Subsection 518(2):

The California statute amended subsection (2) to redefine the date from which the lessee's damages are calculated in the event the lessee covers by entering into a substantially similar lease agreement. In the Official Text, damages are calculated from the date of the lessor's default. In the California statute, however, the lessee's damages are calculated from the date of the commencement of the term of the new lease agreement. This is consistent with the damage formula established for lessors in Sections 527 and 528 as amended by California and followed by Massachusetts. The word "then" is also inserted before the phrase "remaining lease term of the original lease agreement."

The Massachusetts bill further amended subsection (2) to delete the cross-reference to Section 503. This amendment is not followed.

Subsection 518(3):

The California statute also amended subsection (3) by giving the lessee that qualifies for treatment under subsection (2) the option to recover damages under either subsection (2) or Section 519. The latter section provides a damage recovery measured by market rent. The Official Text does not explicitly give this option to the lessee. Again, this change is consistent with the lessor's options contained within Sections 527 and 528 as amended by California and followed by Massachusetts.

The California statute further amended subsection (3) by deleting the words "and Section 2A-519 governs" that appear at the end of subsection (3) and inserting the words "under Section 2A-519" following the word "lessor." This is essentially a non-substantive change.

SECTION 519

Section 519:

Section 519 follows the California amendment to the Official Text, as further amended by the Massachusetts bill. The California statute amended subsection (1) to substitute the phrase "whether or not the lease agreement qualifies" for "that for any reason does not qualify." This amendment makes it clear that the lessee has the option of recovering damages under either Section 518 or Section 519 regardless of the lessee's decision to cover. This amendment also conforms Section 519 with Section 528.

The California statute also amended subsection (1) to substitute the phrase "default by the lessor (subsection 1 of Section 2A-508) is" for "nondelivery or repudiation by the lessor or for rejection or revocation of acceptance by the lessee is." The Official Text version was rejected because the list fails to mention non-payment of rent as a type of default. This amendment conforms Section 519 with Section 528.

The Massachusetts bill further amended subsection (1) to delete the reference to "subsection 1" of 2A-508 to conform to the revision to Section 508. The Massachusetts bill also amended subsection (1) to delete the cross-reference to Section 503. This latter amendment is not followed.

SECTION 523

Section 523:

Section 523 follows the Massachusetts amendment to the Official Text. Subsection (2) clarifies the right and remedies of a lessor for defaults other than those specified in subsection (1) by making Article 2A remedies available for any default under the lease contract, unless excluded or modified by the lease contract.

SECTION 524

Subsection 524(1):

The reference to "subsection (1)" of 2A-523 is deleted to conform this section to the revision made to subsection 523(2).

SECTION 527

Section 527:

Section 527 follows the California amendment of the Official Text, as further amended by the Massachusetts bill. The California statute amended subsection (2) by establishing the date of the new lease term as the date from which the lessor's damages are calculated and discounted to present value. The lessor recovers the full amount of unpaid rent until the date of the commencement of the new lease agreement. The lessor also receives the present value, as of the date of the commencement of the new lease, of the difference between the total rent then remaining under the original lease and the total rent for the lease term of the new lease agreement.

Under the Official Text, the damages are determined "as of the date of default" which will usually be prior to the time that the lessor can obtain possession of and re-lease the goods. Under this view, the lessor is not entitled to be paid the full rent during the time the defaulting lessee still has possession of the goods. The lessor will only receive a damage recovery during that gap period measured by "the present value as of the date of default of the difference between the total rent for the remaining lease term of the original lease agreement and the total rent for the lease term of the new lease agreement." Rapson, "Deficiencies and Ambiguities in Lessor's Remedies Under Article 2A: Using Official Comments to Cure Problems in the Statute," 39 Ala.L.Rev. 875, 898, n.73 (1988). The California amendment is intended to correct this unfair result. However, the lessor cannot unduly delay obtaining possession of its goods in order to get a higher damage award because the substitute lease must be made in good faith and in a commercially reasonable manner.

The California statute also amended subsection (3) to make clear that, in the event the lessor enters into a substantially similar lease agreement, the lessor has the option to proceed under either Section 527 or Section 528 to recover damages.

[11]

The Massachusetts bill further amended subsection (1) by deleting the reference to "subsection 1" of 2A-523 to conform to the revision to subsection 523(2). The Massachusetts bill also amended subsection (2) to delete the cross-reference to Section 503. This latter amendment is not followed.

SECTION 528

Section 528:

Section 528 follows the California amendment of the Official Text, as further amended by the Massachusetts bill. The California statute amended subsection (1) by substituting the phrase "whether or not the lease agreement qualifies for treatment under subdivision (2) of Section 10527" for the phrase "that for any reason does not qualify for treatment under Section 527(2)" used in the Official Text. Cross-references to Section 503 and Section 523 were added.

The California amendment also substitutes the phrase "damages for default by the lessee" for the phrase "damages for non-acceptance or repudiation by the lessee" to make it clear that this provision applies to a lessee's payment default, as well as to a lessee's repudiation or non-acceptance.

Furthermore, the California statute changes the date from which damages are calculated in subsection (1)(a) to the date the lessor either obtained possession of the goods or the date the lessee made a tender of possession of the goods back to the lessor, whichever date is earlier. Reference to this date is made in subsection (1)(b). The Official Text measures damages from the date of default. As a result, the lessor is not entitled to be paid the agreed rent during the time the lessee still has possession of the goods. Under the Official Text, the lessor's damages for the gap period are measured by "the present value as of the date of default of the difference between the total rent for the remaining lease term of the original lease agreement and the market rent." This formula produces a damage recovery less than that provided under the California statute.

The California statute amends subsection (2) by making the "present value" of the profit, not the profit itself as the Official Text indicates, the lessor's measure of damages, if the damages provided in subsection (1) are insufficient to make the lessor whole.

The Massachusetts bill amended subsection (1) to delete the reference to "subsection (1)" of Section 523. The Massachusetts bill also substituted the words "on the date" for "at the time" in subsection (1). This amendment is a clarification, not a substantive change. In addition, the Massachusetts bill deleted the cross-reference to Section 503 in subsection (1). However, this amendment is not followed.

SECTION 529

Section 529:

Section 529 follows the California amendment to the Official Text, as further amended by the Massachusetts bill. The California amendment to subsection (1)(a) "limits the right of the lessor to recover, in the case of accepted goods, accrued and unpaid rent plus the present value of the rent for the remaining lease term of the lease agreement, to those instances where the goods are 'not repossessed by or effectively tendered back to the lessor.'" Rapson and Sigman, "Reasons for Revisions," 11, supra. If the goods have been repossessed or tendered back, subsection (1)(b) applies.

California further amended subsection (1)(a) by determining the lessor's damages "as of the date of entry of judgment in favor of the lessor" instead of the "date of default." Because the lessor is "being deprived of the possession of the goods, it is entitled to full rent, not just the present value of future rentals." Rapson and Sigman, "Reasons for Revisions," 11, supra. The phrase "within a commercially reasonable time" is deleted to simplify the statute.

California amended subsection (1)(b) by adding the language "where the lessor has not delivered the goods or has taken possession of them or the lessee has effectively tendered them back to the lessor". The phrase "identified to the lease contract" encompasses goods the lessor has never delivered. Under this subsection, if the goods have never been delivered or are repossessed by the lessor or effectively tendered back by the lessee, the lessor must first attempt to mitigate damages. The lessor can recover unmitigated damages only upon a showing that his attempts to mitigate damages have failed. The unmitigated damage recovery is measured by the present value "of the rent for the then remaining lease term of the lease agreement." The measure of damages is the same under both subsection (1)(a) and subsection (1)(b); the difference is that under subsection (1)(b) the lessor must first attempt to mitigate damages. As in the case of subsection (1)(a), subsection (1)(b) determines the lessor's damages "as of the date of entry of judgment in favor of the lessor."

California amended subsection (3) to clarify that a lessor who obtains a judgment under Section 529(1), and later disposes of the goods before the end of the remaining lease term, must cause an appropriate credit against the judgment "to the extent that the amount of the judgment exceeds the recovery available" under Section 527 and 528.

California amended subsection (4) to add the requirement that, after payment of the judgment for damages, a lessee is entitled to use and have possession of the goods during the remaining lease term, provided the lessee complies with all other terms and conditions of the lease agreement.

The Massachusetts bill further amended the California statute by deleting the reference to subsection (1) of Section 523.

SECTION 532

Section 532:

Section 532 follows the California amendment. Section 532 was added to Article 2A by California because there was no specific reference in the Official Text of Article 2A to the lessor's reversionary interest. The purpose of Section 532 is "to clearly provide for the right of a lessor to the reversionary interest in the goods leased and to make clear that the preceding remedial sections relate to the lease term and are in addition to and do not negate protection of the reversion." "California Report," 39 Ala. L.Rev. 979, 1045-46 (1988).

AMENDMENTS

SECTION 2-403

Former subsection (1)(d) used the sentence "the delivery was procured through fraud punishable as larcenous under the criminal law" to state the rule that a person who obtains goods through fraud can transfer good title to a bonafide purchaser. The Code of Criminal Justice does not recognize larceny as a criminal offense. Thus, the phrase "fraud punishable under the criminal law" has been substituted for the phrase "fraud punishable as larcenous under the criminal law." This amendment conforms this subsection to Sections 304 and 305 of Article 2A.

SECTION 9-302

Former subsection 9-302(3)(b), which listed the certificate of title statutes of New Jersey, did not include the Boat Ownership Certificate Act found in N.J.S. 12:7A-1 et seq. The enactment of amended Section 302 in 1981 preceded the enactment in 1987 of the Boat Ownership Certificate Act. Reference to the latter statute has been added to subsection (3)(b) to complete the list of certificate of title statutes in New Jersey.

SECTION 9-306

The amendment to subsection 9-306(1) expands the definition of the term "proceeds" to include rent received from a lease contract. This amendment makes clear that rental payments are the proceeds of collateral that the debtor leases to others. Thus, a security interest continues in collateral notwithstanding the debtor's unauthorized disposition by lease contract. In effect, the secured party is given a perfected security interest in the lease contract itself by operation of law. This is viewed as the correct result under Section 9-306. See, Harris, "Rights of Creditors under Article 2A," 39 Ala. L.Rev. 803, 824-26 (1988). A few cases have held, however, that rent is not a Section 306 proceed because a rental of property is not a permanent disposition of property. See, e.g., General Electric Credit Corp. v. Cleary Brothers Construction Co., 30 U.C.C. Rep. 1444, 1445-46 (S.D. Fla. 1980). But see, Feldman v. Philadelphia National Bank, 408 F.Supp. 24, 37 (E.D. Pa. 1976). Amended Section 9-306 adopts the view that a lease contract is a disposition of collateral within the meaning of the statute, since the lease of the collateral has the capacity to limit its value.

SECTION 9-318(4)

The amendment to subsection (4) follows the California amendment to this subsection. The phrase "security interest in chattel paper" is added to make clear that any term in a lease contract purporting to prohibit the lessor from granting a security interest in the lease contract is ineffective. This amendment follows from the amendment made to 2A-303.

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The Commission examined the comprehensive new Act and proposes it for adoption in this State. The "payment day rule" endorsed by the Act will bring the adopting states into agreement with most foreign trading partners and satisfy foreign-money claims without undercompensating or overcompensating foreign-money claimants.

The Report and Recommendations Concerning the Uniform Foreign-Money Claims Act is appended to this Annual Report.

C. Uniform Commercial Code Article 4A

In 1990, the Commission filed a Report and Recommendations recommending the enactment of a new Chapter 4A of the Uniform Commercial Code concerning funds transfers, a method of payment used primarily by business or financial institutions and commonly referred to as wholesale funds transfers. Article 4A establishes rules to govern funds transfers processed through the banking system. The Article primarily applies to commercial wire transfers, but it applies to some consumer transactions as well. Although funds transfers have become a common method of payment, prior to the promulgation of Article 4A, commercial wire transfers were virtually unregulated and New Jersey lacks a comprehensive law regulating them.

Concurrently, the Commission recommended that the Permanent Editorial Board of the Uniform Commercial Code consider an amendment requiring banks to inform consumers who make funds transfers of the risk of loss applicable to those transactions. Article 4A prohibits recovery of consequential damages resulting from miscarried funds transfers. A consumer who makes a funds transfer payment may not realize the limited liability of the bank for miscarried transactions unless informed of the rule.

The Report and Recommendations Concerning Uniform Commercial Code Article 4A "Funds Transfers" is appended to this Annual report.

IV. PROJECTS AWAITING FINAL RECOMMENDATIONS

A. Statute of Frauds

Few New Jersey statutes are of more ancient derivation than the New Jersey Statute of Frauds, R.S. 25:1-1 to 9. Drawn almost verbatim from the English statute of 1677, the New Jersey statute was enacted in 1794 and was included in Paterson's Laws of 1799.

The New Jersey statute has survived several complete revisions of the New Jersey statutes virtually without change other than minor wording changes in the original five sections and the addition of four new sections. The Statute has been construed in hundreds of reported decisions, many of which apply the statute's provisions in ways that are not consistent with their literal terms. The archaic terminology of the Statute's sections, coupled with the volume of reported cases, make the Statute difficult to understand and apply in many situations.

During 1990, the Commission staff prepared an extensive report on the history and interpretation of the statute, on the basis of which the Commission prepared a revised statute. The Commission proposal eliminates archaic and unnecessary provisions in the existing law and modernizes the language in the remaining provisions. Where court interpretation of the Statute of Frauds had been consistent, that interpretation was codified in the Commission draft. On the subject of exceptions to the statute, where court decisions have been inconsistent, the draft proposes clear rules.

NJ LAW REVISION COMM. ANNUAL REPORT, 1990
APPENDIX C

**REPORT AND RECOMMENDATIONS
CONCERNING UNIFORM COMMERCIAL CODE ARTICLE
4A
"FUNDS TRANSFERS"**

**NEW JERSEY LAW REVISION COMMISSION
15 Washington Street
Newark, New Jersey 07102
(201)648-4575
October, 1990**

INTRODUCTION

The National Conference of Commissioners on Uniform State Laws and The American Law Institute have approved a new Article to the Uniform Commercial Code entitled Article 4A "Funds Transfers." The New Jersey Law Revision Commission, pursuant to its authority to review uniform state laws, undertook an examination of Article 4A to determine whether it should be adopted in the State of New Jersey. The Commission recommends that the legislature adopt Uniform Commercial Code Article 4A Official Text 1989. Concurrently, the Commission recommends that the Permanent Editorial Board of the Uniform Commercial Code consider an amendment requiring banks to inform customers who make funds transfers of the risk of loss applicable to those transactions.

Article 4A governs "funds transfers" made through the banking system and allocates the risk of loss between the parties. The Article primarily governs wholesale funds transfers which are transfers of large amounts of money normally made by commercial enterprises. The average size of a payment made through FedWire, a wire service operated by the Federal Reserve Board, was 3.1 million dollars in 1989.¹ The average size of a payment made through the Clearing House Interbank Payments System (CHIPS), a privately operated wire service, was 5.2 million in 1989. The total amount of money transferred through FedWire and CHIPS that year was 373 trillion dollars. Commercial parties obviously are the primary users of funds transfer systems and Article 4A is tailored to reflect banking and commercial practices.

While most funds transfers subject to Article 4A involve large commercial enterprises and large dollar amounts, 25% of all funds transfers are less than \$10,000 dollars. It is not clear what percentage of this 25% consists of consumer transactions.² But consumer funds transfers involving more than one bank are likely to be made through a wire service system. Since Article 4A applies to all transactions, whether commercial or consumer, that are processed through a wire service system, Article 4A may govern some consumer transactions. In addition, Article 4A applies to some consumer transactions processed through an automated clearing house.³

New Jersey lacks a comprehensive statute or body of case law to establish rules for funds transfers. The Electronic Fund Transfer Privacy Act, the only relevant New Jersey law, protects the privacy of consumer electronic funds transfers.⁴ Adoption of Article 4A thus would not displace existing law and would provide the commercial community with a system of rules to govern a new, and popular, method of payment. However, certain aspects of Article 4A are new to New Jersey law. Under Article 4A, the customer in a funds transfer bears a slightly greater risk of loss for an unauthorized payment order than a drawer of a check bears for an

¹ For a discussion of the major wire systems see Scott, Corporate Wire Transfers and the Uniform New Payments Code, 83 Colum. L.Rev. 1664, 1669-1674 (1983). The statistics cited for FedWire and CHIPS are available from the Federal Reserve Board.

² Research indicates that statistics for consumer transactions processed through wire service systems are not available.

³ 12 C.F.R. 205.3(g).

⁴ N.J.S. 17:16K-1 et seq.

unauthorized signature.⁵ Nor does Article 4A allow the recovery of consequential damages for miscarried funds transfers whereas Article 4 allows the recovery of consequential damages proximately caused by the wrongful dishonor of checks by a payor bank.⁶

Commercial parties can protect themselves from the consequences of these new rules because they have the bargaining power to negotiate agreements with their banks. However, consumers who lack equivalent bargaining power may be adversely affected by the Article 4A rules because these rules are new and Article 4A does not require a customer to be notified of them. A consumer might be led to believe incorrectly that the rules of negotiable instruments govern the funds transfer transaction. While the slightly increased risk of loss the customer bears in funds transfers is justified by the nature of the transaction, it might be preferable if Article 4A contained a requirement that banks notify customers of the risk of loss rules, especially the no-consequential damage rule for miscarried funds transfers.

This Final Report summarizes the Commission's analysis of Article 4A. The Commission examined how adoption of Article 4A would affect banking law in New Jersey, identified the impact Article 4A would have upon consumer transactions in this state, and compared the rules of Articles 3 and 4 governing payment made by check with the rules of Article 4A governing payment made by funds transfer. The latter analysis ascertained the differences in the way the Code treats the two forms of payment. This report contains five sections: (1) History and Overview of Article 4A, (2) Comparison of Checks and Payment Orders, (3) Effect of Article 4A upon Consumer Transactions, (4) Impact of Article 4A upon New Jersey law, and (5) Recommendation.

I. HISTORY AND OVERVIEW OF ARTICLE 4A

A. History

Technological advances, especially in the areas of electronics and computers, have revolutionized the banking industry.⁷ These improvements in technology have permitted banks to automate operations and reduce the volume of paper necessary for transactions. One system affected by the technological revolution is the payment system. Traditionally checks have been used to make payments. Today, however, electronic transfers of funds satisfy a substantial volume of commercial obligation without the issuance of a check. The development of legal principles has not kept pace with technological change in the banking industry. Consequently, the law of payments does not reflect actual commercial practices.⁸

⁵ Compare U.C.C. 4A-202 with U.C.C. 4-401.

⁶ Compare U.C.C. 4A-305 with U.C.C. 4-402.

⁷ Comment, Regulation of Wire Transfers and the Recoverability of Consequential Damages, 36 Buffalo L. Rev. 745 (1987).

⁸ Alces, A Jurisprudential Perspective for the True Codification of Payments Law, 53 Fordham L. Rev. 83 (1984).

Prior to the promulgation of Article 4A, commercial wire transfers were virtually unregulated.⁹ Uniform Commercial Code Articles 3 and 4 do not apply to wire transfers, although courts have cited analogous provisions in discussing electronic wire transfer systems.¹⁰ Federal Reserve Board regulations presently contain some provisions governing funds transfers but apply only to FedWire and the banks using the Federal Reserve System.¹¹ Non-statutory laws, such as automated clearing house rules and wire transfers system rules, apply to member banks. Private contracts between banks and their customers often do not exist, and if they do, fail to allocate significant risks among the parties.¹²

Most consumer wire transfers are regulated. The federal Electronic Funds Transfer Act of 1978 (EFTA) and its implementing Regulation E regulate electronic fund transfers made by consumers that are not sent through wire service systems such as FedWire and CHIPS.¹³ Consumers who wire money generally use Western Union or American Express.¹⁴ These corporations employ agents, not banks, to transfer the funds and therefore are not subject to Article 4A. However, to the extent that a consumer sends money through the banking system and uses a wire service system, the transaction is covered by Article 4A. Nine states have enacted electronic fund transfer laws which deal with consumer issues: Colorado, Iowa, Kansas, Michigan, Minnesota, Montana, New Mexico, Virginia and Wisconsin.¹⁵ An additional thirteen states, including New Jersey, have enacted statutes that bear upon the consumer aspects of electronic fund transfers, but do not regulate the substance of the transaction. Id.

In response to the lack of uniform and comprehensive law regulating commercial funds transfers, the National Conference of Commissioners on Uniform State Laws and the American Law Institute promulgated Article 4A. To date, eleven states have adopted Article 4A and it has been introduced in the legislatures of a number of other states.¹⁶ The Federal Reserve Board has adopted a proposed revision of subpart B to Regulation J to make it consistent with Article 4A. Revised Regulation J is expected to become effective January 1991 and would apply to transactions involving Federal Reserve Banks even if the state in which the Federal Bank is located had not yet adopted Article 4A. The Clearing House International Payments System, a private funds transfer system, also is expected to adopt Article 4A. It appears that in the next few years Article 4A will be adopted in most, if not all, the states.

⁹ Comment, supra n. 7 at 750.

¹⁰ Jetton, Evra Corp. v. Swiss Bank Corp.; Consequential Damages for Bank Negligence in Wire Transfers, 9 Rutgers Computer & Tech. L.J. 369, 398 (1983).

¹¹ 12 C.F.R. 210.

¹² Comment, supra at 758.

¹³ 15 U.S.C. 1693 et seq.

¹⁴ Ramirez, 2 Giants Battle in Money-Wiring, N.Y. Times, Aug. 14, 1990, at D1, col. 3.

¹⁵ N. Penny & D. Baker, The Law of Electronic Fund Transfer Systems, 10-2, 10-7 (1980).

¹⁶ Information on enactment of Article 4A is current to August 15, 1990. The eleven states are named in the Section V of this report.

B. Overview¹⁷

"Article 4A creates a series of rules to govern the resolution of legal issues that may arise out of funds transfers."¹⁸ The rules generally may be varied by agreement of the parties or by the operating rules of funds transfer systems but some rules which protect fundamental policy choices are not variable by agreement.¹⁹ The ability to vary the effect of the rules allows for the development of commercial practices not anticipated by Article 4A and provides a "safety net" for parties that do not negotiate all issues in their contracts. The flexibility of Article 4A combined with its gap-filling function makes it like most other articles of the Code.

Under Article 4A, a "funds transfer" is a series of payment orders by which an originator makes a payment to a beneficiary.²⁰ A payment order is an instruction to pay that is sent by the originator to a bank, or sent by a bank to cause another bank to pay a fixed amount of money to a beneficiary.²¹ The funds transfer begins when the customer of a bank issues a payment order to the bank which instructs the bank to pay a named beneficiary.²² The term "funds transfer" includes any payment order the bank may issue, or any payment order an intermediary bank may issue, to carry out the original payment order.²³ A funds transfer is completed when the beneficiary's bank accepts the payment order for the benefit of the beneficiary.²⁴

Many things can and do go wrong in funds transfers. There are two principal problems: (1) unauthorized funds transfers, and (2) erroneously executed payment orders. A serious but less common problem is a bank's failure to settle accounts. Unauthorized payment orders occur when the bank debits money from the customer's account without the customer's authorization. Erroneously executed payment orders occur for a variety of reasons and include, for example, misdescription of the beneficiary, duplication of payment orders, payment of the wrong amount to the beneficiary and failure to complete the transfer according to the customer's instruction. A bank that becomes insolvent and is unable to settle its accounts jeopardizes the finality of payments to beneficiaries. Article 4A provides comprehensive rules defining the rights and responsibilities of parties to funds transfers to solve these and other problems..

If a loss results from an unauthorized payment order, the customer suffers the loss if the bank accepted the order in good faith, and complied with a commercially reasonable security procedure to verify the authenticity

¹⁷ This section is inherently superficial since Article 4A is difficult, technical and complex. The 1989 Official Text of Article 4A contains comments to each provision which explain its function and meaning. It is not necessary to duplicate the commentary in this report. For a general explanation of Article 4A, see B. Clark, The Law of Bank Deposits, Collections and Credit Cards (1990).

¹⁸ Miller, Uniform Commercial Code Article 4A: A Framework for Transmitting Large Amounts of Funds, 44 Consumer L. Q. Rep. 150, 152 (1990)

¹⁹ U.C.C. 4A-501 and 4A-107.

²⁰ U.C.C. 4A-104(a).

²¹ U.C.C. 4A-103(a)(1).

²² U.C.C. 4A-104(a).

²³ U.C.C. 4A-104(a).

²⁴ Id.

of the order.²⁵ The customer can shift the loss to the bank if the customer shows that its shop did not cause the loss.²⁶ If the loss falls upon the bank, the bank refunds any payment received from the customer and, if applicable, interest on the refundable amount.²⁷

Significantly, Article 4A does not allow the customer making a payment by funds transfer to recover consequential damages from the bank if the transaction is miscarried, unless the customer and bank have entered into a written agreement allowing for this remedy.²⁸ The prohibition against the recovery of damages for aborted funds transfers is based upon policy grounds. Article 4A takes the position that to hold the bank liable for millions of dollars in damages for a transaction that costs a few dollars is unreasonable. Placing liability on the bank for consequential damages would increase the cost and decrease the speed of the transaction. Additionally, the Code presumes that the customer is in the best position to avoid the loss.

If a bank in the funds transfer system fails before it settles its accounts, the customer does not suffer the loss unless the customer specifically designated that the transaction be routed through the failed bank. Article 4A also authorizes "bilateral and unilateral netting of payment obligations which reduces the risk in the event of bank insolvency."²⁹

II. COMPARISON OF CHECKS AND PAYMENT ORDERS

Payment orders are not exactly like checks. "Payment orders, unlike checks, do not embody independent rights and liabilities for the payment of money."³⁰ Rather, the rights and liabilities of the parties to a payment order arise out of the contract formed when the bank executes the payment order of the customer. Also, a payment order is sent to a bank while a check is sent to a payee. These practical and conceptual differences between checks and funds transfers ostensibly justify the difference in the way the Code prohibits consequential damages for miscarried funds transfers and permits them for wrongfully dishonored checks.

In the checking system, a payor bank that wrongfully dishonors a check is liable for damages, including consequential damages, that are proximately caused by the wrongful dishonor.³¹ However, a non-payor bank that fails to exercise ordinary care in the handling of a check is liable only for the value of the check absent bad faith.³² In a funds transfer, the payor/non-payor bank distinction does not hold because the payment order is sent to the bank not the payee. No matter which bank in the funds transfer blunders the transaction its liability is limited to the amount of the payment order, interest

²⁵ U.C.C. 4A-202.

²⁶ U.C.C. 4A-203.

²⁷ U.C.C. 4A-204.

²⁸ U.C.C. §4A-305.

²⁹ Miller, *supra* n.17 at 152.

³⁰ Miller, *supra* n.17 at 153.

³¹ U.C.C. 4-402.

³² U.C.C. 4-103(5).

losses and incidental expenses.³³ Because banks in funds transfers are more analogous to non-payor banks than to payor banks in the check payment system, the no-consequential damage rule of Article 4A appears consistent with Article 4.

While practical and conceptual differences exist between checks and funds transfers, these differences do not logically justify the distinction in treatment of damages. The Code could have placed liability upon the banks for consequential damages for miscarried funds transfers on the policy ground of encouraging greater accuracy of banking practices. The fact that the drafters did not choose this policy reflects the participation of the banking industry in the drafting of Article 4A. The rule of Article 4A prohibiting the recovery of damages in the absence of an agreement with the bank departs from the principles of liability contained in the law of negotiable instruments which allows recovery of consequential damages from a payor bank for the wrongful dishonor of a check.

III. EFFECT OF ARTICLE 4A UPON CONSUMER TRANSACTIONS

Article 4A does not apply to any consumer transaction covered by the Electronic Funds Transfer Act (EFTA) and its implementing Regulation E. But EFTA does not apply to any consumer transaction sent through a wire service system such as FedWire, Clearing House Interbank Payment or Society for Worldwide International Financial Communication.³⁴ Since, for practical purposes, any funds transfer that involves more than one bank is executed through a wire transfer system, any consumer transaction that is not executed within one bank is likely to be governed by Article 4A. EFTA also does not apply to "preauthorized automated clearing house transfers received by a financial institution with assets of \$25 million or less, if the institution does not provide any other electronic payment services to its consumer customers."³⁵ As already noted, the application of Article 4A to consumer transactions has the effect of producing slightly different rules for payment by check and payment by funds transfer. A consumer may be wholly unaware of these differences because Article 4A does not contain a notification requirement.

A comparison of two rules, damages and unauthorized payments, illustrates the differences in treatment between the two forms of payment. A bank in a funds transfer is not responsible for an unauthorized payment order if the bank follows a commercially reasonable security procedure to verify the authenticity of the payment order unless the customer shows it was not responsible for the unauthorized order.³⁶ A bank that pays a check bearing an unauthorized signature of the drawer bears the loss unless the bank proves the customer's negligence caused the unauthorized signature.³⁷ Because Article 4A requires a customer to bear the loss of an unauthorized payment where the bank has followed security procedures, the customer in a

³³ A beneficiary's bank may be liable for consequential damages for intentional refusal to pay coupled with notice of special circumstances giving rise to such damages.

³⁴ 15 U.S.C. 1693; 12 C.F.R. 205.3(b).

³⁵ 12. C.F.R. 205.3(g).

³⁶ U.C.C. 4A-202(b) and U.C.C. 4A-203.

³⁷ U.C.C. 4-401; U.C.C. 4-406 and U.C.C. 3-406.

funds transfer bears a slightly greater risk of loss for an unauthorized instruction to pay than a drawer of a check bears for an unauthorized signature. Additionally, the Code treats the measure of damages for wrongful dishonor of checks differently from the measure of damages for miscarried funds transfers.

IV. IMPACT OF ARTICLE 4A ON NEW JERSEY LAW

New Jersey does not have a statute to regulate the substantive aspects of funds transfers. The Electronic Fund Transfer Privacy Act is a consumer statute concerned with protecting the privacy of financial transactions.³⁸ The Act prohibits a financial institution from disclosing information concerning an electronic funds transfer to third parties unless the Act specifically permits the disclosure.³⁹ Violations of the Act entitle the consumer to obtain actual damages, and if the violation is willful or reckless, the Act entitles the consumer to collect punitive damages.⁴⁰

References to electronic funds transfers are also made in three other statutes unrelated to the regulation of funds transfers. N.J.S. 17:11B-14(1), a provision within an act providing for the regulation and licensing of mortgage bankers and brokers, permits payment of mortgage proceeds by electronic funds transfer. N.J.S. 17:12B-48(17), a provision within the 1963 Savings and Loan Act, allows an association to make payments in the form of electronic transfers. N.J.S. 52:14-15(b) allows the state treasurer to deposit by an electronic funds transfer the pay of a state employee in a banking institution by means of an electronic transfer). In addition, a credit union may maintain automated terminals to transact business with financial institutions.⁴¹

New Jersey case law does not address the issue of electronic funds transfers. However, a New Jersey federal district court, applying Pennsylvania law, establishes some precedent in New Jersey for funds transfers. Mellon Bank N.A. v. Securities Settlement Corp.⁴² The court in Mellon held that a bank which executed a payment order in a funds transfer and made payment to the beneficiary's bank could not recover the payment from its customer because the bank failed to exercise ordinary care to cancel the payment order when instructed to do so by the customer.

Article 4A would apply to all commercial funds transfers and consumer transactions not governed by the Electronic Fund Transfer Act of 1978. Article 4A would not displace the New Jersey Electronic Fund Transfer Privacy Act. Whether the result in Mellon Bank N.A. v. Securities Settlement Corp., would obtain under Article 4A is difficult to ascertain because the Mellon decision does not report enough facts to make this determination. To the extent that Article 4A provides that an order to cancel is ineffective if the receiving bank has accepted the order, a different result probably would obtain under Mellon because the bank accepted the order before it received notice of the cancellation. In any event, the Mellon

³⁸ N.J.S. 17:16K-1 et seq.

³⁹ N.J.S. 17:16K-3.

⁴⁰ N.J.S. 17:16K-6.

⁴¹ N.J.S. 17:13-89(m).

⁴² 710 F.Supp. 991 (D.N.J. 1989).

decision would no longer constitute a precedent for the law of funds transfers if Article 4A were adopted in New Jersey since Article 4A rejects negligence concepts.

V. RECOMMENDATION

The Commission recommends that the New Jersey Legislature adopt Uniform Commercial Code Article 4A "Funds Transfers" 1989 Official Text. Adoption of this Article fills a void with respect to payments made by funds transfers and would not disrupt the law of this State. Article 4A has been adopted in eleven states: California, Colorado, Connecticut, Kansas, Louisiana, Minnesota, New York, Oklahoma, Utah, Virginia, and West Virginia. Major wire service systems such as FedWire and CHIPS also are expected to adopt Article 4A. Concurrently, the Commission recommends that the Permanent Editorial Board of the Uniform Commercial Code consider an amendment requiring banks to inform customers who make funds transfers of the risk of loss provisions applicable to those transfers.

NEW JERSEY LAW REVISION COMMA.
ANNUAL REPORT, 1991.

Legislative Counsel (N.J.S. 52:11-61). By L.1985, c.498, the Legislature transferred the functions of statutory revision and codification to the New Jersey Law Revision Commission.

III. PROJECTS AND RECOMMENDATIONS

In 1991, the New Jersey Law Revision Commission filed six final reports: Uniform Commercial Code Article 6 (Bulk Transfers), Municipal Courts, Surrogates, Tax Court, Terms of Appointment and Statute of Frauds.

A. U.C.C. Article 6 (Bulk Transfers)

The Commission filed a Report and Recommendations Concerning the Repeal of Article 6 (Bulk Transfers) of the Uniform Commercial Code, N.J.S. 12A:6-101 et seq. (See Appendix A.) In its report, the Commission recommended that the Legislature repeal Article 6 of the Uniform Commercial Code.

The proposal implemented a recommendation of the Permanent Editorial Board of the Uniform Commercial Code and the National Conference of Commissioners on Uniform State Laws. The Commission studied the recommendation and solicited comments from members of the New Jersey Bar. Based on the responses and its study of the issue, the Commission determined that Article 6 had ceased to protect the interests of creditors in the context of modern commercial transactions. Article 6 contains ambiguous terms, is difficult and inefficient to apply, and, in most circumstances, is waived by both parties. Creditors rely on other laws to protect their security interests in merchandise. To the extent that Article 6 is currently employed, it is expensive and provides little benefit. Repeal of Article 6 will save money for parties transacting business affected by its provisions.

NJ LAW REVISION COMM. ANNUAL REPORT, 1991
APPENDIX A

**REPORT AND RECOMMENDATIONS
CONCERNING REPEAL OF ARTICLE 6 BULK TRANSFERS
OF THE UNIFORM COMMERCIAL CODE,
12A:6-101 et seq.**

**NEW JERSEY LAW REVISION COMMISSION
15 Washington Street
Newark, New Jersey 07102
(201)648-4575
July, 1991**

Report and Recommendations

Concerning Repeal of Article 6 Bulk Transfers of the Uniform Commercial Code, 12A:6-101 et seq.

Bulk sales statutes were enacted in many states around the turn of the century to combat what had become, it was believed, a common phenomenon: the merchant who acquired retail stock on credit and then would close shop, sell the entire inventory in bulk and disappear with the proceeds. The merchant's creditors could sue on the debt and recover a judgment, but collection was often difficult because the creditor and the proceeds of the sale were difficult to trace. Creditors ordinarily had no recourse against the goods themselves because the sale was usually to a good faith purchaser who took the goods free of any claim by the merchant's creditors.

The drafters of the Uniform Commercial Code incorporated the common features of these bulk sales statutes into Article 6 Bulk Sales of the Uniform Commercial Code. As adopted in New Jersey, Article 6 covers sales "in bulk and not in the ordinary course of business" in enterprises whose "principal business is the sale of merchandise for stock." The transfer must be of "the major part" of the transferor's inventory. Transfers for security (i.e. the giving of a mortgage) are exempt. The seller in a bulk sale is required to notify all of its creditors of the pendency of a bulk sale and must distribute the proceeds to those creditors. The creditors which must be notified are "those holding claims based on transactions or events occurring before the bulk transfer," whether those claims are in contract or tort, and whether they are liquidated or unliquidated, secured or unsecured, contingent or fixed, due or undue. The proceeds of the bulk sale must then be distributed to the creditors. If the notice and distribution requirements of the bulk sales chapter are not complied with, the transfer is deemed "ineffective" against the creditors of the seller and the buyer is liable to the creditors.

Article 6 has engendered criticism and controversy continuously since its inclusion in the Uniform Commercial Code. See, e.g., Rapson, "U.C.C. Article 6: Should It Be Revised or 'Deep-Sixed'?" 38 *Business Lawyer* 1753 (1983). One of the difficulties in applying Article 6 Bulk Transfers is the confusion that has arisen over the interpretation of its provisions. For example, the article is applicable to the sale of "a major part" of the seller's inventory, yet there is no guidance as to how to measure what constitutes "a major part" in particular circumstances. The commentary to Article 6 suggests that more than 50% is a major part of inventory, yet it does not indicate whether the measurement should be of the number of items in inventory or the value of the items. While most courts have interpreted the provision to apply to 50% of the value of inventory, further questions have arisen in determining what constitutes the total inventory from which the calculation is made. The question has arisen in cases involving enterprises with more than one place of business within a state, or those with places of business both within and without the state.

Another interpretive difficulty in Article 6 involves the determination of the nature and amount of creditors' claims. The definition of a claim is very broad, and includes such things as unliquidated tort claims and contingent claims. The seller in a bulk transfer must therefore determine the kind and nature of such claims which might be asserted, and who might assert them, and then notify the potential claimants of the pendency of the bulk transfer. The requirement of notice to creditors may therefore trigger claims which might not otherwise have been made. The resolution of these types of uncertain legal issues adds to the cost of transactions which are, or arguably might be, covered by Article 6.

Even if the determination of the identity of creditors and the nature of the claims is itself straightforward, the cost of complying with Article 6 can be substantial. For example, even a small retail business may have hundreds of trade creditors, each one of which must be separately identified and sent a notice of the pendency of the bulk sale. In a small business transaction, the cost of extracting the names and addresses of these creditors and sending the required notice can add up rapidly and in some cases consume a significant portion of the proceeds of the sale itself. In this connection, the most consistent comment received by the Commission from New Jersey practitioners concerning the operation of the bulk sales law is that the law is waived in most transactions because compliance would add substantially to the cost and difficulty of completing the transaction. One New Jersey attorney commented to the Commission that in his 30-year experience in practice in the state, "in more cases than not, Article 6 has been waived by the parties. When a transaction was conducted in accordance with the requirements of Article 6, it added substantial expense, required cumbersome contract provisions and closing procedures, and did not appear to be giving substantial added protection to creditors."

The use of waivers of Article 6 in business transactions developed not only in response to the costs involved in compliance, but also in response to the concerns of both sellers and buyers that creditors would respond to the receipt of a notice of bulk sale by assuming that the seller was going out of business or was in financial difficulty. In these cases compliance with Article 6 would have the unsatisfactory result of impairing the financial reputation of a going business.

One of the primary reasons cited by the National Conference of Commissioners on Uniform State Laws and the American Law Institute supporting the repeal of Article 6 is the change in the legal context of modern business transactions since bulk transfer laws were first adopted. First, the Conference and the Institute cited the ready availability to creditors of timely information to assist them in making decisions concerning the extension of credit. Second, the Conference and the Institute referred to the greater opportunities afforded creditors to collect debts under modern statutes. They cited, for example, the promulgation of state long-arm statutes, which give creditors the ability to more readily obtain personal jurisdiction over debtors, and the widespread adoption of the Uniform Fraudulent Transfer Act, which provides remedies in the case of a fraudulent bulk transfer. In addition, creditors are able to protect their interests at the time of extending credit by retaining an Article 9 security interest in the goods which are being sold.

The reasons supporting the retention of Article 6 are not compelling in comparison to the reasons supporting its repeal. While compliance with the provisions of Article 6 often results in the payment of creditors from the proceeds of a bulk sale, there is no evidence that the vast majority of these creditors would not have been paid in the ordinary course of a transaction in the absence of Article 6. Significantly, the remedy provided creditors by Article 6 is largely illusory, as creditors have only a ten-day notice of the pendency of a bulk transfer in which to take some action to protect their interests. Generally, the remedies available to creditors in that short period of time are a levy on the inventory sold to the buyer, the issuance of a writ of attachment or *capias*, enjoining the transaction and seeking the appointment of a receiver, or the filing of an involuntary bankruptcy petition. The alternative of a levy is available only to a creditor who has a claim which has been reduced to judgment. The writs of attachment and *capias* require specific factual showings such as intent of the debtor to abscond or intent to defraud which are nonexistent in most cases or in any event, difficult to prove. The standards for obtaining appointment of a receiver or an involuntary bankruptcy petition are equally difficult to establish, and the proceedings are cumbersome. Moreover, the requirements of Article 6 are easily circumvented by those who do have an intent to defraud their creditors, by providing the bulk buyer with an affidavit indicating that they have no unpaid creditors.

In 1990 the National Conference of Commissioners on Uniform State Laws and the American Law Institute studied Article 6 and its relationship to other creditors' rights statutes. The Conference and the Institute jointly recommended that Article 6 be repealed in those states which have enacted it. Alternatively, they proposed a revised Article 6 for those states which perceive a particular problem with bulk sales in their jurisdictions. A copy of the recommendation of the Conference and the Institute is attached to this report as Exhibit A.

The Law Revision Commission received the recommendation of the Conference and the Institute and decided to seek comments concerning the advisability of repealing Article 6 in this state from members of the bar. The comments received by the Commission were uniformly in favor of repeal. The Commission has concluded that the remedies available to creditors in the ordinary course, either before extending credit or in pursuing an unpaid debt, are sufficient, and that the imposition of burdens on all transactions on the assumption that bulk sellers will not satisfy their creditors, are not justified.

Based upon the recommendation of the Conference and the Institute and on the confirmatory comments received from New Jersey attorneys, the Commission recommends that the New Jersey version of Article 6 of the Uniform Commercial Code, N.J.S. 12A:6-101 et seq., be repealed and not replaced.

UNIFORM COMMERCIAL CODE

THE AMERICAN LAW INSTITUTE
NATIONAL CONFERENCE OF
COMMISSIONERS ON UNIFORM
STATE LAWS

REPEALER OF ARTICLE 6 - BULK TRANSFERS

and

[REVISED] ARTICLE 6 - BULK SALES

(States to Select One Alternative)

(With Conforming Amendment to
Article 1)

1989 OFFICIAL TEXT
WITH COMMENTS

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By

THE AMERICAN LAW INSTITUTE

and

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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Approved by the American Bar Association
Los Angeles, California, February 13, 1990

Appendix A - 1

UNIFORM COMMERCIAL CODE
REPEALER OF ARTICLE 6 - BULK TRANSFERS
and
[REVISED] ARTICLE 6 - BULK SALES
(States to Select One Alternative)

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UNIFORM COMMERCIAL CODE
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(States to Select One Alternative)

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UNIFORM COMMERCIAL CODE
REPEALER OF ARTICLE 6 - BULK TRANSFERS
and
[REVISED] ARTICLE 6 - BULK SALES
(States to Select One Alternative) .

PREFATORY NOTE

Background. Bulk sale legislation originally was enacted in response to a fraud perceived to be common around the turn of the century: a merchant would acquire his stock in trade on credit, then sell his entire inventory ("in bulk") and abscond with the proceeds, leaving creditors unpaid. The creditors had a right to sue the merchant on the unpaid debts, but that right often was of little practical value. Even if the merchant-debtor was found, in personam jurisdiction over him might not have been readily available. Those creditors who succeeded in obtaining a judgment often were unable to satisfy it because the defrauding seller had spent or hidden the sale proceeds. Nor did the creditors ordinarily have recourse to the merchandise sold. The transfer of the inventory to an innocent buyer effectively immunized the goods from the reach of the seller's creditors. The creditors of a bulk seller thus might be left without a means to satisfy their claims.

To a limited extent, the law of fraudulent conveyances ameliorated the creditors' plight. When the buyer in bulk was in league with the seller or paid less than full value for the inventory, fraudulent conveyance law enabled the defrauded creditors to avoid the sale and apply the transferred inventory toward the satisfaction of their claims against the seller. But fraudulent conveyance law provided no remedy against persons who bought in good faith, without reason to know of the seller's intention to pocket the proceeds and disappear, and for adequate value. In those cases, the only remedy for the seller's creditors was to attempt to recover from the absconding seller.

State legislatures responded to this perceived "bulk sale risk" with a variety of legislative enactments. Common to these statutes was the imposition of a duty on the buyer in bulk to notify the seller's creditors of the impending sale. The buyer's failure to comply with these and any other statutory duties generally afforded the seller's creditors a remedy analogous to the remedy for fraudulent conveyances: the creditors acquired the right to set aside the sale and reach the transferred inventory in the hands of the buyer.

Like its predecessors, Article 6 (1987 Official Text) is remarkable in that it obligates buyers in bulk to incur costs to protect the interests of the seller's creditors, with whom they usually have no relationship. Even more striking is that Article 6 affords creditors a remedy against a good faith purchaser for full value without notice of any wrongdoing on the part of the seller. The Article thereby impedes normal business transactions, many of which can be expected to benefit the seller's creditors. For this reason, Article 6 has been subjected to serious criticism. See, e.g., Rapson, U.C.C. Article 6: Should It Be Revised or "Dèep-Sixed"? 38 Bus. Law. 1753 (1983).

In the legal context in which Article 6 (1987 Official Text) and its nonuniform predecessors were enacted, the benefits to creditors appeared to justify the costs of interfering with good faith transactions. Today, however, creditors are better able than ever to make informed decisions about whether to extend credit. Changes in technology have enabled credit reporting services to provide fast, accurate, and more complete credit histories at relatively little cost. A search of the public real estate and personal property records will disclose most encumbrances on a debtor's property with little inconvenience.

In addition, changes in the law now afford creditors greater opportunities to collect their debts. The development of "minimum contacts" with the forum state as a basis for in personam jurisdiction and the universal promulgation of state long-arm statutes and rules have greatly improved the possibility of obtaining personal jurisdiction over a debtor who flees to another state. Widespread enactment of the Uniform Enforcement of Foreign Judgments Act has facilitated nation-wide collection of judgments. And to the extent that a bulk sale is fraudulent and the buyer is a party to fraud, aggrieved creditors have a remedy under the Uniform Fraudulent Transfer Act. Moreover, creditors of a merchant no longer face the choice of extending unsecured credit or no credit at all. Retaining an interest in inventory to secure its price has become relatively simple and inexpensive under Article 9.

Finally, there is no evidence that, in today's economy, fraudulent bulk sales are frequent enough, or engender credit losses significant enough, to require regulation of all bulk sales, including the vast majority that are conducted in good faith. Indeed, the experience of the Canadian Province of British Columbia, which repealed its Sale of Goods in Bulk Act

in 1985, and of the United Kingdom, which never has enacted bulk sales legislation, suggests that regulation of bulk sales no longer is necessary.

Recommendation. The National Conference of Commissioners on Uniform State Laws and the American Law Institute believe that changes in the business and legal contexts in which sales are conducted have made regulation of bulk sales unnecessary. The Conference and the Institute therefore withdraw their support for Article 6 of the Uniform Commercial Code and encourage those states that have enacted the Article to repeal it.

The Conference and the Institute recognize that bulk sales may present a particular problem in some states and that some legislatures may wish to continue to regulate bulk sales. They believe that existing Article 6 has become inadequate for that purpose. For those states that are disinclined to repeal Article 6, they have promulgated a revised version of Article 6. The revised Article is designed to afford better protection to creditors while minimizing the impediments to good-faith transactions.

The Official Comment to Section 6-101 explains the rationale underlying the revisions and highlights the major substantive changes reflected in them. Of particular interest is Section 6-103(1)(a), which limits the application of the revised Article to bulk sales by sellers whose principal business is the sale of inventory from stock. In approving this provision, the Conference and the Institute were mindful that some states have expanded the coverage of existing Article 6 to include bulk sales conducted by sellers whose principal business is the operation of a restaurant or tavern. Expansion of the scope of revised Article 6 is inconsistent with the recommendation that Article 6 be repealed. Nevertheless, the inclusion of restaurants and taverns within the scope of the revised Article as it is enacted in particular jurisdictions would not disturb the internal logic and structure of the revised Article.