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Short Title: UCC Leases.

(Public)

Sponsors:

Referred to:

April 19, 1993

1 A BILL TO BE ENTITLED
2 AN ACT TO ENACT NEW ARTICLE 2A OF THE UNIFORM COMMERCIAL
3 CODE AND TO ADD A NEW ARTICLE 2 to CHAPTER 22B OF THE
4 GENERAL STATUTES MAKING JURY TRIAL WAIVER PROVISIONS IN
5 CONTRACTS UNENFORCEABLE.

6 The General Assembly of North Carolina enacts:

7 Section 1. Chapter 25 of the General Statutes is amended by adding the
8 following new Article to read:

9 **"ARTICLE 2A.**
10 **"LEASES.**
11 **"PART 1.**
12 **"GENERAL PROVISIONS.**

13 **"§ 25-2A-101. Short title.**

14 This Article shall be known and may be cited as the Uniform Commercial Code -
15 Leases.

16 **"§ 25-2A-102. Scope.**

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

18 **"§ 25-2A-103. Definitions and index of definitions.**

19 (1) In this Article unless the context otherwise requires:

20 (a) 'buyer in ordinary course of business', means a person who in good faith and
21 without knowledge that the sale to him is in violation of the ownership rights or security

1 interest or leasehold interest of a third party in the goods buys in ordinary course from a
2 person in the business of selling goods of that kind but does not include a pawnbroker.
3 'Buying' may be for cash or by exchange of other property or on secured or unsecured
4 credit and includes receiving goods or documents of title under a preexisting contract
5 for sale but does not include a transfer in bulk or as security for or in total or partial
6 satisfaction of a money debt.

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

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

15 (d) 'conforming' goods or performance under a lease contract means goods or
16 performance that are in accordance with the obligations under the lease contract.

17 (e) 'consumer lease' means a lease that a lessor regularly engaged in the business
18 of leasing or selling makes to a lessee who is an individual and who takes under the
19 lease primarily for a personal, family, or household purpose, if the total payments to be
20 made under the lease contract, excluding payments for options to renew or buy, do not
21 exceed twenty-five thousand dollars (\$25,000).

22 (f) 'fault' means wrongful act, omission, breach, or default.

23 (g) 'finance lease' means a lease with respect to which: (i) the lessor does not
24 select, manufacturer, or supply the goods; (ii) the lessor acquires the goods or the right
25 to possession and use of the goods in connection with the lease; and (iii) one of the
26 following occurs:

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

29 (B) the lessee's approval of the contract by which the lessor acquired the goods or
30 the right to possession and use of the goods is a condition to effectiveness of the lease
31 contract;

32 (C) the lessee, before signing the lease contract, receives an accurate and
33 complete statement designating the promises and warranties, and any disclaimers of
34 warranties, limitations or modifications of remedies, or liquidated damages, including
35 those of a third party, such as the manufacturer of the goods, provided to the lessor by
36 the person supplying the goods in connection with or as part of the contract by which
37 the lessor acquired the goods or the right to possession and use of the goods; or

38 (D) if the lease is not a consumer lease, the lessor, before the lessee signs the
39 lease contract, informs the lessee in writing (a) of the identity of the person supplying
40 the goods to the lessor, unless the lessee has selected that person and directed the lessor
41 to acquire the goods or the right to possession and use of the goods from that person, (b)
42 that the lessee is entitled under this Article to the promises and warranties, including
43 those of any third party, provided to the lessor by the person supplying the goods in
44 connection with or as part of the contract by which the lessor acquired the goods or the

1 right to possession and use of the goods, and (c) that the lessee may communicate with
2 the person supplying the goods to the lessor and receive an accurate and complete
3 statement of those promises and warranties, including any disclaimers and limitations of
4 them or of remedies.

5 (h) 'goods' means all things that are movable at the time of identification to the
6 lease contract, or are fixtures (G.S. 25-2A-309), but the term does not include money,
7 documents, instruments, accounts, chattel paper, general intangibles, or minerals or the
8 like, including oil and gas, before extraction. The term also includes the unborn young
9 of animals.

10 (i) 'installment lease contract' means a lease contract that authorizes or requires
11 the delivery of goods in separate lots to be separately accepted, even though the lease
12 contract contains a clause 'each delivery is a separate lease' or its equivalent.

13 (j) 'lease' means a transfer of the right to possession and use of goods for a term
14 in return for consideration, but a sale, including a sale on approval or a sale or return, or
15 retention or creation of a security interest is not a lease. Unless the context clearly
16 indicates otherwise, the term includes a sublease.

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

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

25 (m) 'leasehold interest' means the interest of the lessor or the lessee under a lease
26 contract.

27 (n) 'lessee' means a person who acquires the right to possession and use of goods
28 under a lease. Unless the context clearly indicates otherwise, the term includes a
29 sublessee.

30 (o) 'lessee in ordinary course of business' means a person who in good faith and
31 without knowledge that the lease to him is in violation of the ownership rights or
32 security interest or leasehold interest of a third party in the goods leases in ordinary
33 course from a person in the business of selling or leasing goods of that kind but does not
34 include a pawnbroker. 'Leasing' may be for cash or by exchange of other property or on
35 secured or unsecured credit and includes receiving goods or documents of title under a
36 preexisting lease contract but does not include a transfer in bulk or as security for or in
37 total or partial satisfaction of a money debt.

38 (p) 'lessor' means a person who transfers the right to possession and use of goods
39 under a lease. Unless the context clearly indicates otherwise, the term includes a
40 sublessor.

41 (q) 'lessor's residual interest' means the lessor's interest in the goods after
42 expiration, termination, or cancellation of the lease contract.

43 (r) 'lien' means a charge against or interest in goods to secure payment of a debt
44 or performance of an obligation, but the term does not include a security interest.

1 (s) 'lot' means a parcel or a single article that is the subject matter of a separate
2 lease or delivery, whether or not it is sufficient to perform the lease contract.

3 (t) 'merchant lessee' means a lessee that is a merchant with respect to goods of
4 the kind subject to the lease.

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

11 (v) 'purchase' includes taking by sale, lease, mortgage, security interest, pledge,
12 gift, or any other voluntary transaction creating an interest in goods.

13 (w) 'sublease' means a lease of goods the right to possession and use of which was
14 acquired by the lessor as a lessee under an existing lease.

15 (x) 'supplier' means a person from whom a lessor buys or leases goods to be
16 leased under a finance lease.

17 (y) 'supply contract' means a contract under which a lessor buys or leases goods
18 to be leased.

19 (z) 'termination' occurs when either party pursuant to a power created by
20 agreement or law puts an end to the lease contract otherwise than for default.

21 (2) Other definitions applying to this Article and the sections in which they
22 appear are:

23 'Accessions'. G.S. 25-2A-310(1).

24 'Construction mortgage'. G.S. 25-2A-309(1)(d).

25 'Encumbrance'. G.S. 25-2A-309(1)(e).

26 'Fixtures'. G.S. 25-2A-309(1)(a).

27 'Fixture filing'. G.S. 25-2A-309(1)(b).

28 'Purchase money lease'. G.S. 25-2A-309(1)(c).

29 (3) The following definitions in other Articles apply to this Article:

30 'Account'. G.S. 25-9-106.

31 'Between merchants'. G.S. 25-2-104(3).

32 'Buyer'. G.S. 25-2-103(1)(a).

33 'Chattel paper'. G.S. 25-9-105(1)(b).

34 'Consumer goods'. G.S. 25-9-109(1).

35 'Document'. G.S. 25-9-105(1)(f).

36 'Entrusting'. G.S. 25-2-403(3).

37 'General intangibles'. G.S. 25-9-106.

38 'Good faith'. G.S. 25-2-103(1)(b).

39 'Instrument'. G.S. 25-9-105(1)(i).

40 'Merchant'. G.S. 25-2-104(1).

41 'Mortgage'. G.S. 25-9-105(1)(j).

42 'Pursuant to commitment'. G.S. 25-9-105(1)(k).

43 'Receipt'. G.S. 25-2-103(1)(c).

44 'Sale'. G.S. 25-2-106(1).

1 'Sale on approval'. G.S. 25-2-326.

2 'Sale or return'. G.S. 25-2-326.

3 'Seller'. G.S. 25-2-103(1)(d).

4 (4) In addition, Article 1 contains general definitions and principles of
5 construction and interpretation applicable throughout this Article.

6 **"§ 25-2A-104. Leases subject to other law.**

7 (1) A lease, although subject to this Article, is also subject to any applicable:

8 (a) certificate of title statute of this State (G.S. 20-50, G.S. 75A-32 et seq.);

9 (b) certificate of title statute of another jurisdiction (G.S. 25-2A-105); or

10 (c) consumer protection statute of this State, or final consumer protection
11 decision of a court of this State existing on the effective date of this Article.

12 (2) In case of conflict between this Article, other than G.S. 2A-105, 2A-304(3),
13 and 2A-305(3), and a statute or decision referred to in subsection (1) of this section, the
14 statute or decision controls.

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

16 **"§ 25-2A-105. Territorial application of Article to goods covered by certificate of**
17 **title.**

18 Subject to the provisions of G.S. 25-2A-304(3) and G.S. 25-2A-305(3), with
19 respect to goods covered by a certificate of title issued under a statute of this State or of
20 another jurisdiction, compliance and the effect of compliance or noncompliance with a
21 certificate of title statute are governed by the law (including the conflict of laws rules)
22 of the jurisdiction issuing the certificate until the earlier of (a) surrender of the
23 certificate, or (b) four months after the goods are removed from that jurisdiction and
24 thereafter until a new certificate of title is issued by another jurisdiction.

25 **"§ 25-2A-106. Limitation on power of parties to consumer lease to choose**
26 **applicable law and judicial forum.**

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

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

34 **"§ 25-2A-107. Waiver or renunciation of claim or right after default.**

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

38 **"§ 25-2A-108. Unconscionability.**

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

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

5 (3) Before making a finding of unconscionability under subsection (1) or (2) of
6 this section, the court, on its own motion or that of a party, shall afford the parties a
7 reasonable opportunity to present evidence as to the setting, purpose, and effect of the
8 lease contract or clause thereof, or of the conduct.

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

11 (a) if the court finds unconscionability under subsection (1) or (2) of this section,
12 the court shall award reasonable attorneys' fees to the lessee.

13 (b) if the court does not find unconscionability and the lessee claiming
14 unconscionability has brought or maintained an action he knew to be groundless, the
15 court shall award reasonable attorneys' fees to the party against whom the claim is
16 made.

17 (c) in determining attorneys' fees, the amount of the recovery on behalf of the
18 claimant under subsections (1) and (2) of this section is not controlling.

19 **"§ 25-2A-109. Option to accelerate at will.**

20 (1) A term providing that one party or his successor in interest may accelerate
21 payment or performance or require collateral or additional collateral 'at will' or 'when he
22 deems himself insecure' or in words of similar import must be construed to mean that he
23 has power to do so only if he in good faith believes that the prospect of payment or
24 performance is impaired.

25 (2) With respect to a consumer lease, the burden of establishing good faith under
26 subsection (1) of this section is on the party who exercised the power; otherwise, the
27 burden of establishing lack of good faith is on the party against whom the power has
28 been exercised.

29 **"PART 2.**

30 **"FORMATION AND CONSTRUCTION OF LEASE CONTRACT.**

31 **"§ 25-2A-201. Statute of frauds.**

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

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

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

38 (2) Any description of leased goods or of the lease term is sufficient and satisfies
39 subsection (1)(b) of this section, whether or not it is specific, if it reasonably identifies
40 what is described.

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

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

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

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

11 or

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

13 (5) The lease term under a lease contract referred to in subsection (4) of this
14 section is:

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

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

19 (c) if there is other evidence of the parties' intent with regard to the lease term,
20 the term so intended; or

21 (d) in the absence of evidence of the parties' intent, a reasonable lease term.

22 **"§ 25-2A-202. Final written expression: parol or extrinsic evidence.**

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

28 (a) by course of dealing or usage of trade or by course of performance; and

29 (b) by evidence of consistent additional terms unless the court finds the writing to
30 have been intended also as a complete and exclusive statement of the terms of the
31 agreement.

32 **"§ 25-2A-203. Seals inoperative.**

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

36 **"§ 25-2A-204. Formation in general.**

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

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

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

44 **"§ 25-2A-205. Firm offers.**

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

6 **"§ 25-2A-206. Offer and acceptance in formation of lease contract.**

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

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

13 **"§ 25-2A-207. Course of performance or practical construction.**

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

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

23 (3) Subject to the provisions of G.S. 25-2A-208 on modification and waiver,
24 course of performance is relevant to show a waiver or modification of any term
25 inconsistent with the course of performance.

26 **"§ 25-2A-208. Modification, rescission and waiver.**

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

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

33 (3) Although an attempt at modification or rescission does not satisfy the
34 requirements of subsection (2) of this section, it may operate as a waiver.

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

39 **"§ 25-2A-209. Lessee under finance lease as beneficiary of supply contract.**

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

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

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

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

15 (4) In addition to the extension of the benefit of the supplier's promises and of
16 warranties to the lessee under subsection (1) of this section, the lessee retains all rights
17 that the lessee may have against the supplier which arise from an agreement between the
18 lessee and the supplier or under other law.

19 **"§ 25-2A-210. Express warranties.**

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

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

24 (b) any description of the goods which is made part of the basis of the bargain
25 creates an express warranty that the goods will conform to the description.

26 (c) any sample or model that is made part of the basis of the bargain creates an
27 express warranty that the whole of the goods will conform to the sample or model.

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

33 **"§ 25-2A-211. Warranties against interference and against infringement; lessee's**
34 **obligation against infringement.**

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

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

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

1 **"§ 25-2A-212. Implied warranty of merchantability.**

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

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

5 (a) pass without objection in the trade under the description in the lease
6 agreement;

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

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

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

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

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

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

17 **"§ 25-2A-213. Implied warranty of fitness for particular purpose.**

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

23 **"§ 25-2A-214. Exclusion or modification of warranties.**

24 (1) Words or conduct relevant to the creation of an express warranty and words
25 or conduct tending to negate or limit a warranty must be construed wherever reasonable
26 as consistent with each other; but, subject to the provisions of G.S. 25-2A-202 on parol
27 or extrinsic evidence, negation or limitation is inoperative to the extent that the
28 construction is unreasonable.

29 (2) Subject to subsection (3) of this section, to exclude or modify the implied
30 warranty of merchantability, or any part of it, the language must mention
31 'merchantability', by a writing, and be conspicuous. Subject to subsection (3) of this
32 section, to exclude or modify any implied warranty of fitness, the exclusion must be by
33 a writing and be conspicuous. Language to exclude all implied warranties of fitness is
34 sufficient if it is in writing, is conspicuous, and states, for example, 'There is no
35 warranty that the goods will be fit for a particular purpose.'

36 (3) Notwithstanding subsection (2) of this section, but subject to subsection (4) of
37 this section:

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

42 (b) if the lessee before entering into the lease contract has examined the goods or
43 the sample or model as fully as desired or has refused to examine the goods, there is no

1 implied warranty with regard to defects that an examination ought in the circumstances
2 to have revealed; and

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

5 (4) To exclude or modify a warranty against interference or against infringement
6 (G.S. 25-2A-211) or any part of it, the language must be specific, be by a writing, and
7 be conspicuous, unless the circumstances, including course of performance, course of
8 dealing, or usage of trade, give the lessee reason to know that the goods are being leased
9 subject to a claim or interest of any person.

10 **"§ 25-2A-215. Cumulation and conflict of warranties express or implied.**

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

15 (a) exact or technical specifications displace an inconsistent sample or model or
16 general language of description.

17 (b) a sample from an existing bulk displaces inconsistent general language of
18 description.

19 (c) express warranties displace inconsistent implied warranties other than an
20 implied warranty of fitness for a particular purpose.

21 **"§ 25-2A-216. Third-party beneficiaries of express and implied warranties.**

22 A warranty to or for the benefit of a lessee under this Article, whether express or
23 implied, extends to any natural person who is in the family or household of the lessee or
24 who is a guest in the lessee's home if it is reasonable to expect that such person may use,
25 consume, or be affected by the goods and who is injured in person by breach of the
26 warranty. This section does not displace principles of law and equity that extend a
27 warranty to or for the benefit of a lessee to other persons. The operation of this section
28 may not be excluded, modified, or limited, but an exclusion, modification, or limitation
29 of the warranty, including any with respect to rights and remedies, effective against the
30 lessee is also effective against any beneficiary designated under this section.

31 **"§ 25-2A-217. Identification.**

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

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

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

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

42 **"§ 25-2A-218. Insurance and proceeds.**

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

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

7 (3) Notwithstanding a lessee's insurable interest under subsections (1) and (2) of
8 this section, the lessor retains an insurable interest until an option to buy has been
9 exercised by the lessee and risk of loss has passed to the lessee.

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

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

15 **"§ 25-2A-219. Risk of loss.**

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

19 (2) Subject to the provisions of this Article on the effect of default on risk of loss
20 (G.S. 25-2A-220), if risk of loss is to pass to the lessee and the time of passage is not
21 stated, the following rules apply:

22 (a) if the lease contract requires or authorizes the goods to be shipped by carrier
23 (i) and it does not require delivery at a particular destination, the risk of loss passes to
24 the lessee when the goods are duly delivered to the carrier; but (ii) if it does require
25 delivery at a particular destination and the goods are there duly tendered while in the
26 possession of the carrier, the risk of loss passes to the lessee when the goods are there
27 duly so tendered as to enable the lessee to take delivery.

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

31 (c) in any case not within subdivision (a) or (b) of this section, the risk of loss
32 passes to the lessee on the lessee's receipt of the goods if the lessor, or, in the case of a
33 finance lease, the supplier, is a merchant; otherwise the risk passes to the lessee on
34 tender of delivery.

35 **"§ 25-2A-220. Effect of default on risk of loss.**

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

38 (a) if a tender or delivery of goods so fails to conform to the lease contract as to
39 give a right of rejection, the risk of their loss remains with the lessor, or, in the case of a
40 finance lease, the supplier, until cure or acceptance.

41 (b) if the lessee rightfully revokes acceptance, he, to the extent of any deficiency
42 in his effective insurance coverage, may treat the risk of loss as having remained with
43 the lessor from the beginning.

1 (2) Whether or not risk of loss is to pass to the lessee, if the lessee as to
2 conforming goods already identified to a lease contract repudiates or is otherwise in
3 default under the lease contract, the lessor, or, in the case of a finance lease, the
4 supplier, to the extent of any deficiency in his effective insurance coverage may treat
5 the risk of loss as resting on the lessee for a commercially reasonable time.

6 **"§ 25-2A-221. Casualty to identified goods.**

7 If a lease contract requires goods identified when the lease contract is made, and the
8 goods suffer casualty without fault of the lessee, the lessor, or the supplier before
9 delivery, or the goods suffer casualty before risk of loss passes to the lessee pursuant to
10 the lease agreement or G.S. 25-2A-219, then:

11 (a) if the loss is total, the lease contract is avoided; and

12 (b) if the loss is partial or the goods have so deteriorated as to no longer conform
13 to the lease contract, the lessee may nevertheless demand inspection and at his option
14 either treat the lease contract as avoided or, except in a finance lease that is not a
15 consumer lease, accept the goods with due allowance from the rent payable for the
16 balance of the lease term for the deterioration or the deficiency in quantity but without
17 further right against the lessor.

18 **"PART 3.**

19 **"EFFECT OF LEASE CONTRACT.**

20 **"§ 25-2A-301. Enforceability of lease contract.**

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

24 **"§ 25-2A-302. Title to and possession of goods.**

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

29 **"§ 25-2A-303. Alienability of party's interest under lease contract or of lessor's**
30 **residual interest in goods; delegation of performance; transfer of rights.**

31 (1) As used in this section, 'creation of a security interest' includes the sale of a
32 lease contract that is subject to Article 9 of this Chapter, Secured Transactions, by
33 reason of G.S. 25-9-102(1)(b).

34 (2) Except as provided in subsections (3) and (4) of this section, a provision in a
35 lease agreement which (i) prohibits the voluntary or involuntary transfer, including a
36 transfer by sale, sublease, creation, or enforcement of a security interest, or attachment,
37 levy, or other judicial process, of an interest of a party under the lease contract or of the
38 lessor's residual interest in the goods; or (ii) makes such a transfer an event of default,
39 gives rise to the rights and remedies provided in subsection (5) of this section, but a
40 transfer that is prohibited or is an event of default under the lease agreement is
41 otherwise effective.

42 (3) A provision in a lease agreement which (i) prohibits the creation or
43 enforcement of a security interest in an interest of a party under the lease contract or in
44 the lessor's residual interest in the goods, or (ii) makes such a transfer an event of

1 default, is not enforceable unless, and then only to the extent that, there is an actual
2 transfer by the lessee of the lessee's right of possession or use of the goods in violation
3 of the provision or an actual delegation of a material performance of either party to the
4 lease contract in violation of the provision. Neither the granting nor the enforcement of
5 a security interest in (i) the lessor's interest under the lease contract or (ii) the lessor's
6 residual interest in the goods is a transfer that materially impairs the prospect of
7 obtaining return performance by, materially changes the duty of, or materially increases
8 the burden or risk imposed on, the lessee within the purview of subsection (5) of this
9 section unless, and then only to the extent that, there is an actual delegation of a material
10 performance of the lessor.

11 (4) A provision in a lease agreement which (i) prohibits a transfer of a right to
12 damages for default with respect to the whole lease contract or of a right to payment
13 arising out of the transferor's due performance of the transferor's entire obligation, or (ii)
14 makes such a transfer an event of default, is not enforceable, and such a transfer is not a
15 transfer that materially impairs the prospect of obtaining return performance by,
16 materially changes the duty of, or materially increases the burden or risk imposed on,
17 the other party to the lease contract within the purview of subsection (5) of this section.

18 (5) Subject to subsections (3) and (4) of this section:

19 (a) if a transfer is made which is made an event of default under a lease
20 agreement, the party to the lease contract not making the transfer, unless that party
21 waives the default or otherwise agrees, has the rights and remedies described in G.S. 25-
22 2A-501(2);

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

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

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

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

1 **"§ 25-2A-304. Subsequent lease of goods by lessor.**

2 (1) Subject to G.S. 25-2A-303, a subsequent lessee from a lessor of goods under
3 an existing lease contract obtains, to the extent of the leasehold interest transferred, the
4 leasehold interest in the goods that the lessor had or had power to transfer, and except as
5 provided in subsection (2) of this section and G.S. 25-2A-527(4), takes subject to the
6 existing lease contract. A lessor with voidable title has power to transfer a good
7 leasehold interest to a good faith subsequent lessee for value, but only to the extent set
8 forth in the preceding sentence. If goods have been delivered under a transaction of
9 purchase, the lessor has that power even though:

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

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

12 (c) it was agreed that the transaction was to be a 'cash sale'; or

13 (d) the delivery was procured through fraud punishable as larcenous under the
14 criminal law.

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

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

25 **"§ 25-2A-305. Sale or sublease of goods by lease.**

26 (1) Subject to the provisions of G.S. 25-2A-303, a buyer or sublessee from the
27 lessee of goods under an existing lease contract obtains, to the extent of the interest
28 transferred, the leasehold interest in the goods that the lessee had or had power to
29 transfer, and except as provided in subsection (2) of this section and G.S. 25-2A-511(4),
30 takes subject to the existing lease contract. A lessee with a voidable leasehold interest
31 has power to transfer a good leasehold interest to a good faith buyer for value or a good
32 faith sublessee for value, but only to the extent set forth in the preceding sentence.
33 When goods have been delivered under a transaction of lease, the lessee has that power
34 even though:

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

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

37 (c) the delivery was procured through fraud punishable as larcenous under the
38 criminal law.

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

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

5 **"§ 25-2A-306. Priority of certain liens arising by operation of law.**

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

12 **"§ 25-2A-307. Priority of liens arising by attachment or levy on, security interests**
13 **in, and other claims to goods.**

14 (1) Except as otherwise provided in G.S. 25-2A-306, a creditor of a lessee takes
15 subject to the lease contract.

16 (2) Except as otherwise provided in subsections (3) and (4) of this section and in
17 G.S. 25-2A-306 and G.S. 25-2A-308, a creditor of a lessor takes subject to the lease
18 contract unless:

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

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

23 (c) the creditor holds a security interest in the goods which was perfected (G.S.
24 25-9-303) before the lease contract became enforceable.

25 (3) A lessee in the ordinary course of business takes the leasehold interest free of
26 a security interest in the goods created by the lessor even though the security interest is
27 perfected (G.S. 25-9-303) and the lessee knows of its existence.

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

34 **"§ 25-2A-308. Special rights of creditors.**

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

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

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

7 **"§ 25-2A-309. Lessor's and lessee's rights when goods become fixtures.**

8 (1) In this section:

9 (a) goods are 'fixtures' when they become so related to particular real estate that
10 an interest in them arises under real estate law;

11 (b) a 'fixture filing' is the filing, in the office where a mortgage on the real estate
12 would be filed or recorded, of a financing statement covering goods that are or are to
13 become fixtures and conforming to the requirements of G.S. 25-9-402(5);

14 (c) a lease is a 'purchase money lease' unless the lessee has possession or use of
15 the goods or the right to possession or use of the goods before the lease agreement is
16 enforceable;

17 (d) a mortgage is a 'construction mortgage' to the extent it secures an obligation
18 incurred for the construction of an improvement on land including the acquisition cost
19 of the land, if the recorded writing so indicates; and

20 (e) 'encumbrance' includes real estate mortgages and other liens on real estate
21 and all other rights in real estate that are not ownership interests.

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

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

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

29 (a) the lease is a purchase money lease, the conflicting interest of the
30 encumbrancer or owner arises before the goods become fixtures, the interest of the
31 lessor is perfected by a fixture filing before the goods become fixtures or within 10 days
32 thereafter, and the lessee has an interest of record in the real estate or is in possession of
33 the real estate; or

34 (b) the interest of the lessor is perfected by a fixture filing before the interest of
35 the encumbrancer or owner is of record, the lessor's interest has priority over any
36 conflicting interest of a predecessor in title of the encumbrancer or owner, and the
37 lessee has an interest of record in the real estate or is in possession of real estate.

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

40 (a) the fixtures are readily removable factory or office machines, readily
41 removable equipment that is not primarily used or leased for use in the operation of the
42 real estate, or readily removable replacements of domestic appliances that are goods
43 subject to a consumer lease, and before the goods become fixtures, the lease contract is
44 enforceable; or

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

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

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

8 (6) Notwithstanding subsection (4)(a) of this section but otherwise subject to
9 subsections (4) and (5) of this section, the interest of a lessor of fixtures, including the
10 lessor's residual interest, is subordinate to the conflicting interest of an encumbrancer of
11 the real estate under a construction mortgage recorded before the goods become fixtures
12 if the goods become fixtures before the completion of the construction. To the extent
13 given to refinance a construction mortgage, the conflicting interest of an encumbrancer
14 of the real estate under a mortgage has this priority to the same extent as the
15 encumbrancer of the real estate under the construction mortgage.

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

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

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

38 **"§ 25-2A-310. Lessor's and lessee's rights when goods become accessions.**

39 (1) Goods are 'accessions' when they are installed in or affixed to other goods.

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

43 (3) The interest of a lessor or a lessee under a lease contract entered into at the
44 time or after the goods became accessions is superior to all subsequently acquired

1 interests in the whole except as stated in subsection (4) of this section but is subordinate
2 to interests in the whole existing at the time the lease contract was made unless the
3 holders of such interests in the whole have in writing consented to the lease or
4 disclaimed an interest in the goods as part of the whole.

5 (4) The interest of a lessor or a lessee under a lease contract described in
6 subsection (2) or (3) of this section is subordinate to the interest of:

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

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

12 (5) When under subsections (2) or (3) and (4) of this section, a lessor or a lessee
13 of accessions holds an interest that is superior to all interests in the whole, the lessor or
14 the lessee may:

15 (a) on default, expiration, termination, or cancellation of the lease contract by the
16 other party but subject to the provisions of the lease contract and this Article; or

17 (b) if necessary to enforce his other rights and remedies under this Article,
18 remove the goods from the whole, free and clear of all interests in the whole, but he
19 must reimburse any holder of an interest in the whole who is not the lessee and who has
20 not otherwise agreed for the cost of repair of any physical injury but not for any
21 diminution in value of the whole caused by the absence of the goods removed or by any
22 necessity for replacing them. A person entitled to reimbursement may refuse
23 permission to remove until the party seeking removal gives adequate security for the
24 performance of this obligation.

25 **"PART 4.**

26 **"PERFORMANCE OF LEASE CONTRACT:**

27 **REPUDIATED, SUBSTITUTED,**

28 **AND EXCUSED.**

29 **"§ 25-2A-401. Insecurity: adequate assurance of performance.**

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

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

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

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

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

3 **"§ 25-2A-402. Anticipatory repudiation.**

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

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

9 (b) make demand pursuant to G.S. 25-2A-401 and await assurance of future
10 performance adequate under the circumstances of the particular case; or

11 (c) resort to any right or remedy upon default under the lease contract or this
12 Article, even though the aggrieved party has notified the repudiating party that the
13 aggrieved party would await the repudiating party's performance and assurance and has
14 urged retraction. In addition, whether or not the aggrieved party is pursuing one of the
15 foregoing remedies, the aggrieved party may suspend performance or, if the aggrieved
16 party is the lessor, proceed in accordance with the provisions of this Article on the
17 lessor's right to identify goods to the lease contract notwithstanding default or to salvage
18 unfinished goods (G.S. 25-2A-524).

19 **"§ 25-2A-403. Retraction of anticipatory repudiation.**

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

24 (2) Retraction may be by any method that clearly indicates to the aggrieved party
25 that the repudiating party intends to perform under the lease contract and includes any
26 assurance demanded under G.S. 25-2A-401.

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

30 **"§ 25-2A-404. Substituted performance.**

31 (1) If without fault of the lessee, the lessor and the supplier, the agreed berthing,
32 loading, or unloading facilities fail, or the agreed type of carrier becomes unavailable or
33 the agreed manner of delivery otherwise becomes commercially impracticable, but a
34 commercially reasonable substitute is available, the substitute performance shall be
35 tendered and accepted.

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

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

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

44 **"§ 25-2A-405. Excused performance.**

1 Subject to G.S. 25-2A-404 on substituted performance, the following rules apply:

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

9 (b) if the causes mentioned in paragraph (a) affect only part of the lessor's or the
10 supplier's capacity to perform, he shall allocate production and deliveries among his
11 customers but at his option may include regular customers not then under contract for
12 sale or lease as well as his own requirements for further manufacture. He may so
13 allocate in any manner that is fair and reasonable.

14 (c) the lessor seasonably shall notify the lessee and in the case of a finance lease
15 the supplier seasonably shall notify the lessor and the lessee, if known, that there will be
16 delay or nondelivery and, if allocation is required under paragraph (b), of the estimated
17 quota thus made available for the lessee.

18 **"§ 25-2A-406. Procedure on excused performance.**

19 (1) If the lessee receives notification of a material or indefinite delay or an
20 allocation justified under G.S. 25-2A-405, the lessee may, by written notification to the
21 lessor as to any goods involved, and with respect to all of the goods if under an
22 installment lease contract, the value of the whole lease contract is substantially impaired
23 (G.S. 25-2A-510):

24 (a) terminate the lease contract (G.S. 25-2A-505(2)); or

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

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

32 **"§ 25-2A-407. Irrevocable promises: finance leases.**

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

36 (2) A promise that has become irrevocable and independent under subsection (1)
37 of this section:

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

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

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

"PART 5.
"DEFAULT
"A. IN GENERAL.

"§ 25-2A-501. Default: procedure.

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

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

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

(4) Except as otherwise provided in G.S. 25-1-106(1) or this Article or the lease agreement, the rights and remedies referred to in subsections (2) and (3) of this section are cumulative.

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

"§ 25-2A-502. Notice after default.

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

"§ 25-2A-503. Modification or impairment of rights and remedies.

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

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

(3) Consequential damages may be liquidated under G.S. 25-2A-504, or may otherwise be limited, altered, or excluded unless the limitation, alteration, or exclusion is unconscionable. Limitation, alteration, or exclusion of consequential damages for injury to the person in the case of consumer goods is **prima facie** unconscionable but limitation, alteration, or exclusion of damages where the loss is commercial is not **prima facie** unconscionable.

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

"§ 25-2A-504. Liquidation of damages.

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

6 (2) If the lease agreement provides for liquidation of damages, and such
7 provision does not comply with subsection (1) of this section, or such provision is an
8 exclusive or limited remedy that circumstances cause to fail of its essential purpose,
9 remedy may be had as provided in this Article.

10 (3) If the lessor justifiably withholds or stops delivery of goods because of the
11 lessee's default or insolvency (G.S. 25-2A-525 or G.S. 25-2A-526), the lessee is entitled
12 to restitution of any amount by which the sum of his payments exceeds:

13 (a) the amount to which the lessor is entitled by virtue of terms liquidating the
14 lessor's damages in accordance with subsection (1) of this section; or

15 (b) in the absence of those terms, twenty percent (20%) of the then-present value
16 of the total rent the lessee was obligated to pay for the balance of the lease term, or, in
17 the case of a consumer lease, the lesser of such amount or five hundred dollars
18 (\$500.00).

19 (4) A lessee's right to restitution under subsection (3) of this section is subject to
20 offset to the extent the lessor establishes:

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

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

25 **"§ 25-2A-505. Cancellation and termination and effect of cancellation,**
26 **termination, rescission, or fraud on rights and remedies.**

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

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

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

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

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

41 **"§ 25-2A-506. Statute of limitations.**

42 (1) An action for default under a lease contract, including breach of warranty or
43 indemnity, must be commenced within four years after the cause of action accrued. By

1 the original lease contract the parties may reduce the period of limitation to not less than
2 one year.

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

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

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

16 **"§ 25-2A-507. Proof of market rent: time and place.**

17 (1) Damages based on market rent (G.S. 25-2A-519 or G.S. 25-2A-528) are
18 determined according to the rent for the use of the goods concerned for a lease term
19 identical to the remaining lease term of the original lease agreement and prevailing at
20 the times specified in G.S. 25-2A-519 and G.S. 25-2A-528.

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

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

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

38 **"B. DEFAULT BY LESSOR.**

39 **"§ 25-2A-508. Lessee's remedies.**

40 (1) If a lessor fails to deliver the goods in conformity to the lease contract (G.S.
41 25-2A-509) or repudiates the lease contract (G.S. 25-2A-402), or a lessee rightfully
42 rejects the goods (G.S. 25-2A-509) or justifiably revokes acceptance of the goods (G.S.
43 25-2A-517), then with respect to any goods involved, and with respect to all of the
44 goods if under an installment lease contract, the value of the whole lease contract is

1 substantially impaired (G.S. 25-2A-510), the lessor is in default under the lease contract,
2 and the lessee may:

3 (a) cancel the lease contract (G.S. 25-2A-505(1));

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

6 (c) cover and recover damages as to all goods affected whether or not they have
7 been identified to the lease contract (G.S. 25-2A-518 and G.S. 25-2A-520), or recover
8 damages for nondelivery (G.S. 25-2A-519 and G.S. 25-2A-520);

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

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

13 (a) if the goods have been identified, recover them (G.S. 25-2A-522); or

14 (b) in a proper case, obtain specific performance or replevy the goods (G.S. 25-
15 2A-521).

16 (3) If a lessor is otherwise in default under a lease contract, the lessee may
17 exercise the rights and pursue the remedies provided in the lease contract, which may
18 include a right to cancel the lease, and in G.S. 25-2A-519(3).

19 (4) If a lessor has breached a warranty, whether express or implied, the lessee
20 may recover damages (G.S. 25-2A-519(4)).

21 (5) On rightful rejection or justifiable revocation of acceptance, a lessee has a
22 security interest in goods in the lessee's possession or control for any rent and security
23 that has been paid and any expenses reasonably incurred in their inspection, receipt,
24 transportation, and care and custody and may hold those goods and dispose of them in
25 good faith and in a commercially reasonable manner, subject to G.S. 25-2A-527(5). A
26 lessee who has rightfully rejected the goods, or justifiably revoked acceptance of the
27 goods, shall account to the lessor for any excess over the amount of the lessee's security
28 interest.

29 (6) Subject to the provisions of G.S. 25-2A-407, a lessee, on notifying the lessor
30 of the lessee's intention to do so, may deduct all or any part of the damages resulting
31 from any default under the lease contract from any part of the rent still due under the
32 same lease contract.

33 **"§ 25-2A-509. Lessee's rights on improper delivery; rightful rejection.**

34 (1) Subject to the provisions of G.S. 25-2A-510 on default in installment lease
35 contracts, if the goods or the tender or delivery fail in any respect to conform to the
36 lease contract, the lessee may reject or accept the goods or accept any commercial unit
37 or units and reject the rest of the goods.

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

40 **"§ 25-2A-510. Installment lease contracts; rejection and default.**

41 (1) Under an installment lease contract a lessee may reject any delivery that is
42 nonconforming if the nonconformity substantially impairs the value of that delivery and
43 cannot be cured or the nonconformity is a defect in the required documents; but if the

1 nonconformity does not fall within subsection (2) of this section and the lessor or the
2 supplier gives adequate assurance of its cure, the lessee must accept that delivery.

3 (2) Whenever nonconformity or default with respect to one or more deliveries
4 substantially impairs the value of the installment lease contract as a whole, there is a
5 default with respect to the whole. But, the aggrieved party reinstates the installment
6 lease contract as a whole if the aggrieved party accepts a nonconforming delivery
7 without seasonably notifying of cancellation or brings an action with respect only to
8 past deliveries or demands performance as to future deliveries.

9 **"§ 25-2A-511. Merchant lessee's duties as to rightfully rejected goods.**

10 (1) Subject to any security interest of a lessee (G.S. 25-2A-508(5)), if a lessor or
11 a supplier has no agent or place of business at the market of rejection, a merchant lessee,
12 after rejection of goods in his possession or control, shall follow any reasonable
13 instructions received from the lessor or the supplier with respect to the goods. In the
14 absence of those instructions, a merchant lessee shall make reasonable efforts to sell,
15 lease, or otherwise dispose of the goods for the lessor's account if they threaten to
16 decline in value speedily. Instructions are not reasonable if, on demand, indemnity for
17 expenses is not forthcoming.

18 (2) If a merchant lessee (subsection (1) of this section) or any other lessee (G.S.
19 25-2A-512) disposes of goods, he is entitled to reimbursement either from the lessor or
20 the supplier or out of the proceeds for reasonable expenses of caring for and disposing
21 of the goods and, if the expenses include no disposition commission, to such
22 commission as is usual in the trade, or if there is none, to a reasonable sum not
23 exceeding ten percent (10%) of the gross proceeds.

24 (3) In complying with this section or G.S. 25-2A-512, the lessee is held only to
25 good faith. Good faith conduct hereunder is neither acceptance or conversion nor the
26 basis of an action for damages.

27 (4) A purchaser who purchases in good faith from a lessee pursuant to this
28 section or G.S. 25-2A-512 takes the goods free of any rights of the lessor and the
29 supplier even though the lessee fails to comply with one or more of the requirements of
30 this Article.

31 **"§ 25-2A-512. Lessee's duties as to rightfully rejected goods.**

32 (1) Except as otherwise provided with respect to goods that threaten to decline in
33 value speedily (G.S. 25-2A-511) and subject to any security interest of a lessee (G.S.
34 25-2A-508(5)):

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

38 (b) if the lessor or the supplier gives no instructions within a reasonable time
39 after notification of rejection, the lessee may store the rejected goods for the lessor's or
40 the supplier's account or ship them to the lessor or the supplier or dispose of them for
41 the lessor's or the supplier's account with reimbursement in the manner provided in G.S.
42 25-2A-511; but

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

1 (2) Action by the lessee pursuant to subsection (1) of this section is not
2 acceptance or conversion.

3 **"§ 25-2A-513. Cure by lessor of improper tender or delivery; replacement.**

4 (1) If any tender or delivery by the lessor or the supplier is rejected because
5 nonconforming and the time for performance has not yet expired, the lessor or the
6 supplier may seasonably notify the lessee of the lessor's or the supplier's intention to
7 cure and may then make a conforming delivery within the time provided in the lease
8 contract.

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

13 **"§ 25-2A-514. Waiver of lessee's objections.**

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

17 (a) if, stated seasonably, the lessor or the supplier could have cured it (G.S. 25-
18 2A-513); or

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

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

25 **"§ 25-2A-515. Acceptance of goods.**

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

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

31 (b) the lessee fails to make an effective rejection of the goods (G.S. 25-2A-
32 509(2)).

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

34 **"§ 25-2A-516. Effect of acceptance of goods; notice of default; burden of**
35 **establishing default after acceptance; notice of claim or litigation to**
36 **person answerable over.**

37 (1) A lessee must pay rent for any goods accepted in accordance with the lease
38 contract, with due allowance for goods rightfully rejected or not delivered.

39 (2) A lessee's acceptance of goods precludes rejection of the goods accepted. In
40 the case of a finance lease, if made with knowledge of a nonconformity, acceptance
41 cannot be revoked because of it. In any other case, if made with knowledge of a
42 nonconformity, acceptance cannot be revoked because of it unless the acceptance was
43 on the reasonable assumption that the nonconformity would be seasonably cured.

1 Acceptance does not of itself impair any other remedy provided by this Article or the
2 lease agreement for nonconformity.

3 (3) If a tender has been accepted:

4 (a) within a reasonable time after the lessee discovers or should have discovered
5 any default, the lessee shall notify the lessor and the supplier, if any, or be barred from
6 any remedy against the party not notified;

7 (b) except in the case of a consumer lease, within a reasonable time after the
8 lessee receives notice of litigation for infringement or the like (G.S. 25-2A-211) the
9 lessee shall notify the lessor or be barred from any remedy over for liability established
10 by the litigation; and

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

12 (4) If a lessee is sued for breach of a warranty or other obligation for which a
13 lessor or a supplier is answerable over the following apply:

14 (a) the lessee may give the lessor or the supplier, or both, written notice of the
15 litigation. If the notice states that the person notified may come in and defend and that
16 if the person notified does not do so, that person will be bound in any action against that
17 person by the lessee by any determination of fact common to the two litigations, then,
18 unless the person notified after seasonable receipt of the notice does come in and
19 defend, that person is so bound.

20 (b) the lessor or the supplier may demand in writing that the lessee turn over
21 control of the litigation, including settlement, if the claim is one for infringement or the
22 like (G.S. 25-2A-211) or else be barred from any remedy over. If the demand states that
23 the lessor or the supplier agrees to bear all expense and to satisfy any adverse judgment,
24 then, unless the lessee after seasonable receipt of the demand does turn over control, the
25 lessee is so barred.

26 (5) Subsections (3) and (4) of this section apply to any obligation of a lessee to
27 hold the lessor or the supplier harmless against infringement or the like (G.S. 25-2A-
28 211).

29 **"§ 25-2A-517. Revocation of acceptance of goods.**

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

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

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

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

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

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

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

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

5 **"§ 25-2A-518. Cover; substitute goods.**

6 (1) After a default by a lessor under the lease contract of the type described in
7 G.S. 25-2A-508(1), or, if agreed, after other default by the lessor, the lessee may cover
8 by making any purchase or lease of or contract to purchase or lease goods in
9 substitution for those due from the lessor.

10 (2) Except as otherwise provided with respect to damages liquidated in the lease
11 agreement (G.S. 25-2A-504) or otherwise determined pursuant to agreement of the
12 parties (G.S. 25-1-102(3) and G.S. 25-2A-503), if a lessee's cover is by a lease
13 agreement substantially similar to the original lease agreement and the new lease
14 agreement is made in good faith and in a commercially reasonable manner, the lessee
15 may recover from the lessor as damages (i) the present value, as of the date of the
16 commencement of the term of the new lease agreement, of the rent under the new lease
17 agreement applicable to that period of the new lease term which is comparable to the
18 then remaining term of the original lease agreement minus the present value as of the
19 same date of the total rent for the then remaining lease term of the original lease
20 agreement, and (ii) any incidental or consequential damages, less expenses saved in
21 consequence of the lessor's default.

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

26 **"§ 25-2A-519. Lessee's damages for nondelivery, repudiation, default, and breach**
27 **of warranty in regard to accepted goods.**

28 (1) Except as otherwise provided with respect to damages liquidated in the lease
29 agreement (G.S. 25-2A-504) or otherwise determined pursuant to agreement of the
30 parties (G.S. 25-1-102(3) and G.S. 25-2A-503), if a lessee elects not to cover or a lessee
31 elects to cover and the cover is by lease agreement that for any reason does not qualify
32 for treatment under G.S. 25-2A-518(2), or is by purchase or otherwise, the measure of
33 damages for nondelivery or repudiation by the lessor or for rejection or revocation of
34 acceptance by the lessee is the present value, as of the date of the default, of the then
35 market rent minus the present value as of the same date of the original rent, computed
36 for the remaining lease term of the original lease agreement, together with incidental
37 and consequential damages, less expenses saved in consequence of the lessor's default.

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

40 (3) Except as otherwise agreed, if the lessee has accepted goods and given
41 notification (G.S. 25-2A-516(3)), the measure of damages for nonconforming tender or
42 delivery or other default by a lessor is the loss resulting in the ordinary course of events
43 from the lessor's default as determined in any manner that is reasonable together with

1 incidental and consequential damages, less expenses saved in consequence of the
2 lessor's default.

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

9 **"§ 25-2A-520. Lessee's incidental and consequential damages.**

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

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

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

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

21 **"§ 25-2A-521. Lessee's right to specific performance or replevin.**

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

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

26 (3) A lessee has a right of replevin, detinue, sequestration, claim and delivery, or
27 the like for goods identified to the lease contract if after reasonable effort the lessee is
28 unable to effect recovery for those goods or the circumstances reasonably indicate that
29 the effort will be unavailing.

30 **"§ 25-2A-522. Lessee's right to goods on lessor's insolvency.**

31 (1) Subject to subsection (2) of this section and even though the goods have not
32 been shipped, a lessee who has paid a part or all of the rent and security for goods
33 identified to a lease contract (G.S. 25-2A-217) on making and keeping good a tender of
34 any unpaid portion of the rent and security due under the lease contract may recover the
35 goods identified from the lessor if the lessor becomes insolvent within 10 days after
36 receipt of the first installment of rent and security.

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

39 **"C. DEFAULT BY LESSEE.**

40 **"§ 25-2A-523. Lessor's remedies.**

41 (1) If a lessee wrongfully rejects or revokes acceptance of goods or fails to make
42 a payment when due or repudiates with respect to a part or the whole, then, with respect
43 to any goods involved, and with respect to all of the goods if under an installment lease

1 contract the value of the whole lease contract is substantially impaired (G.S. 25-2A-
2 510), the lessee is in default under the lease contract and the lessor may:

3 (a) cancel the lease contract (G.S. 25-2A-505(1));

4 (b) proceed respecting goods not identified to the lease contract (G.S. 25-2A-
5 524);

6 (c) withhold delivery of the goods and take possession of goods previously
7 delivered (G.S. 25-2A-525);

8 (d) stop delivery of the goods by any bailee (G.S. 25-2A-526);

9 (e) dispose of the goods and recover damages (G.S. 25-2A-527), or retain the
10 goods and recover damages (G.S. 25-2A-528), or in a proper case recover rent (G.S. 25-
11 2A-529);

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

14 (2) If a lessor does not fully exercise a right or obtain a remedy to which the
15 lessor is entitled under subsection (1) of this section, the lessor may recover the loss
16 resulting in the ordinary course of events from the lessee's default as determined in any
17 reasonable 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, the lessor may
20 exercise the rights and pursue the remedies provided in the lease contract, which may
21 include a right to cancel the lease. In addition, unless otherwise provided in the lease
22 contract:

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

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

28 **"§ 25-2A-524. Lessor's right to identify goods to lease contract.**

29 (1) After default by the lessee under the lease contract of the type described in
30 G.S. 25-2A-523(1) or G.S. 25-2A-523(3)(a) or, if agreed, after other default by the
31 lessee, the lessor may:

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

35 (b) dispose of goods (G.S. 25-2A-527(1)) that demonstrably have been intended
36 for the particular lease contract even though those goods are unfinished.

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

42 **"§ 25-2A-525. Lessor's right to possession of goods.**

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

1 (2) After a default by the lessee under the lease contract of the type described in
2 G.S. 25-2A-523(1) or G.S. 25-2A-523(3) (a) or, if agreed, after other default by the
3 lessee, the lessor has the right to take possession of the goods. If the lease contract so
4 provides, the lessor may require the lessee to assemble the goods and make them
5 available to the lessor at a place to be designated by the lessor which is reasonably
6 convenient to both parties. Without removal, the lessor may render unusable any goods
7 employed in trade or business, and may dispose of goods on the lessee's premises (G.S.
8 25-2A-527).

9 (3) The lessor may proceed under subsection (2) of this section without judicial
10 process if it can be done without breach of the peace or the lessor may proceed by
11 action.

12 **"§ 25-2A-526. Lessor's stoppage of delivery in transit or otherwise.**

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

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

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

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

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

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

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

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

33 **"§ 25-2A-527. Lessor's rights to dispose of goods.**

34 (1) After a default by a lessee under the lease contract of the type described in
35 G.S. 25-2A-523(1) or G.S. 25-2A-523(3)(a) or after the lessor refuses to deliver or takes
36 possession of goods (G.S. 25-2A-525 or G.S. 25-2A-526), or, if agreed, after other
37 default by a lessee, the lessor may dispose of the goods concerned or the undelivered
38 balance thereof by lease, sale, or otherwise.

39 (2) Except as otherwise provided with respect to damages liquidated in the lease
40 agreement (G.S. 25-2A-504) or otherwise determined pursuant to agreement of the
41 parties (G.S. 25-1-102(3) and G.S. 25-2A-503), if the disposition is by lease agreement
42 substantially similar to the original lease agreement and the new lease agreement is
43 made in good faith and in a commercially reasonable manner, the lessor may recover
44 from the lessee as damages (i) accrued and unpaid rent as of the date of the

1 commencement of the term of the new lease agreement, (ii) the present value, as of the
2 same date, of the total rent for the then remaining lease term of the original lease
3 agreement minus the present value, as of the same date, of the rent under the new lease
4 agreement applicable to that period of the new lease term which is comparable to the
5 then remaining term of the original lease agreement, and (iii) any incidental damages
6 allowed under G.S. 25-2A-530, less expenses saved in consequence of the lessee's
7 default.

8 (3) If the lessor's disposition is by lease agreement that for any reason does not
9 qualify for treatment under subsection (2) of this section, or is by sale or otherwise, the
10 lessor may recover from the lessee as if the lessor had elected not to dispose of the
11 goods and G.S. 25-2A-528 governs.

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

16 (5) The lessor is not accountable to the lessee for any profit made on any
17 disposition. A lessee who has rightfully rejected or justifiably revoked acceptance shall
18 account to the lessor for any excess over the amount of the lessee's security interest
19 (G.S. 25-2A-508(5)).

20 **"§ 25-2A-528. Lessor's damages for nonacceptance, failure to pay, repudiation, or**
21 **other default.**

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

38 (2) If the measure of damages provided in subsection (1) of this section, is
39 inadequate to put a lessor in as good a position as performance would have, the measure
40 of damages is the present value of the profit, including reasonable overhead, the lessor
41 would have made from full performance by the lessee, together with any incidental
42 damages allowed under G.S. 25-2A-530, due allowance for costs reasonably incurred
43 and due credit for payments or proceeds of disposition.

44 **"§ 25-2A-529. Lessor's action for the rent.**

1 (1) After default by the lessee under the lease contract of the type described in
2 G.S. 25-2A-523(1) or G.S. 25-2A-523(3)(a) or, if agreed, after other default by the
3 lessee, if the lessor complies with subsection (2) of this section, the lessor may recover
4 from the lessee as damages:

5 (a) for goods accepted by the lessee and not repossessed by or tendered to the
6 lessor, and for conforming goods lost or damaged within a commercially reasonable
7 time after risk of loss passes to the lessee (G.S. 25-2A-219), (i) accrued and unpaid rent
8 as of the date of entry of judgment in favor of the lessor, (ii) the present value as of the
9 same date of the rent for the then remaining lease term of the lease agreement, and (iii)
10 any incidental damages allowed under G.S. 25-2A-530, less expenses saved in
11 consequence of the lessee's default; and

12 (b) for goods identified to the lease contract if the lessor is unable after
13 reasonable effort to dispose of them at a reasonable price or the circumstances
14 reasonably indicate that effort will be unavailing, (i) accrued and unpaid rent as of the
15 date of entry of judgment in favor of the lessor, (ii) the present value as of the same date
16 of the rent for the then remaining lease term of the lease agreement, and (iii) any
17 incidental damages allowed under G.S. 25-2A-530, less expenses saved in consequence
18 of the lessee's default.

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

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

29 (4) Payment of the judgment for damages obtained pursuant to subsection (1) of
30 this section, entitles the lessee to the use and possession of the goods not then disposed
31 of for the remaining lease term of and in accordance with the lease agreement.

32 (5) After a default by the lessee under the lease contract of the type described in
33 G.S. 25-2A-523(1) or G.S. 25-2A-523(3)(a) or, if agreed, after other default by the
34 lessee, a lessor who is held not entitled to rent under this section must nevertheless be
35 awarded damages for nonacceptance under G.S. 25-2A-527 or G.S. 25-2A-528.

36 **"§ 25-2A-530. Lessor's incidental damages.**

37 Incidental damages to an aggrieved lessor include any commercially reasonable
38 charges, expenses, or commissions incurred in stopping delivery, in the transportation,
39 care, and custody of goods after the lessee's default, in connection with return or
40 disposition of the goods, or otherwise resulting from the default.

41 **"§ 25-2A-531. Standing to sue third parties for injury to goods.**

42 (1) If a third party so deals with goods that have been identified to a lease
43 contract as to cause actionable injury to a party to the lease contract then (a) the lessor

1 has a right of action against the third party, and (b) the lessee also has a right of
 2 action against the third party if the lessee:

3 (i) has a security interest in the goods;

4 (ii) has an insurable interest in the goods; or

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

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

11 (3) Either party, with the consent of the other, may sue for the benefit of whom it
 12 may concern.

13 **"§ 25-2A-532. Lessor's rights to residual interest.**

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

18 Sec. 2. G.S. 25-1-201(37) reads as rewritten:

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

39 (a) Whether a transaction creates a lease or security interest is
 40 determined by the facts of each case; however, a transaction
 41 creates a security interest if:

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

- 1 (ii) The lessee is bound to renew the lease for the
2 remaining economic life of the goods or is bound to
3 become the owner of the goods, or
- 4 (iii) The lessee has an option to renew the lease for the
5 remaining economic life of the goods for no
6 additional consideration or nominal additional
7 consideration upon compliance with the lease
8 agreement, or
- 9 (iv) The lessee has an option to become the owner of the
10 goods for no additional consideration or nominal
11 additional consideration upon compliance with the
12 lease agreement.
- 13 (b) A transaction does not create a security interest merely because
14 it provides that:
- 15 (i) The present value of the consideration the lessee is
16 obligated to pay the lessor for the right to
17 possession and use of the goods is substantially
18 equal to or is greater than the fair market value of
19 the goods at the time the lease is entered into,
- 20 (ii) The lessee assumes risk of loss of the goods, or
21 agrees to pay taxes, insurance, filing, recording, or
22 registration fees, or service or maintenance costs
23 with respect to the goods,
- 24 (iii) The lessee has an option to renew the lease or to
25 become the owner of the goods,
- 26 (iv) The lessee has an option to renew the lease for a
27 fixed rent that is equal to or greater than the
28 reasonably predictable fair market rent for the use of
29 the goods for the term of the renewal at the time the
30 option is to be performed, or
- 31 (v) The lessee has an option to become the owner of the
32 goods for a fixed price that is equal to or greater
33 than the reasonably predictable fair market value of
34 the goods at the time the option is to be performed.
- 35 (c) For purposes of this subsection (37):
- 36 (i) Additional consideration is not nominal if (i) when
37 the option to renew the lease is granted to the lessee
38 the rent is stated to be the fair market rent for the
39 use of the goods for the term of the renewal
40 determined at the time the option is to be
41 performed, or (ii) when the option to become the
42 owner of the goods is granted to the lessee the price
43 is stated to be the fair market value of the goods
44 determined at the time the option is to be

1 performed. Additional consideration is nominal if it
 2 is less than the lessee's reasonably predictable cost
 3 of performing under the lease agreement if the
 4 option is not exercised;

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

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

19 Sec. 3. G.S. 25-9-113 reads as rewritten:

20 "**§ 25-9-113. Security interests arising under article on sales.** ~~sales or under article~~
 21 **on leases.**

22 A security interest arising solely under the article on sales (~~article Article 2~~) or the
 23 article on leases (Article 2A) is subject to the provisions of this article except that to the
 24 extent that and so long as the debtor does not have or does not lawfully obtain
 25 possession of the goods

26 (a) no security agreement is necessary to make the security interest enforceable;
 27 and

28 (b) no filing is required to perfect the security interest; and

29 (c) the rights of the secured party on default by the debtor are governed (i) by the
 30 article on sales (~~article 2~~)-(Article 2) in the case of a security interest arising solely
 31 under that Article, or (ii) by the article on leases (Article 2A) in the case of a security
 32 interest arising solely under that Article."

33 Sec. 4. The revisor of statutes shall cause to be printed along with this act all
 34 relevant portions of the official comments to the Uniform Commercial Code, Article
 35 2A, as the revisor deems appropriate.

36 Sec. 5. Chapter 22B of the General Statutes is amended by adding a new
 37 Article 2 to read:

38 **"ARTICLE 2.**

39 **"JURY TRIAL WAIVERS UNENFORCEABLE.**

40 **"§ 22B-2. Contract provisions waiving jury trial unenforceable.**

41 Any provision in a contract requiring a party to the contract to waive his right to a
 42 jury trial is unconscionable as a matter of law and the provision shall be unenforceable."

43 Sec. 6. This act is effective October 1, 1993, and shall not apply to pending
 44 litigation.