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REGULAR SESSION, 1996



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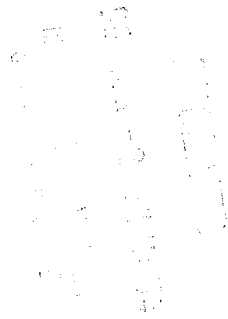
Com. Sub. for
HOUSE BILL No. 4371

(By Delegates Beane, Doyle, Jenkins,
and Walters)



Passed March 9, 1996

In Effect ninety days from Passage



ENROLLED

COMMITTEE SUBSTITUTE

FOR

H. B. 4371

(BY DELEGATES BEANE, DOYLE, JENKINS AND WALTERS)

[Passed March 9, 1996; in effect ninety days from passage.]

AN ACT to amend article four-a, chapter seventeen-a of the code of West Virginia, one thousand nine hundred thirty-one, as amended, by adding thereto a new section, designated section sixteen; to amend and reenact sections one hundred five and two hundred one, article one, chapter forty-six of said code; to further amend said chapter by adding thereto a new article, designated article two-a; to amend and reenact section one hundred thirteen, article nine of said chapter; to amend and reenact sections one hundred two, one hundred four, one hundred six, and one hundred seven, article one, chapter forty-six-a of said code; to amend article two, chapter forty-six-a of said code by adding thereto a new section, designated section one hundred three-a; to amend and reenact sections one hundred four, one hundred six, one hundred thirteen, one hundred fourteen, one hundred sixteen, one hundred seventeen, one hundred eighteen, one hundred twenty-one, one hundred twenty-two, one hundred thirty, one hundred thirty-one, and one hundred thirty-six, article two, chapter forty-six-a of said code; to amend and reenact section one hundred two, article six of said chapter; and to

amend and reenact sections one hundred two and one hundred nine, article seven of said chapter, all relating to personal property leases which are not sales or security interests; territorial application of the uniform commercial code; parties' power to choose applicable law; definitions; adopting a new article in the uniform commercial code relating to leases; general provisions; short title; scope; definitions; leases subject to other laws; territorial application of article to goods covered by certificate of title; limitation on power of parties to consumer lease to choose applicable law and judicial forum; waiver or renunciation of claim or right after default; unconscionability; option to accelerate at will; formation and construction of lease contract; statute of frauds; final written expression; parol or extrinsic evidence; seals inoperative; formation in general; firm offers; offer and acceptance in formation of lease contract; course of performance or practical construction; modification, rescission and waiver; lessee under finance contract as beneficiary of supply contract; express warranties; warranties against interference and infringement; lessee's obligation against infringement; implied warranty of merchantability; implied warranty of fitness for particular purpose; exclusion or modification of warranties; cumulation and conflict of warranties express or implied; third-party beneficiaries of express and implied warranties; identification; insurance and proceeds; risk of loss; effect of default on risk of loss; casualty to identified goods; effect of lease contract; enforceability of lease contract; title to and possession of goods; alienability of parties' interest under lease contract or of lessor's residual interest in goods; delegation of performance; transfer of rights; subsequent lease of goods by lessor; sale or sublease of goods by lessee; priority of certain liens arising by operation of law; priority of liens arising by attachment or levy on, security interests in and other claims to goods; special rights of creditors; parties' rights when goods become fixtures; parties' rights when goods become accessions; priority subject to subordination; performance of lease contract: repudiated, substituted and excused; insecurity; adequate assurance of performance; anticipatory repudiation; retraction of anticipatory repudiation; substituted performance; excused perfor-

mance; procedure on excused performance; irrevocable promises; finance leases; default; default procedure; notice after default; modification or impairment of rights and remedies; liquidation of damages; cancellation and termination and effect of cancellation, termination, rescission or fraud on rights and remedies; statute of limitations; proof of market rent; time and place; default by lessor; lessee's remedies; lessee's rights on improper delivery; rightful rejection; installment lease contracts; rejection and default; merchant lessee's duty as to rightfully rejected goods; lessee's duties as to rightfully rejected goods; cure by lessor of improper tender or delivery; replacement; waiver of lessee's objections; acceptance of goods; effect of acceptance of goods; notice of default; burden of establishing default after acceptance; notice of claim or litigation to person answerable over; revocation of acceptance of goods; cover; substitute goods; lessee's damages for nondelivery, repudiation, default and breach of warranty in regard to accepted goods; lessee's incidental and consequential damages; lessee's right to specific performance or replevin; lessee's right to goods on lessor's insolvency; default by lessee; lessor's remedies; lessor's right to identify goods to lease contract; lessor's right to possession of goods; lessor's stoppage of delivery in transit or otherwise; lessor's rights to dispose of goods; lessor's damages for nonacceptance, failure to pay, repudiation or other default; lessor's action for rent; lessor's incidental damages; standing to sue third parties for injury to goods; lessor's rights to residual interest; secured transactions; sales of accounts and chattel paper; security interests arising under the article on sales or under the article on leases; West Virginia Consumer Credit and Protection Act; definitions; application of chapter; sales, leases or loans subject to chapter by agreement of parties; waiver of rights and benefits under chapter; consumer credit protection; lessor subject to claims and defenses arising from leases; notice to cosigners; notice of consumer's right to cure default; cure; acceleration; notice of assignment; receipts; statements of account; evidence of payment; assignment of earnings; authorization to confess judgment prohibited; no garnishment before judgment; unconscionability; inducement by unconscionable conduct;

definitions; limitation on garnishment; no discharge or reprisal because of garnishment; personal property exemptions; general consumer protection; definitions; power of attorney general; reliance on rules of attorney general or commissioner of banking; duty to report; and injunctions against unconscionable agreements and fraudulent or unconscionable conduct.

Be it enacted by the Legislature of West Virginia:

That article four-a, chapter seventeen-a of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended by adding thereto a new section, designated section sixteen; that sections one hundred five and two hundred one, article one, chapter forty-six of said code be amended and reenacted; that said chapter be further amended by adding thereto a new article, designated article two-a; that section one hundred thirteen, article nine of said chapter be amended and reenacted; that sections one hundred two, one hundred four, one hundred six, and one hundred seven, article one, chapter forty-six-a of said code be amended and reenacted; that article two of said chapter be amended by adding thereto a new section, designated section one hundred three-a; that sections one hundred four, one hundred six, one hundred thirteen, one hundred fourteen, one hundred sixteen, one hundred seventeen, one hundred eighteen, one hundred twenty-one, one hundred twenty-two, one hundred thirty, one hundred thirty-one, and one hundred thirty-six, article two, chapter forty-six-a of said code be amended and reenacted; that section one hundred two, article six of said chapter be amended and reenacted; and that sections one hundred two and one hundred nine, article seven of said chapter be amended and reenacted, all to read as follows:

**CHAPTER 17A. MOTOR VEHICLE ADMINISTRATION,
REGISTRATION, CERTIFICATE OF TITLE,
AND ANTITHEFT PROVISIONS.**

**ARTICLE 4A. LIENS AND ENCUMBRANCES ON VEHICLES TO
BE SHOWN ON CERTIFICATE OF TITLE; NO-
TICE TO CREDITORS AND PURCHASERS.**

§17A-4A-16. Vehicle leases which are not sales or security interests.

1 In the case of motor vehicles or trailers, notwithstand-
2 ing any other provision of law, a transaction does not
3 create a conditional sale or security interest merely be-
4 cause it provides that the rental price is permitted or re-
5 quired to be adjusted under the agreement either upward
6 or downward by reference to the amount realized upon
7 sale or other disposition of the motor vehicle or trailer.

CHAPTER 46. UNIFORM COMMERCIAL CODE.

ARTICLE 1. GENERAL PROVISIONS.

§46-1-105. Territorial application of the act; parties' power to choose applicable law.

1 (1) Except as provided hereafter in this section, when a
2 transaction bears a reasonable relation to this state and also
3 to another state or nation the parties may agree that the
4 law either of this state or of such other state or nation shall
5 govern their rights and duties. Failing such agreement,
6 this chapter applies to transactions bearing an appropriate
7 relation to this state.

8 (2) Where one of the following provisions of this
9 chapter specifies the applicable law, that provision governs
10 and a contrary agreement is effective only to the extent
11 permitted by the law (including the conflict of laws rules)
12 so specified:

13 Sections 2A-105 and 2A-106, applicability of the
14 article on leases.

15 Section 2-402, rights of creditors against sold goods.

16 Section 4-102, applicability of the article on bank
17 deposits and collections.

18 Section 8-106, applicability of the article on invest-
19 ment securities.

20 Section 9-103, perfection provisions of the article on
21 secured transactions.

PART 2. GENERAL DEFINITIONS
AND PRINCIPLES OF INTERPRETATION.

§46-1-201. General definitions.

1 Subject to additional definitions contained in the sub-
2 sequent articles of this chapter which are applicable to
3 specific articles or parts thereof, and unless the context
4 otherwise requires, in this chapter:

5 (1) "Action" in the sense of a judicial proceeding in-
6 cludes recoupment, counterclaim, setoff, suit in equity and
7 any other proceedings in which rights are determined.

8 (2) "Aggrieved party" means a party entitled to resort
9 to a remedy.

10 (3) "Agreement" means the bargain of the parties in
11 fact as found in their language or by implication from
12 other circumstances including course of dealing or usage
13 of trade or course of performance as provided in this
14 chapter (sections 1-205 and 2-208). Whether an agree-
15 ment has legal consequences is determined by the provi-
16 sions of this chapter, if applicable; otherwise by the law of
17 contracts (section 1-103). (Compare "Contract.")

18 (4) "Bank" means any person engaged in the business
19 of banking.

20 (5) "Bearer" means the person in possession of an
21 instrument, document of title, or certificated security pay-
22 able to bearer or indorsed in blank.

23 (6) "Bill of lading" means a document evidencing the
24 receipt of goods for shipment issued by a person engaged
25 in the business of transporting or forwarding goods, and
26 includes an airbill. "Airbill" means a document serving
27 for air transportation as a bill of lading for marine or rail
28 transportation, and includes an air consignment note or air
29 waybill.

30 (7) "Branch" includes a separately incorporated for-
31 eign branch of a bank.

32 (8) "Burden of establishing a fact" means the burden
33 of persuading the triers of fact that the existence of the
34 fact is more probable than its nonexistence.

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

49 (10) "Conspicuous" means a term or clause is conspic-
50 uous when it is so written that a reasonable person against
51 whom it is to operate ought to have noticed it. A printed
52 heading in capitals (as: NONNEGOTIABLE BILL OF
53 LADING) is conspicuous. Language in the body of a
54 form is "conspicuous" if it is in larger or other contrasting
55 type or color. But in a telegram any stated term is "con-
56 spicuous." Whether a term or clause is "conspicuous" or
57 not is for decision by the court.

58 (11) "Contract" means the total legal obligation which
59 results from the parties' agreement as affected by this
60 chapter and any other applicable rules of law. (Compare
61 "Agreement.")

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

67 (13) "Defendant" includes a person in the position of
68 defendant in a cross action or counterclaim.

69 (14) "Delivery" with respect to instruments, documents
70 of title, chattel paper or certificated securities means vol-
71 untary transfer of possession.

72 (15) "Document of title" includes bill of lading, dock
73 warrant, dock receipt, warehouse receipt or order for the
74 delivery of goods, and also any other document which in
75 the regular course of business or financing is treated as
76 adequately evidencing that the person in possession of it is
77 entitled to receive, hold and dispose of the document and
78 the goods it covers. To be a document of title a document
79 must purport to be issued by or addressed to a bailee and
80 purport to cover goods in the bailee's possession which are
81 either identified or are fungible portions of an identified
82 mass.

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

84 (17) "Fungible" with respect to goods or securities
85 means goods or securities of which any unit is, by nature
86 or usage of trade, the equivalent of any other like unit.
87 Goods which are not fungible shall be deemed fungible
88 for the purposes of this chapter to the extent that under a
89 particular agreement or document unlike units are treated
90 as equivalents.

91 (18) "Genuine" means free of forgery or counterfeit-
92 ing.

93 (19) "Good faith" means honesty in fact in the con-
94 duct or transaction concerned.

95 (20) "Holder" with respect to a negotiable instrument
96 means the person in possession if the instrument is pay-
97 able to bearer or, in the case of an instrument payable to
98 an identified person, if the identified person is in posses-
99 sion. "Holder" with respect to a document of title means
100 the person in possession if the goods are deliverable to the
101 bearer or to the order of the person in possession.

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

105 (22) "Insolvency proceedings" includes any assign-
106 ment for the benefit of creditors or other proceedings
107 intended to liquidate or rehabilitate the estate of the per-
108 son involved.

109 (23) A person is "insolvent" who either has ceased to
110 pay his or her debts in the ordinary course of business or
111 cannot pay his or her debts as they become due or is in-
112 solvent within the meaning of the Federal Bankruptcy
113 Law.

114 (24) "Money" means a medium of exchange autho-
115 rized or adopted by a domestic or foreign government
116 and includes a monetary unit of account established by an
117 intergovernmental organization or by agreement between
118 two or more nations.

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

120 (a) He has actual knowledge of it; or

121 (b) He has received a notice or notification of it; or

122 (c) From all the facts and circumstances known to him
123 or her at the time in question he or she has reason to know
124 that it exists. A person "knows" or has "knowledge" of a
125 fact when he or she has actual knowledge of it. "Discover"
126 or "learn" or a word or phrase of similar import refers to
127 knowledge rather than to reason to know. The time and
128 circumstances under which a notice or notification may
129 cease to be effective are not determined by this chapter.

130 (26) A person "notifies" or "gives" a notice or notifica-
131 tion to another by taking such steps as may be reasonably
132 required to inform the other in ordinary course whether or
133 not such other actually comes to know of it. A person
134 "receives" a notice or notification when:

135 (a) It comes to his or her attention; or

136 (b) It is duly delivered at the place of business through
137 which the contract was made or at any other place held out
138 by him or her as the place for receipt of such communica-
139 tions.

140 (27) Notice, knowledge or a notice or notification
141 received by an organization is effective for a particular
142 transaction from the time when it is brought to the atten-
143 tion of the individual conducting that transaction, and in
144 any event from the time when it would have been brought
145 to his attention if the organization had exercised due dili-
146 gence. An organization exercises due diligence if it main-
147 tains reasonable routines for communicating significant
148 information to the person conducting the transaction and
149 there is reasonable compliance with the routines. Due
150 diligence does not require an individual acting for the
151 organization to communicate information unless such
152 communication is part of his or her regular duties or un-
153 less he or she has reason to know of the transaction and
154 that the transaction would be materially affected by the
155 information.

156 (28) "Organization" includes a corporation, govern-
157 ment or governmental subdivision or agency, business
158 trust, estate, trust, partnership or association, two or more
159 persons having a joint or common interest, or any other
160 legal or commercial entity.

161 (29) "Party," as distinct from "third party," means a
162 person who has engaged in a transaction or made an
163 agreement within this chapter.

164 (30) "Person" includes an individual or an organiza-
165 tion (see section 1-102).

166 (31) "Presumption" or "presumed" means that the trier
167 of fact must find the existence of the fact presumed unless
168 and until evidence is introduced which would support a
169 finding of its nonexistence.

170 (32) "Purchase" includes taking by sale, discount,
171 negotiation, mortgage, pledge, lien, issue or reissue, gift or
172 any other voluntary transaction creating an interest in
173 property.

174 (33) "Purchaser" means a person who takes by pur-
175 chase.

176 (34) "Remedy" means any remedial right to which an
177 aggrieved party is entitled with or without resort to a tribu-
178 nal.

179 (35) "Representative" includes an agent, an officer of a
180 corporation or association, and a trustee, executor or ad-
181 ministrator of an estate, or any other person empowered to
182 act for another.

183 (36) "Rights" includes remedies.

184 (37) "Security interest" means an interest in personal
185 property or fixtures which secures payment or perfor-
186 mance of an obligation. The retention or reservation of
187 title by a seller of goods notwithstanding shipment or
188 delivery to the buyer (section 2-401) is limited in effect to
189 a reservation of a "security interest." The term also in-
190 cludes any interest of a buyer of accounts or chattel paper,
191 which is subject to article nine. The special property inter-
192 est of a buyer of goods on identification of those goods
193 to a contract for sale under section 2-401 is not a "security
194 interest," but a buyer may also acquire a "security interest"
195 by complying with article nine. Unless a consignment is
196 intended as security, reservation of title thereunder is not a
197 "security interest", but a consignment in any event is sub-
198 ject to the provisions on consignment sales (section
199 2-326).

200 (a) Whether a transaction creates a lease or security
201 interest is determined by the facts of each case; however, a
202 transaction creates a security interest if the consideration
203 the lessee is to pay the lessor for the right to possession
204 and use of the goods is an obligation for the term of the
205 lease not subject to termination by the lessee, and:

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

208 (ii) The lessee is bound to renew the lease for the re-
209 maining economic life of the goods or is bound to be-
210 come the owner of the goods;

211 (iii) The lessee has an option to renew the lease for the

212 remaining economic life of the goods for no additional
213 consideration or nominal additional consideration upon
214 compliance with the lease agreement; or

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

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

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

226 (ii) The lessee assumes risk of loss of the goods, or
227 agrees to pay taxes, insurance, filing, recording or registra-
228 tion fees, or service or maintenance costs with respect to
229 the goods;

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

232 (iv) The lessee has an option to renew the lease for a
233 fixed rent that is equal to or greater than the reasonably
234 predictable fair market rent for the use of the goods for
235 the term of the renewal at the time the option is to be per-
236 formed; or

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

241 (c) For purposes of this subsection (37):

242 (i) Additional consideration is not nominal if: (i)
243 When the option to renew the lease is granted to the lessee
244 the rent is stated to be the fair market rent for the use of
245 the goods for the term of the renewal determined at the
246 time the option is to be performed; or (ii) when the option

247 to become the owner of the goods is granted to the lessee
248 the price is stated to be the fair market value of the goods
249 determined at the time the option is to be performed.
250 Additional consideration is nominal if it is less than the
251 lessee's reasonably predictable cost of performing under
252 the lease agreement if the option is not exercised;

253 (ii) "Reasonably predictable" and "remaining econom-
254 ic life of the goods" are to be determined with reference to
255 the facts and circumstances at the time the transaction is
256 entered into; and

257 (iii) "Present value" means the amount as of a date
258 certain of one or more sums payable in the future, dis-
259 counted to the date certain. The discount is determined
260 by the interest rate specified by the parties if the rate is not
261 manifestly unreasonable at the time the transaction is en-
262 tered into; otherwise, the discount is determined by a com-
263 mercially reasonable rate that takes into account the facts
264 and circumstances of each case at the time the transaction
265 was entered into.

266 (38) "Send" in connection with any writing or notice
267 means to deposit in the mail or deliver for transmission by
268 any other usual means of communication with postage or
269 cost of transmission provided for and properly addressed
270 and in the case of an instrument to an address specified
271 thereon or otherwise agreed, or if there be none to any
272 address reasonable under the circumstances. The receipt
273 of any writing or notice within the time at which it would
274 have arrived if properly sent has the effect of a proper
275 sending.

276 (39) "Signed" includes any symbol executed or adopt-
277 ed by a party with present intention to authenticate a writ-
278 ing.

279 (40) "Surety" includes guarantor.

280 (41) "Telegram" includes a message transmitted by
281 radio, teletype, cable, any mechanical method of transmis-
282 sion, or the like.

283 (42) "Term" means that portion of an agreement
284 which relates to a particular matter.

285 (43) "Unauthorized signature" means one made with-
286 out actual, implied or apparent authority and includes a
287 forgery.

288 (44) "Value." Except as otherwise provided with re-
289 spect to negotiable instruments and bank collections (sec-
290 tions 3-303, 4-208 and 4-209), a person gives "value" for
291 rights if he acquires them:

292 (a) In return for a binding commitment to extend
293 credit or for the extension of immediately available credit
294 whether or not drawn upon and whether or not a
295 chargeback is provided for in the event of difficulties in
296 collection; or

297 (b) As security for or in total or partial satisfaction of
298 a preexisting claim; or

299 (c) By accepting delivery pursuant to a preexisting
300 contract for purchase; or

301 (d) Generally, in return for any consideration suffi-
302 cient to support a simple contract.

303 (45) "Warehouse receipt" means a receipt issued by a
304 person engaged in the business of storing goods for hire.

305 (46) "Written" or "writing" includes printing, typewrit-
306 ing or any other intentional reduction to tangible form.

ARTICLE 2A. LEASES.

PART 1. GENERAL PROVISIONS.

§46-2A-101. Short title.

1 This article shall be known and may be cited as the
2 Uniform Commercial Code—Leases.

§46-2A-102. Scope.

1 This article applies to any transaction, regardless of
2 form, that creates a lease.

§46-2A-103. Definitions and index of definitions.

1 (1) In this article unless the context otherwise requires:

2 (a) "Buyer in ordinary course of business" means a
3 person who in good faith and without knowledge that the
4 sale to him or her is in violation of the ownership rights or
5 security interest or leasehold interest of a third party in the
6 goods, buys in ordinary course from a person in the busi-
7 ness of selling goods of that kind but does not include a
8 pawnbroker. "Buying" may be for cash or by exchange
9 of other property or on secured or unsecured credit and
10 includes receiving goods or documents of title under a
11 preexisting contract for sale but does not include a trans-
12 fer in bulk or as security for or in total or partial satisfac-
13 tion of a money debt.

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

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

24 (d) "Conforming" goods or performance under a lease
25 contract means goods or performance that are in accor-
26 dance with the obligations under the lease contract.

27 (e) "Consumer lease" shall have the same meaning as
28 that ascribed to it in section one hundred two, article one,
29 chapter forty-six-a of this code.

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

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

34 (i) The lessor does not select, manufacture or supply
35 the goods;

36 (ii) The lessor acquires the goods or the right to pos-
37 session and use of the goods in connection with the lease;
38 and

39 (iii) One of the following occurs:

40 (A) The lessee receives a copy of the contract by
41 which the lessor acquired the goods or the right to posses-
42 sion and use of the goods before signing the lease con-
43 tract;

44 (B) The lessee's approval of the contract by which the
45 lessor acquired the goods or the right to possession and
46 use of the goods is a condition to effectiveness of the lease
47 contract;

48 (C) The lessee, before signing the lease contract, re-
49 ceives an accurate and complete statement designating the
50 promises and warranties, and any disclaimers of warranties,
51 limitations or modifications of remedies, or liquidated
52 damages, including those of a third party, such as the
53 manufacturer of the goods, provided to the lessor by the
54 person supplying the goods in connection with or as part
55 of the contract by which the lessor acquired the goods or
56 the right to possession and use of the goods; or

57 (D) If the lease is not a consumer lease, the lessor,
58 before the lessee signs the lease contract, informs the les-
59 see in writing: (a) Of the identity of the person supplying
60 the goods to the lessor, unless the lessee has selected that
61 person and directed the lessor to acquire the goods or the
62 right to possession and use of the goods from that person;
63 (b) that the lessee is entitled under this article to the prom-
64 ises and warranties, including those of any third party,
65 provided to the lessor by the person supplying the goods
66 in connection with or as part of the contract by which the
67 lessor acquired the goods or the right to possession and
68 use of the goods; and (c) that the lessee may communicate
69 with the person supplying the goods to the lessor and
70 receive an accurate and complete statement of those prom-
71 ises and warranties, including any disclaimers and limita-
72 tions of them or of remedies.

73 (h) "Goods" means all things that are movable at the
74 time of identification to the lease contract, or are fixtures
75 (section 2A-309), but the term does not include money,
76 documents, instruments, accounts, chattel paper, general
77 intangibles, or minerals or the like, including oil and gas,
78 before extraction. The term also includes the unborn
79 young of animals.

80 (i) "Installment lease contract" means a lease contract
81 that authorizes or requires the delivery of goods in sepa-
82 rate lots to be separately accepted, even though the lease
83 contract contains a clause "each delivery is a separate
84 lease" or its equivalent.

85 (j) "Lease" means a transfer of the right to possession
86 and use of goods for a term in return for consideration,
87 but a sale, including a sale on approval or a sale or return,
88 or retention or creation of a security interest is not a lease.
89 Unless the context clearly indicates otherwise, the term
90 includes a sublease.

91 (k) "Lease agreement" means the bargain, with respect
92 to the lease, of the lessor and the lessee in fact as found in
93 their language or by implication from other circumstances
94 including course of dealing or usage of trade or course of
95 performance as provided in this article. Unless the context
96 clearly indicates otherwise, the term includes a sublease
97 agreement.

98 (l) "Lease contract" means the total legal obligation
99 that results from the lease agreement as affected by this
100 article and any other applicable rules of law. Unless the
101 context clearly indicates otherwise, the term includes a
102 sublease contract.

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

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

109 (o) "Lessee in ordinary course of business" means a
110 person who in good faith and without knowledge that the
111 lease to him or her is in violation of the ownership rights
112 or security interest or leasehold interest of a third party in
113 the goods leases in ordinary course from a person in the
114 business of selling or leasing goods of that kind but does
115 not include a pawnbroker. "Leasing" may be for cash or
116 by exchange of other property or on secured or unse-
117 cured credit and includes receiving goods or documents
118 of title under a preexisting lease contract but does not
119 include a transfer in bulk or as security for or in total or
120 partial satisfaction of a money debt.

121 (p) "Lessor" means a person who transfers the right to
122 possession and use of goods under a lease. Unless the
123 context clearly indicates otherwise, the term includes a
124 sublessor.

125 (q) "Lessor's residual interest" means the lessor's inter-
126 est in the goods after expiration, termination or cancella-
127 tion of the lease contract.

128 (r) "Lien" means a charge against or interest in goods
129 to secure payment of a debt or performance of an obliga-
130 tion, but the term does not include a security interest.

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

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

136 (u) "Present value" means the amount as of a date
137 certain of one or more sums payable in the future, dis-
138 counted to the date certain. The discount is determined
139 by the interest rate specified by the parties if the rate was
140 not manifestly unreasonable at the time the transaction was
141 entered into; otherwise, the discount is determined by a
142 commercially reasonable rate that takes into account the
143 facts and circumstances of each case at the time the trans-
144 action was entered into.

145 (v) "Purchase" includes taking by sale, lease, mortgage,
146 security interest, pledge, gift or any other voluntary trans-
147 action creating an interest in goods.

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

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

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

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

158 (2) Other definitions applying to this article and the
159 sections in which they appear are:

160 "Accessions." Section 2A-310(1).

161 "Construction mortgage." Section 2A-309(1)(d).

162 "Encumbrance." Section 2A-309(1)(e).

163 "Fixtures." Section 2A-309(1)(a).

164 "Fixture filing." Section 2A-309(1)(b).

165 "Purchase money lease." Section 2A-309(1)(c).

166 (3) The following definitions in other articles apply to
167 this article:

168 "Account." Section 9-106.

169 "Between merchants." Section 2-104(3).

170 "Buyer." Section 2-103(1)(a).

171 "Chattel paper." Section 9-105(1)(b).

172 "Consumer goods." Section 9-109(1).

173 "Document." Section 9-105(1)(f).

174 "Entrusting." Section 2-403(3).

- 175 "General intangibles." Section 9-106.
- 176 "Good faith." Section 2-103(1)(b).
- 177 "Instrument." Section 9-105(1)(i).
- 178 "Merchant." Section 2-104(1).
- 179 "Mortgage." Section 9-105(1)(j).
- 180 "Pursuant to commitment." Section 9-105(1)(k).
- 181 "Receipt." Section 2-103(1)(c).
- 182 "Sale." Section 2-106(1).
- 183 "Sale on approval." Section 2-326.
- 184 "Sale or return." Section 2-326.
- 185 "Seller." Section 2-103(1)(d).

186 (4) In addition, article one contains general definitions
187 and principles of construction and interpretation applica-
188 ble throughout this article.

§46-2A-104. Leases subject to other law.

- 1 (1) A lease, although subject to this article, is also
2 subject to any applicable:
 - 3 (a) Certificate of title statute of this state: Section
4 17A-3-2;
 - 5 (b) Certificate of title statute of another jurisdiction
6 (section 2A-105); or
 - 7 (c) Consumer protection statute of this state, or final
8 consumer protection decision of a court of this state exist-
9 ing on the effective date of this article.
- 10 (2) In case of conflict between this article, other than
11 sections 2A-105, 2A-304(3), and 2A-305(3), and a statute
12 or decision referred to in subsection (1), the statute or
13 decision controls.
- 14 (3) Failure to comply with an applicable law has only
15 the effect specified therein.

§46-2A-105. Territorial application of article to goods covered by certificate of title.

1 Subject to the provisions of sections 2A-304(3) and
2 2A-305(3), with respect to goods covered by a certificate
3 of title issued under a statute of this state or of another
4 jurisdiction, compliance and the effect of compliance or
5 noncompliance with a certificate of title statute are gov-
6 erned by the law (including the conflict of laws rules) of
7 the jurisdiction issuing the certificate until the earlier of:
8 (a) Surrender of the certificate; or (b) four months after
9 the goods are removed from that jurisdiction and thereaf-
10 ter until a new certificate of title is issued by another juris-
11 diction.

§46-2A-106. Limitation on power of parties to consumer lease to choose applicable law and judicial forum.

1 (1) If the law chosen by the parties to a consumer
2 lease is that of a jurisdiction other than a jurisdiction in
3 which the lessee resides at the time the lease agreement
4 becomes enforceable or within thirty days thereafter or in
5 which the goods are to be used, the choice is not enforce-
6 able.

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

§46-2A-107. Waiver or renunciation of claim or right after default.

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

§46-2A-108. Unconscionability.

1 (1) If the court as a matter of law finds a lease contract
2 or any clause of a lease contract to have been unconscio-
3 nable at the time it was made the court may refuse to en-
4 force the lease contract, or it may enforce the remainder
5 of the lease contract without the unconscionable clause, or

6 it may so limit the application of any unconscionable
7 clause as to avoid any unconscionable result.

8 (2) With respect to a consumer lease, if the court as a
9 matter of law finds that a lease contract or any clause of a
10 lease contract has been induced by unconscionable con-
11 duct or that unconscionable conduct has occurred in the
12 collection of a claim arising from a lease contract, the
13 court may grant appropriate relief.

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

20 (4) In an action in which the lessee claims unconscio-
21 nability with respect to a consumer lease:

22 (a) If the court finds unconscionability under subsec-
23 tion (1) or (2), the court shall award reasonable attorney's
24 fees to the lessee.

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

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

§46-2A-109. Option to accelerate at will.

1 (1) A term providing that one party or his or her suc-
2 cessor in interest may accelerate payment or performance
3 or require collateral or additional collateral "at will" or
4 "when he or she deems himself or herself insecure" or in
5 words of similar import must be construed to mean that he
6 or she has power to do so only if he or she in good faith
7 believes that the prospect of payment or performance is
8 impaired.

9 (2) With respect to a consumer lease, the burden of
10 establishing good faith under subsection (1) is on the
11 party who exercised the power; otherwise the burden of
12 establishing lack of good faith is on the party against
13 whom the power has been exercised.

PART 2. FORMATION AND
CONSTRUCTION OF LEASE CONTRACT.

§46-2A-201. Statute of frauds.

1 (1) A lease contract is not enforceable by way of ac-
2 tion or defense unless:

3 (a) The total payments to be made under the lease
4 contract, excluding payments for options to renew or buy,
5 are less than one thousand dollars; or

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

11 (2) Any description of leased goods or of the lease
12 term is sufficient and satisfies subsection (1)(b), whether
13 or not it is specific, if it reasonably identifies what is de-
14 scribed.

15 (3) A writing is not insufficient because it omits or
16 incorrectly states a term agreed upon, but the lease con-
17 tract is not enforceable under subsection (1)(b) beyond
18 the lease term and the quantity of goods shown in the
19 writing.

20 (4) A lease contract that does not satisfy the require-
21 ments of subsection (1), but which is valid in other re-
22 spects, is enforceable:

23 (a) If the goods are to be specially manufactured or
24 obtained for the lessee and are not suitable for lease or
25 sale to others in the ordinary course of the lessor's busi-
26 ness, and the lessor, before notice of repudiation is re-
27 ceived and under circumstances that reasonably indicate

28 that the goods are for the lessee, has made either a sub-
29 stantial beginning of their manufacture or commitments
30 for their procurement;

31 (b) If the party against whom enforcement is sought
32 admits in that party's pleading, testimony or otherwise in
33 court that a lease contract was made, but the lease contract
34 is not enforceable under this provision beyond the quanti-
35 ty of goods admitted; or

36 (c) With respect to goods that have been received and
37 accepted by the lessee.

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

40 (a) If there is a writing signed by the party against
41 whom enforcement is sought or by that party's authorized
42 agent specifying the lease term, the term so specified;

43 (b) If the party against whom enforcement is sought
44 admits in that party's pleading, testimony, or otherwise in
45 court a lease term, the term so admitted; or

46 (c) A reasonable lease term.

§46-2A-202. Final written expression: Parol or extrinsic evidence.

1 Terms with respect to which the confirmatory memo-
2 randa of the parties agree or which are otherwise set forth
3 in a writing intended by the parties as a final expression of
4 their agreement with respect to such terms as are included
5 therein may not be contradicted by evidence of any prior
6 agreement or of a contemporaneous oral agreement but
7 may be explained or supplemented:

8 (a) By course of dealing or usage of trade or by
9 course of performance; and

10 (b) By evidence of consistent additional terms unless
11 the court finds the writing to have been intended also as a
12 complete and exclusive statement of the terms of the
13 agreement.

§46-2A-203. Seals inoperative.

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

§46-2A-204. Formation in general.

1 (1) A lease contract may be made in any manner suf-
2 ficient to show agreement, including conduct by both
3 parties which recognizes the existence of a lease contract.

4 (2) An agreement sufficient to constitute a lease con-
5 tract may be found although the moment of its making is
6 undetermined.

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

§46-2A-205. Firm offers.

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

**§46-2A-206. Offer and acceptance in formation of lease con-
tract.**

1 (1) Unless otherwise unambiguously indicated by the
2 language or circumstances, an offer to make a lease con-
3 tract must be construed as inviting acceptance in any man-
4 ner and by any medium reasonable in the circumstances.

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

§46-2A-207. Course of performance or practical construction.

1 (1) If a lease contract involves repeated occasions for
2 performance by either party with knowledge of the nature
3 of the performance and opportunity for objection to it by
4 the other, any course of performance accepted or acqui-
5 esced in without objection is relevant to determine the
6 meaning of the lease agreement.

7 (2) The express terms of a lease agreement and any
8 course of performance, as well as any course of dealing
9 and usage of trade, must be construed whenever reason-
10 able as consistent with each other; but if that construction
11 is unreasonable, express terms control course of perfor-
12 mance, course of performance controls both course of
13 dealing and usage of trade and course of dealing controls
14 usage of trade.

15 (3) Subject to the provisions of section 2A-208 on
16 modification and waiver, course of performance is relevant
17 to show a waiver or modification of any term inconsistent
18 with the course of performance.

§46-2A-208. Modification, rescission and waiver.

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

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

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

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

§46-2A-209. Lessee under finance lease as beneficiary of supply contract.

1 (1) The benefit of a supplier's promises to the lessor
2 under the supply contract and of all warranties, whether
3 express or implied, including those of any third party
4 provided in connection with or as part of the supply con-
5 tract, extends to the lessee to the extent of the lessee's
6 leasehold interest under a finance lease related to the sup-
7 ply contract, but is subject to the terms of the warranty and
8 of the supply contract and all defenses or claims arising
9 therefrom.

10 (2) The extension of the benefit of a supplier's prom-
11 ises and of warranties to the lessee (section 2A-209(1))
12 does not: (i) Modify the rights and obligations of the
13 parties to the supply contract, whether arising therefrom or
14 otherwise; or (ii) impose any duty or liability under the
15 supply contract on the lessee.

16 (3) Any modification or rescission of the supply con-
17 tract by the supplier and the lessor is effective between the
18 supplier and the lessee unless, before the modification or
19 rescission, the supplier has received notice that the lessee
20 has entered into a finance lease related to the supply con-
21 tract. If the modification or rescission is effective between
22 the supplier and the lessee, the lessor is deemed to have
23 assumed, in addition to the obligations of the lessor to the
24 lessee under the lease contract, promises of the supplier to
25 the lessor and warranties that were so modified or rescind-
26 ed as they existed and were available to the lessee before
27 modification or rescission.

28 (4) In addition to the extension of the benefit of the
29 supplier's promises and of warranties to the lessee under
30 subsection (1), the lessee retains all rights that the lessee
31 may have against the supplier which arise from an agree-
32 ment between the lessee and the supplier or under other
33 law.

§46-2A-210. Express warranties.

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

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

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

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

13 (2) It is not necessary to the creation of an express
14 warranty that the lessor use formal words, such as "war-
15 rant" or "guarantee," or that the lessor have a specific in-
16 tention to make a warranty, but an affirmation merely of
17 the value of the goods or a statement purporting to be
18 merely the lessor's opinion or commendation of the goods
19 does not create a warranty.

**§46-2A-211. Warranties against interference and against
infringement; lessee's obligation against
infringement.**

1 (1) There is in a lease contract a warranty that for the
2 lease term no person holds a claim to or interest in the
3 goods that arose from an act or omission of the lessor,
4 other than a claim by way of infringement or the like,
5 which will interfere with the lessee's enjoyment of its lease-
6 hold interest.

7 (2) Except in a finance lease, there is in a lease con-
8 tract by a lessor who is a merchant regularly dealing in
9 goods of the kind, a warranty that the goods are delivered
10 free of the rightful claim of any person by way of in-
11 fringement or the like.

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

§46-2A-212. Implied warranty of merchantability.

1 (1) Except in a finance lease, a warranty that the goods
2 will be merchantable is implied in a lease contract if the
3 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 de-
6 scription in the lease agreement;

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

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

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

14 (e) Are adequately contained, packaged and labeled as
15 the lease agreement may require; and

16 (f) Conform to any promises or affirmations of fact
17 made on the container or label.

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

§46-2A-213. Implied warranty of fitness for particular purpose.

1 Except in a finance lease, if the lessor at the time the
2 lease contract is made has reason to know of any particu-
3 lar purpose for which the goods are required and that the
4 lessee is relying on the lessor's skill or judgment to select
5 or furnish suitable goods, there is in the lease contract an
6 implied warranty that the goods will be fit for that pur-
7 pose.

§46-2A-214. Exclusion or modification of warranties.

1 (1) Words or conduct relevant to the creation of an
2 express warranty and words or conduct tending to negate
3 or limit a warranty must be construed wherever reasonable

4 as consistent with each other; but, subject to the provisions
5 of section 2A-202 on parol or extrinsic evidence, negation
6 or limitation is inoperative to the extent that the construc-
7 tion is unreasonable.

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

18 (3) Notwithstanding subsection (2), but subject to
19 subsection (4),

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

26 (b) If the lessee before entering into the lease contract
27 has examined the goods or the sample or model as fully as
28 desired or has refused to examine the goods, there is no
29 implied warranty with regard to defects that an examina-
30 tion ought in the circumstances to have revealed; and

31 (c) An implied warranty may also be excluded or
32 modified by course of dealing, course of performance or
33 usage of trade.

34 (4) To exclude or modify a warranty against interfer-
35 ence or against infringement (section 2A-211) or any part
36 of it, the language must be specific, be by a writing and be
37 conspicuous, unless the circumstances, including course of
38 performance, course of dealing or usage of trade, give the
39 lessee reason to know that the goods are being leased
40 subject to a claim or interest of any person.

§46-2A-215. Cumulation and conflict of warranties express or implied.

1 Warranties, whether express or implied, must be con-
2 strued as consistent with each other and as cumulative, but
3 if that construction is unreasonable, the intention of the
4 parties determines which warranty is dominant. In ascer-
5 taining that intention the following rules apply:

6 (a) Exact or technical specifications displace an incon-
7 sistent sample or model or general language of descrip-
8 tion.

9 (b) A sample from an existing bulk displaces inconsis-
10 tent general language of description.

11 (c) Express warranties displace inconsistent implied
12 warranties other than an implied warranty of fitness for a
13 particular purpose.

§46-2A-216. Third-party beneficiaries of express and implied warranties.

1 A warranty to or for the benefit of a lessee under this
2 article, whether express or implied, extends to any natural
3 person who is in the family or household of the lessee or
4 who is a guest in the lessee's home if it is reasonable to
5 expect that such person may use, consume, or be affected
6 by the goods and who is injured in person by breach of
7 the warranty. This section does not displace principles of
8 law and equity that extend a warranty to or for the benefit
9 of a lessee to other persons. The operation of this section
10 may not be excluded, modified or limited, but an exclu-
11 sion, modification or limitation of the warranty, including
12 any with respect to rights and remedies, effective against
13 the lessee is also effective against any beneficiary desig-
14 nated under this section.

§46-2A-217. Identification.

1 Identification of goods as goods to which a lease con-
2 tract refers may be made at any time and in any manner
3 explicitly agreed to by the parties. In the absence of ex-
4 plicit agreement, identification occurs:

5 (a) When the lease contract is made if the lease con-
6 tract is for a lease of goods that are existing and identified;

7 (b) When the goods are shipped, marked, or otherwise
8 designated by the lessor as goods to which the lease con-
9 tract refers, if the lease contract is for a lease of goods that
10 are not existing and identified; or

11 (c) When the young are conceived, if the lease contract
12 is for a lease of unborn young of animals.

§46-2A-218. Insurance and proceeds.

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

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

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

14 (4) Nothing in this section impairs any insurable inter-
15 est recognized under any other statute or rule of law.

16 (5) The parties by agreement may determine that one
17 or more parties have an obligation to obtain and pay for
18 insurance covering the goods and by agreement may
19 determine the beneficiary of the proceeds of the insur-
20 ance.

§46-2A-219. Risk of loss.

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

4 (2) Subject to the provisions of this article on the ef-

5 fect of default on risk of loss (section 2A-220), if risk of
6 loss is to pass to the lessee and the time of passage is not
7 stated, the following rules apply:

8 (a) If the lease contract requires or authorizes the
9 goods to be shipped by carrier:

10 (i) And it does not require delivery at a particular
11 destination, the risk of loss passes to the lessee when the
12 goods are duly delivered to the carrier; but

13 (ii) If it does require delivery at a particular destina-
14 tion and the goods are there duly tendered while in the
15 possession of the carrier, the risk of loss passes to the les-
16 see when the goods are there duly so tendered as to enable
17 the lessee to take delivery.

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

22 (c) In any case not within subsection (a) or (b), the
23 risk of loss passes to the lessee on the lessee's receipt of the
24 goods if the lessor, or, in the case of a finance lease, the
25 supplier, is a merchant; otherwise the risk passes to the
26 lessee on tender of delivery.

§46-2A-220. Effect of default on risk of loss.

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

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

7 (b) If the lessee rightfully revokes acceptance, he or
8 she, to the extent of any deficiency in his or her effective
9 insurance coverage, may treat the risk of loss as having
10 remained with the lessor from the beginning.

11 (2) Whether or not risk of loss is to pass to the lessee,
12 if the lessee as to conforming goods already identified to a

13 lease contract repudiates or is otherwise in default under
14 the lease contract, the lessor, or, in the case of a finance
15 lease, the supplier, to the extent of any deficiency in his or
16 her effective insurance coverage may treat the risk of loss
17 as resting on the lessee for a commercially reasonable
18 time.

§46-2A-221. Casualty to identified goods.

1 If a lease contract requires goods identified when the
2 lease contract is made, and the goods suffer casualty with-
3 out fault of the lessee, the lessor or the supplier before
4 delivery, or the goods suffer casualty before risk of loss
5 passes to the lessee pursuant to the lease agreement or
6 section 2A-219, then:

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

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

PART 3. EFFECT OF LEASE CONTRACT.

§46-2A-301. Enforceability of lease contract.

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

§46-2A-302. Title to and possession of goods.

1 Except as otherwise provided in this article, each pro-
2 vision of this article applies whether the lessor or a third
3 party has title to the goods, and whether the lessor, the
4 lessee or a third party has possession of the goods, not-
5 withstanding any statute or rule of law that possession or
6 the absence of possession is fraudulent.

§46-2A-303. Alienability of party's interest under lease contract or of lessor's residual interest in goods; delegation of performance; transfer of rights.

1 (1) As used in this section, "creation of a security in-
2 terest" includes the sale of a lease contract that is subject to
3 article nine, secured transactions, by reason of section
4 9-102(1)(b).

5 (2) Except as provided in subsections (3) and (4), a
6 provision in a lease agreement which: (i) Prohibits the
7 voluntary or involuntary transfer, including a transfer by
8 sale, sublease, creation or enforcement of a security inter-
9 est, or attachment, levy, or other judicial process, of an
10 interest of a party under the lease contract or of the les-
11 sor's residual interest in the goods; or (ii) makes such a
12 transfer an event of default, gives rise to the rights and
13 remedies provided in subsection (5), but a transfer that is
14 prohibited or is an event of default under the lease agree-
15 ment is otherwise effective.

16 (3) A provision in a lease agreement which: (i) Pro-
17 hibits the creation or enforcement of a security interest in
18 an interest of a party under the lease contract or in the
19 lessor's residual interest in the goods; or (ii) makes such a
20 transfer an event of default, is not enforceable unless, and
21 then only to the extent that, there is an actual transfer by
22 the lessee of the lessee's right of possession or use of the
23 goods in violation of the provision or an actual delegation
24 of a material performance of either party to the lease con-
25 tract in violation of the provision. Neither the granting
26 nor the enforcement of a security interest in: (i) The les-
27 sor's interest under the lease contract; or (ii) the lessor's
28 residual interest in the goods is a transfer that materially
29 impairs the prospect of obtaining return performance by,
30 materially changes the duty of, or materially increases the
31 burden or risk imposed on, the lessee within the purview
32 of subsection (5) unless, and then only to the extent that,
33 there is an actual delegation of a material performance of
34 the lessor.

35 (4) A provision in a lease agreement which: (i) Pro-

36 hibits a transfer of a right to damages for default with
37 respect to the whole lease contract or of a right to payment
38 arising out of the transferor's due performance of the
39 transferor's entire obligation; or (ii) makes such a transfer
40 an event of default, is not enforceable, and such a transfer
41 is not a transfer that materially impairs the prospect of
42 obtaining return performance by, materially changes the
43 duty of, or materially increases the burden or risk imposed
44 on, the other party to the lease contract within the purview
45 of subsection (5).

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

47 (a) If a transfer is made which is made an event of
48 default under a lease agreement, the party to the lease
49 contract not making the transfer, unless that party waives
50 the default or otherwise agrees, has the rights and remedies
51 described in section 2A-501(2);

52 (b) If paragraph (a) is not applicable and if a transfer
53 is made that: (i) Is prohibited under a lease agreement; or
54 (ii) materially impairs the prospect of obtaining return
55 performance by, materially changes the duty of, or materi-
56 ally increases the burden or risk imposed on, the other
57 party to the lease contract, unless the party not making the
58 transfer agrees at any time to the transfer in the lease con-
59 tract or otherwise, then, except as limited by contract: (i)
60 The transferor is liable to the party not making the trans-
61 fer for damages caused by the transfer to the extent that
62 the damages could not reasonably be prevented by the
63 party not making the transfer; and (ii) a court having
64 jurisdiction may grant other appropriate relief, including
65 cancellation of the lease contract or an injunction against
66 the transfer.

67 (6) A transfer of "the lease" or of "all my rights under
68 the lease," or a transfer in similar general terms, is a trans-
69 fer of rights and, unless the language or the circumstances,
70 as in a transfer for security, indicate the contrary, the
71 transfer is a delegation of duties by the transferor to the
72 transferee. Acceptance by the transferee constitutes a
73 promise by the transferee to perform those duties. The

74 promise is enforceable by either the transferor or the other
75 party to the lease contract.

76 (7) Unless otherwise agreed by the lessor and the les-
77 see, a delegation of performance does not relieve the
78 transferor as against the other party of any duty to per-
79 form or of any liability for default.

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

§46-2A-304. Subsequent lease of goods by lessor.

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

13 (a) The lessor's transferor was deceived as to the iden-
14 tity of the lessor;

15 (b) The delivery was in exchange for a check which is
16 later dishonored;

17 (c) It was agreed that the transaction was to be a "cash
18 sale"; or

19 (d) The delivery was procured through fraud punish-
20 able as larcenous under the criminal law.

21 (2) A subsequent lessee in the ordinary course of
22 business from a lessor who is a merchant dealing in goods
23 of that kind to whom the goods were entrusted by the
24 existing lessee of that lessor before the interest of the sub-

25 sequent lessee became enforceable against that lessor ob-
26 tains, to the extent of the leasehold interest transferred, all
27 of that lessor's and the existing lessee's rights to the goods,
28 and takes free of the existing lease contract.

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

§46-2A-305. Sale or sublease of goods by lessee.

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

14 (a) The lessor was deceived as to the identity of the
15 lessee;

16 (b) The delivery was in exchange for a check which is
17 later dishonored; or

18 (c) The delivery was procured through fraud punish-
19 able as larcenous under the criminal law.

20 (2) A buyer in the ordinary course of business or a
21 sublessee in the ordinary course of business from a lessee
22 who is a merchant dealing in goods of that kind to whom
23 the goods were entrusted by the lessor obtains, to the ex-
24 tent of the interest transferred, all of the lessor's and les-
25 see's rights to the goods, and takes free of the existing
26 lease contract.

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

§46-2A-306. Priority of certain liens arising by operation of law.

1 If a person in the ordinary course of his or her busi-
2 ness furnishes services or materials with respect to goods
3 subject to a lease contract, a lien upon those goods in the
4 possession of that person given by statute or rule of law
5 for those materials or services takes priority over any in-
6 terest of the lessor or lessee under the lease contract or this
7 article unless the lien is created by statute and the statute
8 provides otherwise or unless the lien is created by rule of
9 law and the rule of law provides otherwise.

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

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

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

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

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

11 (c) The creditor holds a security interest in the goods
12 which was perfected (section 9-303) before the lease con-
13 tract became enforceable.

14 (3) A lessee in the ordinary course of business takes
15 the leasehold interest free of a security interest in the

16 goods created by the lessor even though the security inter-
17 est is perfected (section 9-303) and the lessee knows of its
18 existence.

19 (4) A lessee other than a lessee in the ordinary course
20 of business takes the leasehold interest free of a security
21 interest to the extent that it secures future advances made
22 after the secured party acquires knowledge of the lease or
23 more than forty-five days after the lease contract becomes
24 enforceable, whichever first occurs, unless the future ad-
25 vances are made pursuant to a commitment entered into
26 without knowledge of the lease and before the expiration
27 of the forty-five-day period.

§46-2A-308. Special rights of creditors.

1 (1) A creditor of a lessor in possession of goods sub-
2 ject to a lease contract may treat the lease contract as void
3 if as against the creditor retention of possession by the
4 lessor is fraudulent under any statute or rule of law, but
5 retention of possession in good faith and current course of
6 trade by the lessor for a commercially reasonable time
7 after the lease contract becomes enforceable is not fraudu-
8 lent.

9 (2) Nothing in this article impairs the rights of credi-
10 tors of a lessor if the lease contract: (a) Becomes enforce-
11 able, not in current course of trade but in satisfaction of or
12 as security for a preexisting claim for money, security, or
13 the like; and (b) is made under circumstances which under
14 any statute or rule of law apart from this article would
15 constitute the transaction a fraudulent transfer or voidable
16 preference.

17 (3) A creditor of a seller may treat a sale or an identi-
18 fication of goods to a contract for sale as void if as against
19 the creditor retention of possession by the seller is fraudu-
20 lent under any statute or rule of law, but retention of pos-
21 session of the goods pursuant to a lease contract entered
22 into by the seller as lessee and the buyer as lessor in con-
23 nection with the sale or identification of the goods is not
24 fraudulent if the buyer bought for value and in good
25 faith.

§46-2A-309. Lessor's and lessee's rights when goods become fixtures.

1 (1) In this section:

2 (a) Goods are "fixtures" when they become so related
3 to particular real estate that an interest in them arises under
4 real estate law;

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

10 (c) A lease is a "purchase money lease" unless the
11 lessee has possession or use of the goods or the right to
12 possession or use of the goods before the lease agreement
13 is enforceable;

14 (d) A mortgage is a "construction mortgage" to the
15 extent it secures an obligation incurred for the construc-
16 tion of an improvement on land including the acquisition
17 cost of the land, if the recorded writing so indicates; and

18 (e) "Encumbrance" includes real estate mortgages and
19 other liens on real estate and all other rights in real estate
20 that are not ownership interests.

21 (2) Under this article a lease may be of goods that are
22 fixtures or may continue in goods that become fixtures,
23 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
26 fixtures pursuant to real estate law.

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

30 (a) The lease is a purchase money lease, the conflict-
31 ing interest of the encumbrancer or owner arises before
32 the goods become fixtures, the interest of the lessor is
33 perfected by a fixture filing before the goods become

34 fixtures or within ten days thereafter, and the lessee has an
35 interest of record in the real estate or is in possession of
36 the real estate; or

37 (b) The interest of the lessor is perfected by a fixture
38 filing before the interest of the encumbrancer or owner is
39 of record, the lessor's interest has priority over any con-
40 flicting interest of a predecessor in title of the encum-
41 brancer or owner, and the lessee has an interest of record
42 in the real estate or is in possession of the real estate.

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

46 (a) The fixtures are readily removable factory or of-
47 fice machines, readily removable equipment that is not
48 primarily used or leased for use in the operation of the
49 real estate, or readily removable replacements of domestic
50 appliances that are goods subject to a consumer lease and
51 before the goods become fixtures the lease contract is
52 enforceable; or

53 (b) The conflicting interest is a lien on the real estate
54 obtained by legal or equitable proceedings after the lease
55 contract is enforceable; or

56 (c) The encumbrancer or owner has consented in
57 writing to the lease or has disclaimed an interest in the
58 goods as fixtures; or

59 (d) The lessee has a right to remove the goods as
60 against the encumbrancer or owner. If the lessee's right to
61 remove terminates, the priority of the interest of the lessor
62 continues for a reasonable time.

63 (6) Notwithstanding subsection (4)(a) but otherwise
64 subject to subsections (4) and (5), the interest of a lessor
65 of fixtures, including the lessor's residual interest, is subor-
66 dinate to the conflicting interest of an encumbrancer of
67 the real estate under a construction mortgage recorded
68 before the goods become fixtures if the goods become
69 fixtures before the completion of the construction. To the

70 extent given to refinance a construction mortgage, the
71 conflicting interest of an encumbrancer of the real estate
72 under a mortgage has this priority to the same extent as
73 the encumbrancer of the real estate under the construction
74 mortgage.

75 (7) In cases not within the preceding subsections, pri-
76 ority between the interest of a lessor of fixtures, including
77 the lessor's residual interest, and the conflicting interest of
78 an encumbrancer or owner of the real estate who is not the
79 lessee is determined by the priority rules governing con-
80 flicting interests in real estate.

81 (8) If the interest of a lessor of fixtures, including the
82 lessor's residual interest, has priority over all conflicting
83 interests of all owners and encumbrancers of the real es-
84 tate, the lessor or the lessee may: (i) On default, expira-
85 tion, termination, or cancellation of the lease agreement
86 but subject to the lease agreement and this article; or (ii) if
87 necessary to enforce other rights and remedies of the
88 lessor or lessee under this article, remove the goods from
89 the real estate, free and clear of all conflicting interests of
90 all owners and encumbrancers of the real estate, but the
91 lessor or lessee must reimburse any encumbrancer or
92 owner of the real estate who is not the lessee and who has
93 not otherwise agreed for the cost of repair of any physical
94 injury, but not for any diminution in value of the real
95 estate caused by the absence of the goods removed or by
96 any necessity of replacing them. A person entitled to
97 reimbursement may refuse permission to remove until the
98 party seeking removal gives adequate security for the
99 performance of this obligation.

100 (9) Even though the lease agreement does not create a
101 security interest, the interest of a lessor of fixtures, includ-
102 ing the lessor's residual interest, is perfected by filing a
103 financing statement as a fixture filing for leased goods
104 that are or are to become fixtures in accordance with the
105 relevant provisions of the article on secured transactions
106 (article nine).

§46-2A-310. Lessor's and lessee's rights when goods become accessions.

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

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

7 (3) The interest of a lessor or a lessee under a lease
8 contract entered into at the time or after the goods became
9 accessions is superior to all subsequently acquired interests
10 in the whole except as stated in subsection (4) but is sub-
11 ordinate to interests in the whole existing at the time the
12 lease contract was made unless the holders of such inter-
13 ests in the whole have in writing consented to the lease or
14 disclaimed an interest in the goods as part of the whole.

15 (4) The interest of a lessor or a lessee under a lease
16 contract described in subsection (2) or (3) is subordinate
17 to the interest of:

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

21 (b) A creditor with a security interest in the whole
22 perfected before the lease contract was made to the extent
23 that the creditor makes subsequent advances without
24 knowledge of the lease contract.

25 (5) When under subsections (2) or (3) and (4) a lessor
26 or a lessee of accessions holds an interest that is superior
27 to all interests in the whole, the lessor or the lessee may:
28 (a) On default, expiration, termination, or cancellation of
29 the lease contract by the other party but subject to the
30 provisions of the lease contract and this article; or (b) if
31 necessary to enforce his or her other rights and remedies
32 under this article, remove the goods from the whole, free
33 and clear of all interests in the whole, but he or she must
34 reimburse any holder of an interest in the whole who is

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

§46-2A-311. Priority subject to subordination.

1 Nothing in this article prevents subordination by
2 agreement by any person entitled to priority.

PART 4. PERFORMANCE OF LEASE CONTRACT:
REPUDIATED, SUBSTITUTED AND EXCUSED.

§46-2A-401. Insecurity; adequate assurance of performance.

1 (1) A lease contract imposes an obligation on each
2 party that the other's expectation of receiving due perfor-
3 mance will not be impaired.

4 (2) If reasonable grounds for insecurity arise with
5 respect to the performance of either party, the insecure
6 party may demand in writing adequate assurance of due
7 performance. Until the insecure party receives that assur-
8 ance, if commercially reasonable the insecure party may
9 suspend any performance for which he or she has not
10 already received the agreed return.

11 (3) A repudiation of the lease contract occurs if assur-
12 ance of due performance adequate under the circumstanc-
13 es of the particular case is not provided to the insecure
14 party within a reasonable time, not to exceed thirty days
15 after receipt of a demand by the other party.

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

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

§46-2A-402. Anticipatory repudiation.

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

6 (a) For a commercially reasonable time, await retrac-
7 tion of repudiation and performance by the repudiating
8 party;

9 (b) Make demand pursuant to section 2A-401 and
10 await assurance of future performance adequate under the
11 circumstances of the particular case; or

12 (c) Resort to any right or remedy upon default under
13 the lease contract or this article, even though the aggrieved
14 party has notified the repudiating party that the aggrieved
15 party would await the repudiating party's performance and
16 assurance and has urged retraction. In addition, whether
17 or not the aggrieved party is pursuing one of the forego-
18 ing remedies, the aggrieved party may suspend perfor-
19 mance or, if the aggrieved party is the lessor, proceed in
20 accordance with the provisions of this article on the les-
21 sor's right to identify goods to the lease contract notwith-
22 standing default or to salvage unfinished goods (section
23 2A-524).

§46-2A-403. Retraction of anticipatory repudiation.

1 (1) Until the repudiating party's next performance is
2 due, the repudiating party can retract the repudiation un-
3 less, since the repudiation, the aggrieved party has can-
4 celed the lease contract or materially changed the ag-
5 grievied party's position or otherwise indicated that the
6 aggrieved party considers the repudiation final.

7 (2) Retraction may be by any method that clearly
8 indicates to the aggrieved party that the repudiating party
9 intends to perform under the lease contract and includes
10 any assurance demanded under section 2A-401.

11 (3) Retraction reinstates a repudiating party's rights

12 under a lease contract with due excuse and allowance to
13 the aggrieved party for any delay occasioned by the repu-
14 diation.

§46-2A-404. Substituted performance.

1 (1) If without fault of the lessee, the lessor and the
2 supplier, the agreed berthing, loading or unloading facili-
3 ties fail or the agreed type of carrier becomes unavailable
4 or the agreed manner of delivery otherwise becomes com-
5 mercially impracticable, but a commercially reasonable
6 substitute is available, the substitute performance must be
7 tendered and accepted.

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

10 (a) The lessor may withhold or stop delivery or cause
11 the supplier to withhold or stop delivery unless the lessee
12 provides a means or manner of payment that is commer-
13 cially a substantial equivalent; and

14 (b) If delivery has already been taken, payment by the
15 means or in the manner provided by the regulation dis-
16 charges the lessee's obligation unless the regulation is
17 discriminatory, oppressive or predatory.

§46-2A-405. Excused performance.

1 Subject to section 2A-404 on substituted performance,
2 the following rules apply:

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

13 (b) If the causes mentioned in paragraph (a) affect

14 only part of the lessor's or the supplier's capacity to per-
15 form, he or she shall allocate production and deliveries
16 among his or her customers but at his or her option may
17 include regular customers not then under contract for sale
18 or lease as well as his or her own requirements for further
19 manufacture. He or she may so allocate in any manner
20 that is fair and reasonable.

21 (c) The lessor seasonably shall notify the lessee and in
22 the case of a finance lease the supplier seasonably shall
23 notify the lessor and the lessee, if known, that there will be
24 delay or nondelivery and, if allocation is required under
25 paragraph (b), of the estimated quota thus made available
26 for the lessee.

§46-2A-406. Procedure on excused performance.

1 (1) If the lessee receives notification of a material or
2 indefinite delay or an allocation justified under section
3 2A-405, the lessee may by written notification to the lessor
4 as to any goods involved, and with respect to all of the
5 goods if under an installment lease contract the value of
6 the whole lease contract is substantially impaired (section
7 2A-510):

8 (a) Terminate the lease contract (section 2A-505(2));
9 or

10 (b) Except in a finance lease that is not a consumer
11 lease, modify the lease contract by accepting the available
12 quota in substitution, with due allowance from the rent
13 payable for the balance of the lease term for the deficien-
14 cy but without further right against the lessor.

15 (2) If, after receipt of a notification from the lessor
16 under section 2A-405, the lessee fails so to modify the
17 lease agreement within a reasonable time not exceeding 30
18 days, the lease contract lapses with respect to any deliveries
19 affected.

§46-2A-407. Irrevocable promises; finance leases.

1 (1) In the case of a finance lease that is not a consum-
2 er lease the lessee's promises under the lease contract be-

3 come irrevocable and independent upon the lessee's ac-
4 ceptance of the goods.

5 (2) A promise that has become irrevocable and inde-
6 pendent under subsection (1):

7 (a) Is effective and enforceable between the parties,
8 and by or against third parties including assignees of the
9 parties; and

10 (b) Is not subject to cancellation, termination, modifi-
11 cation, repudiation, excuse or substitution without the
12 consent of the party to whom the promise runs.

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

17 (4) In the case of a consumer lease, the promises of
18 each party are dependent on the promises of the other
19 party or parties.

PART 5. DEFAULT.

A. IN GENERAL

§46-2A-501. Default; procedure.

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

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

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

15 (4) Except as otherwise provided in section 1-106(1)
16 or this article or the lease agreement, the rights and reme-
17 dies referred to in subsections (2) and (3) are cumulative.

18 (5) If the lease agreement covers both real property
19 and goods, the party seeking enforcement may proceed
20 under this part as to the goods, or under other applicable
21 law as to both the real property and the goods in accor-
22 dance with that party's rights and remedies in respect of
23 the real property, in which case this part does not apply.

§46-2A-502. Notice after default.

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

§46-2A-503. Modification or impairment of rights and remedies.

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

6 (2) Resort to a remedy provided under this article or
7 in the lease agreement is optional unless the remedy is
8 expressly agreed to be exclusive. If circumstances cause
9 an exclusive or limited remedy to fail of its essential pur-
10 pose, or provision for an exclusive remedy is unconscio-
11 nable, remedy may be had as provided in this article.

12 (3) Consequential damages may be liquidated under
13 section 2A-504, or may otherwise be limited, altered or
14 excluded unless the limitation, alteration or exclusion is
15 unconscionable. Limitation, alteration, or exclusion of
16 consequential damages for injury to the person in the case
17 of consumer goods is prima facie unconscionable but
18 limitation, alteration or exclusion of damages where the
19 loss is commercial is not prima facie unconscionable.

20 (4) Rights and remedies on default by the lessor or the

21 lessee with respect to any obligation or promise collateral
22 or ancillary to the lease contract are not impaired by this
23 article.

§46-2A-504. Liquidation of damages.

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

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

13 (3) If the lessor justifiably withholds or stops delivery
14 of goods because of the lessee's default or insolvency
15 (section 2A-525 or 2A-526), the lessee is entitled to resti-
16 tution of any amount by which the sum of his or her pay-
17 ments exceeds:

18 (a) The amount to which the lessor is entitled by virtue
19 of terms liquidating the lessor's damages in accordance
20 with subsection (1); or

21 (b) In the absence of those terms, twenty percent of
22 the then present value of the total rent the lessee was obli-
23 gated to pay for the balance of the lease term, or, in the
24 case of a consumer lease, the lesser of such amount or five
25 hundred dollars.

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

28 (a) A right to recover damages under the provisions of
29 this article other than subsection (1); and

30 (b) The amount or value of any benefits received by
31 the lessee directly or indirectly by reason of the lease
32 contract.

§46-2A-505. Cancellation and termination and effect of cancellation, termination, rescission, or fraud on rights and remedies.

1 (1) On cancellation of the lease contract, all obliga-
2 tions that are still executory on both sides are discharged,
3 but any right based on prior default or performance sur-
4 vives, and the canceling party also retains any remedy for
5 default of the whole lease contract or any unperformed
6 balance.

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

10 (3) Unless the contrary intention clearly appears, ex-
11 pressions of "cancellation," "rescission," or the like of the
12 lease contract may not be construed as a renunciation or
13 discharge of any claim in damages for an antecedent de-
14 fault.

15 (4) Rights and remedies for material misrepresentation
16 or fraud include all rights and remedies available under
17 this article for default.

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

§46-2A-506. Statute of limitations.

1 (1) An action for default under a lease contract, in-
2 cluding breach of warranty or indemnity, must be com-
3 menced within four years after the cause of action ac-
4 crued. By the original lease contract the parties may re-
5 duce the period of limitation to not less than one year.

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

12 should have been discovered by the indemnified party,
13 whichever is later.

14 (3) If an action commenced within the time limited by
15 subsection (1) is so terminated as to leave available a rem-
16 edy by another action for the same default or breach of
17 warranty or indemnity, the other action may be com-
18 menced after the expiration of the time limited and within
19 six months after the termination of the first action unless
20 the termination resulted from voluntary discontinuance or
21 from dismissal for failure or neglect to prosecute.

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

§46-2A-507. Proof of market rent; time and place.

1 (1) Damages based on market rent (section 2A-519 or
2 2A-528) are determined according to the rent for the use
3 of the goods concerned for a lease term identical to the
4 remaining lease term of the original lease agreement and
5 prevailing at the times specified in sections 2A-519 and
6 2A-528.

7 (2) If evidence of rent for the use of the goods con-
8 cerned for a lease term identical to the remaining lease
9 term of the original lease agreement and prevailing at the
10 times or places described in this article is not readily avail-
11 able, the rent prevailing within any reasonable time before
12 or after the time described or at any other place or for a
13 different lease term which in commercial judgment or
14 under usage of trade would serve as a reasonable substitute
15 for the one described may be used, making any proper
16 allowance for the difference, including the cost of trans-
17 porting the goods to or from the other place.

18 (3) Evidence of a relevant rent prevailing at a time or
19 place or for a lease term other than the one described in
20 this article offered by one party is not admissible unless
21 and until he or she has given the other party notice the
22 court finds sufficient to prevent unfair surprise.

23 (4) If the prevailing rent or value of any goods regu-
24 larly leased in any established market is in issue, reports in
25 official publications or trade journals or in newspapers or
26 periodicals of general circulation published as the reports
27 of that market are admissible in evidence. The circum-
28 stances of the preparation of the report may be shown to
29 affect its weight but not its admissibility.

B. DEFAULT BY LESSOR

§46-2A-508. Lessee's remedies.

1 (1) If a lessor fails to deliver the goods in conformity
2 to the lease contract (section 2A-509) or repudiates the
3 lease contract (section 2A-402), or a lessee rightfully re-
4 jects the goods (section 2A-509) or justifiably revokes
5 acceptance of the goods (section 2A-517), then with re-
6 spect to any goods involved, and with respect to all of the
7 goods if under an installment lease contract the value of
8 the whole lease contract is substantially impaired (section
9 2A-510), the lessor is in default under the lease contract
10 and the lessee may:

11 (a) Cancel the lease contract (section 2A-505(1));

12 (b) Recover so much of the rent and security as has
13 been paid and is just under the circumstances;

14 (c) Cover and recover damages as to all goods affected
15 whether or not they have been identified to the lease con-
16 tract (sections 2A-518 and 2A-520), or recover damages
17 for nondelivery (sections 2A-519 and 2A-520);

18 (d) Exercise any other rights or pursue any other
19 remedies provided in the lease contract.

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

23 (a) If the goods have been identified, recover them
24 (section 2A-522); or

25 (b) In a proper case, obtain specific performance or
26 replevy the goods (section 2A-521).

27 (3) If a lessor is otherwise in default under a lease
28 contract, the lessee may exercise the rights and pursue the
29 remedies provided in the lease contract, which may in-
30 clude a right to cancel the lease, and in section 2A-519(3).

31 (4) If a lessor has breached a warranty, whether ex-
32 press or implied, the lessee may recover damages (section
33 2A-519(4)).

34 (5) On rightful rejection or justifiable revocation of
35 acceptance, a lessee has a security interest in goods in the
36 lessee's possession or control for any rent and security that
37 has been paid and any expenses reasonably incurred in
38 their inspection, receipt, transportation, and care and cus-
39 tody and may hold those goods and dispose of them in
40 good faith and in a commercially reasonable manner,
41 subject to section 2A-527(5).

42 (6) Subject to the provisions of section 2A-407, a
43 lessee, on notifying the lessor of the lessee's intention to
44 do so, may deduct all or any part of the damages resulting
45 from any default under the lease contract from any part of
46 the rent still due under the same lease contract.

§46-2A-509. Lessee's rights on improper delivery; rightful rejection.

1 (1) Subject to the provisions of section 2A-510 on
2 default in installment lease contracts, if the goods or the
3 tender or delivery fail in any respect to conform to the
4 lease contract, the lessee may reject or accept the goods or
5 accept any commercial unit or units and reject the rest of
6 the goods.

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

§46-2A-510. Installment lease contracts; rejection and default.

1 (1) Under an installment lease contract a lessee may
2 reject any delivery that is nonconforming if the noncon-
3 formity substantially impairs the value of that delivery and
4 cannot be cured or the nonconformity is a defect in the

5 required documents; but if the nonconformity does not
6 fall within subsection (2) and the lessor or the supplier
7 gives adequate assurance of its cure, the lessee must accept
8 that delivery.

9 (2) Whenever nonconformity or default with respect to
10 one or more deliveries substantially impairs the value of
11 the installment lease contract as a whole there is a default
12 with respect to the whole. But, the aggrieved party rein-
13 states the installment lease contract as a whole if the ag-
14 grieved party accepts a nonconforming delivery without
15 seasonably notifying of cancellation or brings an action
16 with respect only to past deliveries or demands perfor-
17 mance as to future deliveries.

§46-2A-511. Merchant lessee's duties as to rightfully rejected goods.

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

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

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

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

§46-2A-512. Lessee's duties as to rightfully rejected goods.

1 (1) Except as otherwise provided with respect to goods
2 that threaten to decline in value speedily (section 2A-511)
3 and subject to any security interest of a lessee (section
4 2A-508(5)):

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

9 (b) If the lessor or the supplier gives no instructions
10 within a reasonable time after notification of rejection, the
11 lessee may store the rejected goods for the lessor's or the
12 supplier's account or ship them to the lessor or the suppli-
13 er or dispose of them for the lessor's or the supplier's ac-
14 count with reimbursement in the manner provided in sec-
15 tion 2A-511; but

16 (c) The lessee has no further obligations with regard to
17 goods rightfully rejected.

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

**§46-2A-513. Cure by lessor of improper tender or delivery;
replacement.**

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

8 (2) If the lessee rejects a nonconforming tender that

9 the lessor or the supplier had reasonable grounds to be-
10 lieve would be acceptable with or without money allow-
11 ance, the lessor or the supplier may have a further reason-
12 able time to substitute a conforming tender if he or she
13 seasonably notifies the lessee.

§46-2A-514. Waiver of lessee's objections.

1 (1) In rejecting goods, a lessee's failure to state a par-
2 ticular defect that is ascertainable by reasonable inspection
3 precludes the lessee from relying on the defect to justify
4 rejection or to establish default:

5 (a) If, stated seasonably, the lessor or the supplier
6 could have cured it (section 2A-513); or

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

11 (2) A lessee's failure to reserve rights when paying rent
12 or other consideration against documents precludes recov-
13 ery of the payment for defects apparent on the face of the
14 documents.

§46-2A-515. Acceptance of goods.

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

3 (a) The lessee signifies or acts with respect to the
4 goods in a manner that signifies to the lessor or the suppli-
5 er that the goods are conforming or that the lessee will
6 take or retain them in spite of their nonconformity; or

7 (b) The lessee fails to make an effective rejection of
8 the goods (section 2A-509(2)).

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

**§46-2A-516. Effect of acceptance of goods; notice of default;
burden of establishing default after accep-
tance; notice of claim or litigation to person
answerable over.**

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

4 (2) A lessee's acceptance of goods precludes rejection
5 of the goods accepted. In the case of a finance lease, if
6 made with knowledge of a nonconformity, acceptance
7 cannot be revoked because of it. In any other case, if
8 made with knowledge of a nonconformity, acceptance
9 cannot be revoked because of it unless the acceptance was
10 on the reasonable assumption that the nonconformity
11 would be seasonably cured. Acceptance does not of itself
12 impair any other remedy provided by this article or the
13 lease agreement for nonconformity.

14 (3) If a tender has been accepted:

15 (a) Within a reasonable time after the lessee discovers
16 or should have discovered any default, the lessee shall
17 notify the lessor and the supplier, if any, or be barred
18 from any remedy against the party not notified;

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

24 (c) The burden is on the lessee to establish any de-
25 fault.

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

29 (a) The lessee may give the lessor or the supplier, or
30 both, written notice of the litigation. If the notice states
31 that the person notified may come in and defend, and that
32 if the person notified does not do so, that person will be
33 bound in any action against that person by the lessee by
34 any determination of fact common to the two litigations,
35 then unless the person notified after seasonable receipt of
36 the notice does come in and defend, that person is so
37 bound;

38 (b) The lessor or the supplier may demand in writing
39 that the lessee turn over control of the litigation including
40 settlement if the claim is one for infringement or the like
41 (section 2A-211) or else be barred from any remedy over.
42 If the demand states that the lessor or the supplier agrees
43 to bear all expense and to satisfy any adverse judgment,
44 then unless the lessee after reasonable receipt of the de-
45 mand does turn over control, the lessee is so barred.

46 (5) Subsections (3) and (4) apply to any obligation of
47 a lessee to hold the lessor or the supplier harmless against
48 infringement or the like (section 2A-211).

§46-2A-517. Revocation of acceptance of goods.

1 (1) A lessee may revoke acceptance of a lot or com-
2 mercial unit whose nonconformity substantially impairs its
3 value to the lessee if the lessee has accepted it:

4 (a) Except in the case of a finance lease, on the rea-
5 sonable assumption that its nonconformity would be cured
6 and it has not been seasonably cured; or

7 (b) Without discovery of the nonconformity if the
8 lessee's acceptance was reasonably induced either by the
9 lessor's assurances or, except in the case of a finance lease,
10 by the difficulty of discovery before acceptance.

11 (2) Except in the case of a finance lease that is not a
12 consumer lease, a lessee may revoke acceptance of a lot or
13 commercial unit if the lessor defaults under the lease con-
14 tract and the default substantially impairs the value of that
15 lot or commercial unit to the lessee.

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

19 (4) Revocation of acceptance must occur within a
20 reasonable time after the lessee discovers or should have
21 discovered the ground for it and before any substantial
22 change in condition of the goods which is not caused by
23 the nonconformity. Revocation is not effective until the
24 lessee notifies the lessor.

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

§46-2A-518. Cover; substitute goods.

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

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

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

**§46-2A-519. Lessee's damages for nondelivery, repudiation,
default, and breach of warranty in regard to
accepted goods.**

1 (1) Except as otherwise provided with respect to dam-
2 ages liquidated in the lease agreement (section 2A-504) or

3 otherwise determined pursuant to agreement of the parties
4 (sections 1-102(3) and 2A-503), if a lessee elects not to
5 cover or a lessee elects to cover and the cover is by lease
6 agreement that for any reason does not qualify for treat-
7 ment under section 2A-518(2), or is by purchase or other-
8 wise, the measure of damages for nondelivery or repudia-
9 tion by the lessor or for rejection or revocation of accep-
10 tance by the lessee is the present value, as of the date of
11 the default, of the then market rent minus the present
12 value as of the same date of the original rent, computed
13 for the remaining lease term of the original lease agree-
14 ment, together with incidental and consequential damages,
15 less expenses saved in consequence of the lessor's default.

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

19 (3) Except as otherwise agreed, if the lessee has ac-
20 cepted goods and given notification (section 2A-516(3)),
21 the measure of damages for nonconforming tender or
22 delivery or other default by a lessor is the loss resulting in
23 the ordinary course of events from the lessor's default as
24 determined in any manner that is reasonable together with
25 incidental and consequential damages, less expenses saved
26 in consequence of the lessor's default.

27 (4) Except as otherwise agreed, the measure of damag-
28 es for breach of warranty is the present value at the time
29 and place of acceptance of the difference between the
30 value of the use of the goods accepted and the value if
31 they had been as warranted for the lease term, unless spe-
32 cial circumstances show proximate damages of a different
33 amount, together with incidental and consequential dam-
34 ages, less expenses saved in consequence of the lessor's
35 default or breach of warranty.

§46-2A-520. Lessee's incidental and consequential damages.

1 (1) Incidental damages resulting from a lessor's de-
2 fault include expenses reasonably incurred in inspection,
3 receipt, transportation and care and custody of goods

4 rightfully rejected or goods the acceptance of which is
5 justifiably revoked, any commercially reasonable charges,
6 expenses or commissions in connection with effecting
7 cover, and any other reasonable expense incident to the
8 default.

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

11 (a) Any loss resulting from general or particular re-
12 quirements and needs of which the lessor at the time of
13 contracting had reason to know and which could not rea-
14 sonably be prevented by cover or otherwise; and

15 (b) Injury to person or property proximately resulting
16 from any breach of warranty.

§46-2A-521. Lessee's right to specific performance or replevin.

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

3 (2) A decree for specific performance may include
4 any terms and conditions as to payment of the rent, dam-
5 ages or other relief that the court deems just.

6 (3) A lessee has a right of replevin, detinue, sequestra-
7 tion, claim and delivery, or the like for goods identified to
8 the lease contract if after reasonable effort the lessee is
9 unable to effect cover for those goods or the circumstanc-
10 es reasonably indicate that the effort will be unavailing.

§46-2A-522. Lessee's right to goods on lessor's insolvency.

1 (1) Subject to subsection (2) and even though the
2 goods have not been shipped, a lessee who has paid a part
3 or all of the rent and security for goods identified to a
4 lease contract (section 2A-217) on making and keeping
5 good a tender of any unpaid portion of the rent and secu-
6 rity due under the lease contract may recover the goods
7 identified from the lessor if the lessor becomes insolvent
8 within ten days after receipt of the first installment of rent
9 and security.

10 (2) A lessee acquires the right to recover goods identi-
11 fied to a lease contract only if they conform to the lease
12 contract.

C. DEFAULT BY LESSEE

§46-2A-523. Lessor's remedies.

1 (1) If a lessee wrongfully rejects or revokes acceptance
2 of goods or fails to make a payment when due or repudi-
3 ates with respect to a part or the whole, then, with respect
4 to any goods involved, and with respect to all of the goods
5 if under an installment lease contract the value of the
6 whole lease contract is substantially impaired (section
7 2A-510), the lessee is in default under the lease contract
8 and the lessor may:

9 (a) Cancel the lease contract (section 2A-505(1));

10 (b) Proceed respecting goods not identified to the
11 lease contract (section 2A-524);

12 (c) Withhold delivery of the goods and take possession
13 of goods previously delivered (section 2A-525);

14 (d) Stop delivery of the goods by any bailee (section
15 2A-526);

16 (e) Dispose of the goods and recover damages (section
17 2A-527), or retain the goods and recover damages (sec-
18 tion 2A-528), or in a proper case recover rent (section
19 2A-529);

20 (f) Exercise any other rights or pursue any other rem-
21 edies provided in the lease contract.

22 (2) If a lessor does not fully exercise a right or obtain
23 a remedy to which the lessor is entitled under subsection
24 (1), the lessor may recover the loss resulting in the ordi-
25 nary course of events from the lessee's default as deter-
26 mined in any reasonable manner, together with incidental
27 damages, less expenses saved in consequence of the les-
28 see's default.

29 (3) If a lessee is otherwise in default under a lease

30 contract, the lessor may exercise the rights and pursue the
31 remedies provided in the lease contract which may include
32 a right to cancel the lease. In addition, unless otherwise
33 provided in the lease contract:

34 (a) If the default substantially impairs the value of the
35 lease contract to the lessor, the lessor may exercise the
36 rights and pursue the remedies provided in subsection (1)
37 or (2); or

38 (b) If the default does not substantially impair the
39 value of the lease contract to the lessor, the lessor may
40 recover as provided in subsection (2).

§46-2A-524. Lessor's right to identify goods to lease contract.

1 (1) After default by the lessee under the lease contract
2 of the type described in section 2A-523(1) or section
3 2A-523(3)(a) or, if agreed, after other default by the les-
4 see, the lessor may:

5 (a) Identify to the lease contract conforming goods
6 not already identified if at the time the lessor learned of
7 the default they were in the lessor's or the supplier's pos-
8 session or control; and

9 (b) Dispose of goods (section 2A-527(1)) that demon-
10 strably have been intended for the particular lease contract
11 even though those goods are unfinished.

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

§46-2A-525. Lessor's right to possession of goods.

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

3 (2) After a default by the lessee under the lease con-

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

14 (3) The lessor may proceed under subsection (2) with-
15 out judicial process if it can be done without breach of the
16 peace or the lessor may proceed by action.

**§46-2A-526. Lessor's stoppage of delivery in transit or other-
wise.**

1 (1) A lessor may stop delivery of goods in the posses-
2 sion of a carrier or other bailee if the lessor discovers the
3 lessee to be insolvent and may stop delivery of carload,
4 truckload, planeload or larger shipments of express or
5 freight if the lessee repudiates or fails to make a payment
6 due before delivery, whether for rent, security or otherwise
7 under the lease contract, or for any other reason the lessor
8 has a right to withhold or take possession of the goods.

9 (2) In pursuing its remedies under subsection (1), the
10 lessor may stop delivery until:

11 (a) Receipt of the goods by the lessee;

12 (b) Acknowledgment to the lessee by any bailee of the
13 goods, except a carrier, that the bailee holds the goods for
14 the lessee; or

15 (c) Such an acknowledgment to the lessee by a carrier
16 via reshipment or as warehouseman.

17 (3)(a) To stop delivery, a lessor shall so notify as to
18 enable the bailee by reasonable diligence to prevent deliv-
19 ery of the goods.

20 (b) After notification, the bailee shall hold and deliver

21 the goods according to the directions of the lessor, but the
22 lessor is liable to the bailee for any ensuing charges or
23 damages.

24 (c) A carrier who has issued a nonnegotiable bill of
25 lading is not obliged to obey a notification to stop re-
26 ceived from a person other than the consignor.

§46-2A-527. Lessor's rights to dispose of goods.

1 (1) After a default by a lessee under the lease contract
2 of the type described in section 2A-523(1) or 2A-523
3 (3)(a) or after the lessor refuses to deliver or takes posses-
4 sion of goods (section 2A-525 or 2A-526), or, if agreed,
5 after other default by a lessee, the lessor may dispose of
6 the goods concerned or the undelivered balance thereof
7 by lease, sale or otherwise.

8 (2) Except as otherwise provided with respect to dam-
9 ages liquidated in the lease agreement (section 2A-504) or
10 otherwise determined pursuant to agreement of the parties
11 (sections 1-102(3) and 2A-503), if the disposition is by
12 lease agreement substantially similar to the original lease
13 agreement and the new lease agreement is made in good
14 faith and in a commercially reasonable manner, the lessor
15 may recover from the lessee as damages: (i) Accrued and
16 unpaid rent as of the date of the commencement of the
17 term of the new lease agreement; (ii) the present value, as
18 of the same date, of the total rent for the then remaining
19 lease term of the original lease agreement minus the pres-
20 ent value, as of the same date, of the rent under the new
21 lease agreement applicable to that period of the new lease
22 term which is comparable to the then remaining term of
23 the original lease agreement; and (iii) any incidental dam-
24 ages allowed under section 2A-530, less expenses saved in
25 consequence of the lessee's default.

26 (3) If the lessor's disposition is by lease agreement that
27 for any reason does not qualify for treatment under sub-
28 section (2), or is by sale or otherwise, the lessor may re-
29 cover from the lessee as if the lessor had elected not to
30 dispose of the goods and section 2A-528 governs.

31 (4) A subsequent buyer or lessee who buys or leases
32 from the lessor in good faith for value as a result of a
33 disposition under this section takes the goods free of the
34 original lease contract and any rights of the original lessee
35 even though the lessor fails to comply with one or more of
36 the requirements of this article.

37 (5) The lessor is not accountable to the lessee for any
38 profit made on any disposition. A lessee who has rightful-
39 ly rejected or justifiably revoked acceptance shall account
40 to the lessor for any excess over the amount of the lessee's
41 security interest (section 2A-508(5)).

§46-2A-528. Lessor's damages for nonacceptance, failure to pay, repudiation, or other default.

1 (1) Except as otherwise provided with respect to dam-
2 ages liquidated in the lease agreement (section 2A-504) or
3 otherwise determined pursuant to agreement of the parties
4 (sections 1-102(3) and 2A-503), if a lessor elects to retain
5 the goods or a lessor elects to dispose of the goods and the
6 disposition is by lease agreement that for any reason does
7 not qualify for treatment under section 2A-527(2), or is
8 by sale or otherwise, the lessor may recover from the les-
9 see as damages for a default of the type described in sec-
10 tion 2A-523(1) or 2A-523(3)(a), or, if agreed, for other
11 default of the lessee; (i) Accrued and unpaid rent as of
12 the date of default if the lessee has never taken possession
13 of the goods, or, if the lessee has taken possession of the
14 goods, as of the date the lessor repossesses the goods or an
15 earlier date on which the lessee makes a tender of the
16 goods to the lessor; (ii) the present value as of the date
17 determined under clause (i) of the total rent for the then
18 remaining lease term of the original lease agreement mi-
19 nus the present value as of the same date of the market
20 rent at the place where the goods are located computed for
21 the same lease term; and (iii) any incidental damages al-
22 lowed under section 2A-530, less expenses saved in conse-
23 quence of the lessee's default.

24 (2) If the measure of damages provided in subsection
25 (1) is inadequate to put a lessor in as good a position as

26 performance would have, the measure of damages is the
27 present value of the profit, including reasonable overhead,
28 the lessor would have made from full performance by the
29 lessee, together with any incidental damages allowed under
30 section 2A-530, due allowance for costs reasonably in-
31 curred and due credit for payments or proceeds of dispo-
32 sition.

§46-2A-529. Lessor's action for the rent.

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

6 (a) For goods accepted by the lessee and not repos-
7 sessed by or tendered to the lessor, and for conforming
8 goods lost or damaged within a commercially reasonable
9 time after risk of loss passes to the lessee (section
10 2A-219): (i) Accrued and unpaid rent as of the date of
11 entry of judgment in favor of the lessor; (ii) the present
12 value as of the same date of the rent for the then remain-
13 ing lease term of the lease agreement; and (iii) any inci-
14 dental damages allowed under section 2A-530, less ex-
15 penses saved in consequence of the lessee's default; and

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

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

30 (3) The lessor may dispose of the goods at any time
31 before collection of the judgment for damages obtained
32 pursuant to subsection (1). If the disposition is before the
33 end of the remaining lease term of the lease agreement,
34 the lessor's recovery against the lessee for damages is gov-
35 erned by section 2A-527 or section 2A-528, and the lessor
36 will cause an appropriate credit to be provided against a
37 judgment for damages to the extent that the amount of the
38 judgment exceeds the recovery available pursuant to sec-
39 tion 2A-527 or 2A-528.

40 (4) Payment of the judgment for damages obtained
41 pursuant to subsection (1) entitles the lessee to the use and
42 possession of the goods not then disposed of for the re-
43 maining lease term of and in accordance with the lease
44 agreement.

45 (5) After default by the lessee under the lease contract
46 of the type described in section 2A-523(1) or section
47 2A-523(3)(a) or, if agreed, after other default by the les-
48 see, a lessor who is held not entitled to rent under this
49 section must nevertheless be awarded damages for nonac-
50 ceptance under section 2A-527 or section 2A-528.

§46-2A-530. Lessor's incidental damages.

1 Incidental damages to an aggrieved lessor include any
2 commercially reasonable charges, expenses or commis-
3 sions incurred in stopping delivery, in the transportation,
4 care and custody of goods after the lessee's default, in
5 connection with return or disposition of the goods, or
6 otherwise resulting from the default.

§46-2A-531. Standing to sue third parties for injury to goods.

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

6 (i) Has a security interest in the goods;

7 (ii) Has an insurable interest in the goods; or

8 (iii) Bears the risk of loss under the lease contract or
9 has since the injury assumed that risk as against the lessor
10 and the goods have been converted or destroyed.

11 (2) If at the time of the injury the party plaintiff did
12 not bear the risk of loss as against the other party to the
13 lease contract and there is no arrangement between them
14 for disposition of the recovery, his or her suit or settle-
15 ment, subject to his or her own interest, is as a fiduciary
16 for the other party to the lease contract.

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

§46-2A-532. Lessor's rights to residual interest.

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

**ARTICLE 9. SECURED TRANSACTIONS; SALES OF ACCOUNTS
AND CHATTEL PAPER.**

**§46-9-113. Security interests arising under article on sales or
under article on leases.**

1 A security interest arising solely under the article on
2 sales (article two) or the article on leases (article two-a) is
3 subject to the provisions of this article except that to the
4 extent that and so long as the debtor does not have or does
5 not lawfully obtain possession of the goods;

6 (a) No security agreement is necessary to make the
7 security interest enforceable; and

8 (b) No filing is required to perfect the security inter-
9 est; and

10 (c) The rights of the secured party on default by the
11 debtor are governed: (i) By the article on sales (article
12 two) in the case of a security interest arising solely under
13 such article; or (ii) by the article on leases (article two-a)
14 in the case of a security interest arising solely under such
15 article.

**CHAPTER 46A. WEST VIRGINIA CONSUMER
CREDIT AND PROTECTION ACT.**

**ARTICLE 1. SHORT TITLE, DEFINITIONS AND GENERAL PRO-
VISIONS.**

§46A-1-102. General definitions.

1 In addition to definitions appearing in subsequent
2 articles, in this chapter: (1) "Actuarial method" means the
3 method, defined by rules adopted by the commissioner, of
4 allocating payments made on a debt between principal or
5 amount financed and loan finance charge or sales finance
6 charge pursuant to which a payment is applied first to the
7 accumulated loan finance charge or sales finance charge
8 and the balance is applied to the unpaid principal or un-
9 paid amount financed.

10 (2) "Agreement" means the bargain of the parties in
11 fact as found in their language or by implication from
12 other circumstances including course of dealing or usage
13 of trade or course of performance. A "consumer credit
14 agreement" is an agreement where credit is granted.

15 (3) "Agricultural purpose" means a purpose related to
16 the production, harvest, exhibition, marketing, transporta-
17 tion, processing or manufacture of agricultural products
18 by a natural person who cultivates, plants, propagates or
19 nurtures the agricultural products. "Agricultural products"
20 includes agricultural, horticultural, viticultural and dairy
21 products, livestock, wildlife, poultry, bees, forest products,
22 fish and shellfish, and any products thereof, including
23 processed and manufactured products, and any and all
24 products raised or produced on farms and any processed
25 or manufactured products thereof.

26 (4) "Amount financed" means the total of the follow-
27 ing items to the extent that payment is deferred:

28 (a) The cash price of the goods, services or interest in
29 land, less the amount of any down payment whether made
30 in cash or in property traded in;

31 (b) The amount actually paid or to be paid by the

32 seller pursuant to an agreement with the buyer to dis-
33 charge a security interest in or a lien on property traded
34 in; and

35 (c) If not included in the cash price:

36 (i) Any applicable sales, use, privilege, excise or docu-
37 mentary stamp taxes;

38 (ii) Amounts actually paid or to be paid by the seller
39 for registration, certificate of title or license fees; and

40 (iii) Additional charges permitted by this chapter.

41 (5) "Average daily balance" in a billing cycle for
42 which a sales finance charge or loan finance charge is
43 made is the sum of the amount unpaid each day during
44 that cycle divided by the number of days in that cycle.
45 The amount unpaid on a day is determined by adding to
46 the balance, if any, unpaid as of the beginning of that day
47 all purchases and other debits and deducting all payments
48 and other credits made or received as of that day.

49 (6) The "cash price" of goods, services or an interest in
50 land means the price at which the goods, services or inter-
51 est in land are offered for sale by the seller to cash buyers
52 in the ordinary course of business, and may include (a)
53 applicable sales, use, privilege, and excise and documenta-
54 ry stamp taxes, (b) the cash price of accessories or related
55 services such as delivery, installation, servicing, repairs,
56 alterations and improvements, and (c) amounts actually
57 paid or to be paid by the seller for registration, certificate
58 of title, or license fees.

59 (7) "Closing costs" with respect to a debt secured by an
60 interest in land include:

61 (a) Fees or premiums for title examination, title insur-
62 ance or similar purposes including surveys;

63 (b) Fees for preparation of a deed, deed of trust, mort-
64 gage, settlement statement or other documents;

65 (c) Escrows for future payments of taxes and insur-
66 ance;

67 (d) Official fees and fees for notarizing deeds and
68 other documents;

69 (e) Appraisal fees; and

70 (f) Credit reports.

71 (8) "Code" means the official code of West Virginia,
72 one thousand nine hundred thirty-one, as amended.

73 (9) "Commercial facsimile transmission" means the
74 electronic or telephonic transmission in the state to a fac-
75 simile device to encourage a person to purchase goods,
76 realty or services.

77 (10) "Commissioner" means the commissioner of
78 banking of West Virginia.

79 (11) "Conspicuous": A term or clause is conspicuous
80 when it is so written that a reasonable person against whom
81 it is to operate ought to have noticed it. Whether a term or
82 clause is conspicuous or not is for decision by the court.

83 (12) "Consumer" means a natural person who incurs
84 debt pursuant to a consumer credit sale or a consumer
85 loan, or debt or other obligations pursuant to a consumer
86 lease.

87 (13) (a) Except as provided in paragraph (b), "con-
88 sumer credit sale" is a sale of goods, services or an interest
89 in land in which:

90 (i) Credit is granted either by a seller who regularly
91 engages as a seller in credit transactions of the same kind
92 or pursuant to a seller credit card;

93 (ii) The buyer is a person other than an organization;

94 (iii) The goods, services or interest in land are pur-
95 chased primarily for a personal, family, household or
96 agricultural purpose;

97 (iv) Either the debt is payable in installments or a sales
98 finance charge is made; and

99 (v) With respect to a sale of goods or services, the

100 amount financed does not exceed forty-five thousand
101 dollars or the sale is of a factory-built home as defined in
102 section two, article fifteen, chapter thirty-seven of this
103 code.

104 (b) "Consumer credit sale" does not include a sale in
105 which the seller allows the buyer to purchase goods or
106 services pursuant to a lender credit card or similar ar-
107 rangement.

108 (14) (a) "Consumer lease" means a lease of goods:

109 (i) Which a lessor regularly engaged in the business of
110 leasing makes to a person, other than an organization, who
111 takes under the lease primarily for a personal, family,
112 household or agricultural purpose;

113 (ii) In which the total of payments under the lease,
114 excluding payments for options to renew or buy, do not
115 exceed forty-five thousand dollars or in which the lease is
116 of a factory-built home as defined in section two, article
117 fifteen, chapter thirty-seven of this code; and

118 (iii) Which is for a term exceeding four months.

119 (b) "Consumer lease" does not include a lease made
120 pursuant to a lender credit card or similar arrangement.

121 (15) "Consumer loan" is a loan made by a person
122 regularly engaged in the business of making loans in
123 which:

124 (a) The debtor is a person other than an organization;

125 (b) The debt is incurred primarily for a personal, fam-
126 ily, household or agricultural purpose;

127 (c) Either the debt is payable in installments or a loan
128 finance charge is made; and

129 (d) Either the principal does not exceed forty-five
130 thousand dollars or the debt is secured by an interest in
131 land or a factory-built home as defined in section two,
132 article fifteen, chapter thirty-seven of this code.

133 (16) "Cosigner" means a natural person who assumes

134 liability for the obligation on a consumer credit sale or
135 consumer loan without receiving goods, services or money
136 in return for the obligation or, in the case of a revolving
137 charge account or revolving loan account of a consumer,
138 without receiving the contractual right to obtain extensions
139 of credit under the account. The term cosigner includes
140 any person whose signature is requested as a condition to
141 granting credit to a consumer or as a condition for for-
142 bearance on collection of a consumer's obligation that is
143 in default. The term cosigner does not include a spouse
144 whose signature is required to perfect a security interest.
145 A person who meets the definition in this paragraph is a
146 "cosigner" whether or not the person is designated as such
147 on the credit obligation.

148 (17) "Credit" means the privilege granted by a creditor
149 to a debtor to defer payment of debt or to incur debt and
150 defer its payment.

151 (18) "Earnings" means compensation paid or payable
152 to an individual or for his account for personal services
153 rendered or to be rendered by him, whether denominated
154 as wages, salary, commission, bonus or otherwise, and
155 includes periodic payments pursuant to a pension, retire-
156 ment or disability program.

157 (19) "Facsimile device" means a machine that receives
158 and copies reproductions or facsimiles of documents or
159 photographs that have been transmitted electronically or
160 telephonically over telecommunications lines.

161 (20) "Federal Consumer Credit Protection Act" means
162 the "Consumer Credit Protection Act" (Public Law 90-321;
163 82 Stat. 146), as amended, and includes regulations issued
164 pursuant to that act.

165 (21) "Goods" includes goods not in existence at the
166 time the transaction is entered into and gift and merchan-
167 dise certificates, but excludes money, chattel paper, docu-
168 ments of title and instruments.

169 (22) "Home solicitation sale" means a consumer credit
170 sale in excess of twenty-five dollars in which the buyer

171 receives a solicitation of the sale at a place other than the
172 seller's business establishment at a fixed location and the
173 buyer's agreement or offer to purchase is there given to
174 the seller or a person acting for the seller. The term does
175 not include a sale made pursuant to a preexisting
176 open-end credit account with the seller in existence for at
177 least three months prior to the transaction, a sale made
178 pursuant to prior negotiations between the parties at the
179 seller's business establishment at a fixed location, a sale of
180 motor vehicles, mobile homes or farm equipment or a sale
181 which may be rescinded under the Federal Truth in Lend-
182 ing Act (being Title I of the Federal Consumer Credit
183 Protection Act). A sale which would be a home sollicita-
184 tion sale if credit were extended by the seller is a home
185 solicitation sale although the goods or services are paid
186 for, in whole or in part, by a consumer loan in which the
187 creditor is subject to claims and defenses arising from the
188 sale.

189 (23) Except as otherwise provided, "lender" includes
190 an assignee of the lender's right to payment but use of the
191 term does not in itself impose on an assignee any obliga-
192 tion of the lender.

193 (24) "Lender credit card or similar arrangement"
194 means an arrangement or loan agreement, other than a
195 seller credit card, pursuant to which a lender gives a debtor
196 the privilege of using a credit card, letter of credit, or other
197 credit confirmation or identification in transactions out of
198 which debt arises:

199 (a) By the lender's honoring a draft or similar order
200 for the payment of money drawn or accepted by the con-
201 sumer;

202 (b) By the lender's payment or agreement to pay the
203 consumer's obligations; or

204 (c) By the lender's purchase from the obligee of the
205 consumer's obligations.

206 (25) "Loan" includes:

207 (a) The creation of debt by the lender's payment of or
208 agreement to pay money to the consumer or to a third
209 party for the account of the consumer other than debts
210 created pursuant to a seller credit card;

211 (b) The creation of debt by a credit to an account with
212 the lender upon which the consumer is entitled to draw
213 immediately;

214 (c) The creation of debt pursuant to a lender credit
215 card or similar arrangement; and

216 (d) The forbearance of debt arising from a loan.

217 (26) (a) "Loan finance charge" means the sum of (i)
218 All charges payable directly or indirectly by the debtor
219 and imposed directly or indirectly by the lender as an
220 incident to the extension of credit, including any of the
221 following types of charges which are applicable: Interest
222 or any amount payable under a point, discount, or other
223 system of charges, however denominated, premium or
224 other charge for any guarantee or insurance protecting the
225 lender against the consumer's default or other credit loss;
226 and (ii) charges incurred for investigating the collateral or
227 credit worthiness of the consumer or for commissions or
228 brokerage for obtaining the credit, irrespective of the
229 person to whom the charges are paid or payable, unless
230 the lender had no notice of the charges when the loan was
231 made. The term does not include charges as a result of
232 default, additional charges, delinquency charges or deferral
233 charges.

234 (b) If a lender makes a loan to a consumer by pur-
235 chasing or satisfying obligations of the consumer pursuant
236 to a lender credit card or similar arrangement, and the
237 purchase or satisfaction is made at less than the face
238 amount of the obligation, the discount is not part of the
239 loan finance charge.

240 (27) "Merchandise certificate" or "gift certificate"
241 means a writing issued by a seller or issuer of a seller cred-
242 it card, not redeemable in cash and usable in its face
243 amount in lieu of cash in exchange for goods or services.

244 (28) "Official fees" means:

245 (a) Fees and charges prescribed by law which actually
246 are or will be paid to public officials for determining the
247 existence of or for perfecting, releasing, terminating or
248 satisfying a security interest related to a consumer credit
249 sale or consumer loan; or

250 (b) Premiums payable for insurance or fees escrowed
251 in a special account for the purpose of funding
252 self-insurance or its equivalent in lieu of perfecting a secu-
253 rity interest otherwise required by the creditor in connec-
254 tion with the sale, lease or loan, if such premium or fee
255 does not exceed the fees and charges described in para-
256 graph (a) which would otherwise be payable.

257 (29) "Organization" means a corporation, government
258 or governmental subdivision or agency, trust, estate, part-
259 nership, cooperative or association.

260 (30) "Payable in installments" means that payment is
261 required or permitted by agreement to be made in (a) Two
262 or more periodic payments, excluding a down payment,
263 with respect to a debt arising from a consumer credit sale
264 pursuant to which a sales finance charge is made, (b) four
265 or more periodic payments, excluding a down payment,
266 with respect to a debt arising from a consumer credit sale
267 pursuant to which no sales finance charge is made, or (c)
268 two or more periodic payments with respect to a debt
269 arising from a consumer loan. If any periodic payment
270 other than the down payment under an agreement requir-
271 ing or permitting two or more periodic payments is more
272 than twice the amount of any other periodic payment,
273 excluding the down payment, the consumer credit sale or
274 consumer loan is "payable in installments."

275 (31) "Person" or "party" includes a natural person or
276 an individual, and an organization.

277 (32) "Person related to" with respect to an individual
278 means (a) The spouse of the individual, (b) a brother,
279 brother-in-law, sister or sister-in-law of the individual, (c)
280 an ancestor or lineal descendant of the individual or his

281 spouse, and (d) any other relative, by blood or marriage,
282 of the individual or his spouse who shares the same home
283 with the individual. "Person related to" with respect to an
284 organization means (a) a person directly or indirectly
285 controlling, controlled by or under common control with
286 the organization, (b) an officer or director of the organi-
287 zation or a person performing similar functions with re-
288 spect to the organization or to a person related to the or-
289 ganization, (c) the spouse of a person related to the orga-
290 nization, and (d) a relative by blood or marriage of a per-
291 son related to the organization who shares the same home
292 with him.

293 (33) "Precomputed loan." A loan, refinancing or
294 consolidation is "precomputed" if:

295 (A) The debt is expressed as a sum comprising the
296 principal and the amount of the loan finance charge com-
297 puted in advance; or

298 (B) The loan is expressed in terms of the principal
299 amount; the loan installment payments are a scheduled,
300 fixed amount including principal and interest and assume
301 payment on the installment due date; and interest pay-
302 ments will not vary or result in an adjustment during the
303 term of the loan or at its final payment as a result of the
304 actual installment payment dates.

305 (34) "Precomputed sale." A sale, refinancing or con-
306 solidation is "precomputed" if:

307 (A) The debt is expressed as a sum comprising the
308 amount financed and the amount of the sales finance
309 charge computed in advance; or

310 (B) The debt is expressed in terms of the principal
311 amount; the debt installment payments are a scheduled,
312 fixed amount including principal and interest and assume
313 payment on the installment due date; and interest pay-
314 ments will not vary or result in an adjustment during the
315 term of the debt or at its final payment as a result of the
316 actual installment payment dates.

317 (35) "Presumed" or "presumption" means that the trier
318 of fact must find the existence of the fact presumed unless
319 and until evidence is introduced which would support a
320 finding of its nonexistence.

321 (36) "Principal" of a loan means the total of:

322 (a) The net amount paid to, receivable by or paid or
323 payable for the account of the debtor;

324 (b) The amount of any discount excluded from the
325 loan finance charge; and

326 (c) To the extent that payment is deferred:

327 (i) Amounts actually paid or to be paid by the lender
328 for registration, certificate of title, or license fees if not
329 included in (a); and

330 (ii) Additional charges permitted by this chapter.

331 (37) "Revolving charge account" means an agreement
332 between a seller and a buyer by which (a) The buyer may
333 purchase goods or services on credit or a seller credit card,
334 (b) the balances of amounts financed and the sales finance
335 and other appropriate charges are debited to an account,
336 (c) a sales finance charge if made is not precomputed but
337 is computed periodically on the balances of the account
338 from time to time, and (d) there is the privilege of paying
339 the balances in installments.

340 (38) "Revolving loan account" means an arrangement
341 between a lender and a consumer including, but not limit-
342 ed to, a lender credit card or similar arrangement, pursuant
343 to which (a) the lender may permit the consumer to obtain
344 loans from time to time, (b) the unpaid balances of princi-
345 pal and the loan finance and other appropriate charges are
346 debited to an account, (c) a loan finance charge if made is
347 not precomputed but is computed periodically on the
348 outstanding unpaid balances of the principal of the con-
349 sumer's account from time to time, and (d) there is the
350 privilege of paying the balances in installments.

351 (39) "Sale of goods" includes any agreement in the

352 form of a bailment or lease of goods if the bailee or lessee
353 agrees to pay as compensation for use a sum substantially
354 equivalent to or in excess of the aggregate value of the
355 goods involved and it is agreed that the bailee or lessee
356 will become, or for no other or a nominal consideration
357 has the option to become, the owner of the goods upon
358 full compliance with his obligations under the agreement.

359 (40) "Sale of an interest in land" includes a lease in
360 which the lessee has an option to purchase the interest and
361 all or a substantial part of the rental or other payments
362 previously made by him are applied to the purchase price.

363 (41) "Sale of services" means furnishing or agreeing to
364 furnish services and includes making arrangements to
365 have services furnished by another.

366 (42) "Sales finance charge" means the sum of (a) All
367 charges payable directly or indirectly by the buyer and
368 imposed directly or indirectly by the seller or issuer of a
369 seller credit card as an incident to the extension of credit,
370 including any of the following types of charges which are
371 applicable: Time-price differential, however denominated,
372 including service, carrying or other charge, premium or
373 other charge for any guarantee or insurance protecting the
374 seller against the buyer's default or other credit loss, and
375 (b) charges incurred for investigating the collateral or
376 credit worthiness of the buyer or for commissions or bro-
377 kerage for obtaining the credit, irrespective of the person
378 to whom the charges are paid or payable; unless the seller
379 had no notice of the charges when the credit was granted.
380 The term does not include charges as a result of default,
381 additional charges, delinquency charges or deferral charg-
382 es. If the seller or issuer of a seller credit card purchases
383 or satisfies obligations of the consumer and the purchase
384 or satisfaction is made at less than the face amount of the
385 obligation, the discount is not part of the sales finance
386 charge.

387 (43) Except as otherwise provided, "seller" includes an
388 assignee of the seller's right to payment but use of the
389 term does not in itself impose on an assignee any obliga-
390 tion of the seller.

391 (44) "Seller credit card" means an arrangement pursu-
392 ant to which a person gives to a buyer or lessee the privi-
393 lege of using a credit card, letter of credit, or other credit
394 confirmation or identification primarily for the purpose of
395 purchasing or leasing goods or services from that person,
396 that person and any other person or persons, a person
397 related to that person, or others licensed or franchised or
398 permitted to do business under his business name or trade
399 name or designation or on his behalf.

400 (45) "Services" includes (a) Work, labor and other
401 personal services, (b) privileges with respect to transporta-
402 tion, use of vehicles, hotel and restaurant accommodations,
403 education, entertainment, recreation, physical culture,
404 hospital accommodations, funerals, cemetery accommoda-
405 tions, and the like, and (c) insurance.

406 (46) "Supervised financial organization" means a per-
407 son, other than a supervised lender or an insurance com-
408 pany or other organization primarily engaged in an insur-
409 ance business:

410 (a) Organized, chartered or holding an authorization
411 certificate under the laws of this state or of the United
412 States which authorizes the person to make consumer
413 loans; and

414 (b) Subject to supervision and examination with re-
415 spect to such loans by an official or agency of this state or
416 of the United States.

417 (47) "Supervised lender" means a person authorized to
418 make or take assignments of supervised loans.

419 (48) "Supervised loan" means a consumer loan made
420 by other than a supervised financial organization, includ-
421 ing a loan made pursuant to a revolving loan account,
422 where the principal does not exceed two thousand dollars,
423 and in which the rate of the loan finance charge exceeds
424 eight percent per year as determined according to the
425 actuarial method.

§46A-1-104. Application.

1 (1) This chapter applies if a consumer, who is a resi-
2 dent of this state, is induced to enter into a consumer cred-
3 it sale made pursuant to a revolving charge account, to
4 enter into a revolving charge account, to enter into a con-
5 sumer loan made pursuant to a revolving loan account, or
6 to enter into a consumer lease, by personal or mail solici-
7 tation, and the goods, services or proceeds are delivered to
8 the consumer in this state, and payment on such account is
9 to be made from this state.

10 (2) With respect to consumer credit sales or consumer
11 loans consummated in another state, a creditor may not
12 collect in an action brought in this state a sales finance
13 charge or loan finance charge in excess of that permitted
14 by this chapter.

§46A-1-106. Sales, leases or loans subject to chapter by agreement of parties.

1 The parties to any sale, lease or loan, other than a
2 consumer credit sale, consumer lease or consumer loan,
3 may agree in writing signed by the parties that the sale,
4 lease or loan is subject to the provisions of this chapter
5 applying to consumer credit sales, consumer leases or
6 consumer loans. If the parties so agree, the sale, lease or
7 loan is subject to this chapter.

§46A-1-107. Waiver.

1 Except as otherwise provided in this chapter, a con-
2 sumer may not waive or agree to forego rights or benefits
3 under this chapter or under article two-a, chapter forty-six
4 of this code.

ARTICLE 2. CONSUMER CREDIT PROTECTION.

§46A-2-103a. Lessor subject to claims and defenses arising from leases.

1 (a) The following provisions shall be applicable to
2 claims and defenses of lessees arising from finance leases
3 which are consumer leases or arising from sale and lease
4 back agreements which include consumer leases:

5 (1) A lessor, other than the issuer of a credit card who,
6 with respect to a particular transaction, makes a consumer
7 lease for the purpose of enabling a lessee to lease goods or
8 services, other than primarily for an agricultural purpose,
9 is subject to all claims and defenses of the lessee against
10 the supplier arising from that specific lease of goods or
11 services if the lessor participates in or is connected with the
12 lease transaction. A lessor is considered to be connected
13 with the lease transaction if:

14 (A) The lessor and the supplier have arranged for a
15 commission or brokerage or referral fee for the agreement
16 to lease by the lessor;

17 (B) The lessor is a person related to the supplier unless
18 the relationship is remote or is not a factor in the transac-
19 tion;

20 (C) The supplier guarantees the payments or otherwise
21 assumes the risk of loss by the lessor upon the lease other
22 than a risk of loss arising solely from the lessor's failure to
23 perfect a lien if necessary;

24 (D) The lessor directly supplies the supplier with doc-
25 uments used by the lessee to evidence the transaction, or
26 the supplier directly supplies the lessor with documents
27 used by the lessee to evidence the transaction;

28 (E) The lease is conditioned upon the lessee's lease of
29 the goods or services from the particular supplier, but the
30 lessor's payment of proceeds of the lease to the supplier
31 does not in itself establish that the lease was so condi-
32 tioned;

33 (F) The supplier in such sale has specifically recom-
34 mended such lessor by name to the lessee, and the lessor
35 has made ten or more leases to lessees within a period of
36 twelve months, within which period the lease in question
37 was made, for goods or services supplied by the supplier
38 or a person related to the supplier, if in connection with
39 such other ten or more leases, the supplier also specifically
40 recommended such lessor by name to the lessees involved;
41 or

42 (G) The supplier was the issuer of a credit card other
43 than a lender credit card which may be used by the lessee
44 in the transaction as a result of a prior agreement between
45 the issuer and the supplier.

46 (b) The total of all claims and defenses which a lessee
47 is permitted to assert against a lessor under the provisions
48 of this section shall not exceed the sums due to the lessor
49 for that lease, except (1) As to any claim or defense
50 founded in fraud: *Provided*, That as to any claim or de-
51 fense founded in fraud, the total sought shall not exceed
52 the total sum due or payable under the lease, and (2) for
53 any excess charges and penalties recoverable under sec-
54 tion one hundred one, article five of this chapter.

55 (c) An agreement may not limit or waive the claims
56 and defenses of a lessee under this section.

57 (d) "Lender credit card" as used in this section means
58 an arrangement or loan agreement, other than a seller
59 credit card, pursuant to which a lender gives a debtor the
60 privilege of using the credit card in transactions which
61 entitle the user thereof to purchase goods or services from
62 at least one hundred persons not related to the issuer of
63 the lender credit card, out of which debt arises:

64 (1) By the lender's honoring a draft or similar order
65 for the payment of money drawn or accepted by the con-
66 sumer;

67 (2) By the lender's payment or agreement to pay the
68 consumer's obligation; or

69 (3) By the lender's purchase from the obligee of the
70 consumer's obligations.

71 (e) A claim or defense which a lessee may assert
72 against a lessor under the provisions of this section may be
73 asserted only as a defense to or setoff against a claim by
74 the lessor: *Provided*, That if a lessee shall have a claim or
75 defense which could be asserted under the provisions of
76 this section as a matter of defense to or set off against a
77 claim which is asserted by the lessor, then the lessee shall

78 have the right to institute and maintain an action or pro-
79 ceeding seeking to obtain the cancellation, in whole or in
80 part, of the obligation evidenced by the lease agreement or
81 the release, in whole or in part, of any lien upon real or
82 personal property securing the payment thereof: *Provid-*
83 *ed, however,* That any claim or defense founded in fraud,
84 lack or failure of consideration, or in a violation of the
85 provisions of this chapter as specified in section one hun-
86 dred one, article five of this chapter, may be asserted by a
87 lessee at any time, subject to the provisions of this code
88 relating to limitation of actions.

89 (f) Nothing contained in this section shall be con-
90 strued in any manner as affecting any transaction entered
91 into prior to the operative date of this chapter.

92 (g) Notwithstanding any provisions of this section, a
93 lessor shall not be subject to any claim or defense arising
94 from or growing out of personal injury or death resulting
95 therefrom, or damage to property.

96 (h) Nothing contained in this section shall be con-
97 strued as affecting any lessee's right of action, claim or
98 defense which is otherwise provided in this code or at
99 common law.

§46A-2-104. Notice to cosigners.

1 (a) No person shall be held liable as cosigner, or be
2 charged with personal liability for payment in a consumer
3 credit sale, consumer lease or consumer loan unless that
4 person, in addition to and before signing any instrument
5 evidencing the transaction, signs and receives a separate
6 notice which clearly explains his liability in the event of
7 default by the consumer and also receives a copy of any
8 disclosure required by the "Federal Consumer Credit Pro-
9 tection Act."

10 (b) Such notice shall be sufficient in a consumer credit
11 sale or consumer loan if it appears under the conspicuous
12 caption "NOTICE TO COSIGNER" and contains substan-
13 tially the following language:

14 "You are being asked to guarantee this debt. Think
15 carefully before you do. If the borrower doesn't pay the
16 debt, you will have to. Be sure you can afford to pay it if
17 you have to, and that you want to accept this responsibili-
18 ty."

19 "You may have to pay up to the full amount of the
20 debt if the borrower does not pay. You may also have to
21 pay late fees or collection costs, which increase this
22 amount."

23 "The creditor can collect this debt from you without
24 first trying to collect from the borrower. The creditor can
25 use the same collection methods against you that can be
26 used against the borrower, such as suing you, garnishing
27 your wages, etc. If this debt is ever in default, that fact may
28 become a part of your credit record."

29 "This notice is not the contract that makes you liable
30 for the debt."

31 The caption shall be typewritten or printed in at least
32 twelve point bold upper case type. The body of the notice
33 shall be typewritten or printed in at least eight point regu-
34 lar type, in upper or lower case, where appropriate.

35 (c) Such notice shall be sufficient in a consumer lease
36 transaction if it appears under the conspicuous caption
37 "NOTICE TO COSIGNER" and contains substantially the
38 following language:

39 "You are being asked to guarantee this lease. Think
40 carefully before you do. If the lessee doesn't pay, you will
41 have to. Be sure you can afford to pay it if you have to,
42 and that you want to accept this responsibility."

43 "You may have to pay up to the full amount if the
44 lessee does not pay. You may also have to pay late fees or
45 collection costs, which increase this amount."

46 "The creditor can collect this debt from you without
47 first trying to collect from the lessee. The creditor can use
48 the same collection methods against you that can be used
49 against the lessee, such as suing you, garnishing your

50 wages, etc. If this debt is ever in default, that fact may
51 become a part of your credit record."

52 "This notice is not the contract which makes you liable
53 for the debt."

54 The caption shall be typewritten or printed in at least
55 twelve point bold upper case type. The body of the notice
56 shall be typewritten or printed in at least eight point regu-
57 lar type, in upper or lower case, where appropriate.

**§46A-2-106. Notice of consumer's right to cure default; cure;
acceleration.**

1 After a consumer has been in default on any install-
2 ment obligation or any other secured obligation for five
3 days for failure to make a scheduled payment or otherwise
4 perform pursuant to such a consumer credit sale, consum-
5 er lease or consumer loan other than with respect to a
6 covenant to provide insurance for or otherwise to protect
7 and preserve the property covered by a security interest,
8 the creditor may give him notice of such fact in the man-
9 ner provided for herein. Actual delivery of such notice to
10 a consumer or delivery or mailing of same to the last
11 known address of the consumer is sufficient for the pur-
12 pose of this section. If given by mail, notice is given when
13 it is deposited in a mailbox properly addressed and post-
14 age prepaid. Notice shall be in writing and shall conspicu-
15 ously state the name, address and telephone number of the
16 creditor to whom payment or other performance is owed,
17 a brief description of the transaction, the consumer's right
18 to cure such default and the amount of payment and other
19 required performance and date by which it must be paid
20 or accomplished in order to cure the default. A copy of
21 the notice required by this section shall be (i) Retained by
22 the creditor, (ii) certified in the manner prescribed by this
23 section by an officer or other authorized representative of
24 such creditor, and (iii) notarized by a person licensed as a
25 notary under the laws of the state of West Virginia or any
26 other state or territory of the United States. The certifica-
27 tion required by this section shall substantially conform to
28 the following language:

29 "I, _____ (name of
30 person certifying),
31 the _____ (title of per-
32 son certifying)
33 of _____ (creditor's name),
34 hereby certify that the notice of the consumer's right to
35 cure default on which this certification appears (or to
36 which this certification is attached) was on this _____
37 day of _____, 19_____, mailed to the per-
38 son(s) whose name(s) appear herein (therein) at the ad-
39 dress(es) set forth herein (therein).

40 _____"
41 (Signature)

42 Except as hereinafter provided in this section, after a
43 default on any installment obligation or any other secured
44 obligation other than with respect to a covenant to provide
45 insurance for or otherwise to protect and preserve the
46 property covered by a security interest or lease, a creditor
47 may not accelerate maturity of the unpaid balance of any
48 such installment obligation or any other such secured
49 obligation, commence any action or demand or take pos-
50 session of collateral on account of default until ten days
51 after notice has been given to the consumer of his right to
52 cure such default. Until such period expires, the consum-
53 er shall have the right to cure any default by tendering the
54 amount of all unpaid sums due at the time of the tender,
55 without acceleration, plus any unpaid delinquency or
56 deferral charges and by tendering any other performance
57 necessary to cure such default. Any such cure shall re-
58 store a consumer to all his rights under the agreement the
59 same as if there had been no default. A consumer who
60 has been in default three or more times on the same obli-
61 gation and who has been given notice of such fact three or
62 more times shall not have the right to cure a default under
63 this section even though previous defaults have been cured
64 and his creditor's right to proceed against him and his
65 collateral shall not be impaired or limited in any way by

66 this section. There shall be no acceleration of the maturi-
67 ty of all or part of any amount owing in such a consumer
68 credit sale, consumer lease or consumer loan, except where
69 nonperformance specified in the agreement as constituting
70 default has occurred.

§46A-2-113. Notice of assignment.

1 A consumer is authorized to pay the original creditor
2 until he receives notification of assignment of rights to
3 payment pursuant to a consumer credit sale, consumer
4 lease or a consumer loan and that payment is to be made
5 to the assignee. A notification which does not reasonably
6 identify the rights assigned is ineffective. If requested by
7 the consumer, the assignee must seasonably furnish rea-
8 sonable proof that the assignment has been made and
9 unless he does so the consumer may pay the original cred-
10 itor.

**§46A-2-114. Receipts; statements of account; evidence of pay-
ment.**

1 (1) The creditor shall deliver or mail to the consumer,
2 without request, a written receipt for each payment by coin
3 or currency on an obligation pursuant to a consumer
4 credit sale, consumer lease or consumer loan. A periodic
5 statement showing a payment received complies with this
6 subsection.

7 (2) Upon written request of a consumer, the person to
8 whom an obligation is owed pursuant to a consumer credit
9 sale, consumer lease or consumer loan, other than one
10 pursuant to a revolving charge account or revolving loan
11 account, shall provide a written statement of the dates and
12 amounts of payments made within the past twelve months
13 and the total amount unpaid. The requested statement
14 shall be provided without charge once during each year of
15 the term of the sale, lease or loan. If additional statements
16 are requested the creditor may charge not in excess of
17 three dollars for each additional statement.

18 (3) After a consumer has fulfilled all obligations with
19 respect to a consumer credit sale, consumer lease or con-

20 sumer loan, other than one pursuant to a revolving charge
21 account or revolving loan account, the person to whom the
22 obligation was owed shall, upon the request of the con-
23 sumer, deliver or mail to the consumer written evidence
24 acknowledging payment in full of all obligations with
25 respect to the transaction.

§46A-2-116. Assignment of earnings.

1 (1) The maximum part of the aggregate disposable
2 earnings of an individual for any workweek which may be
3 subjected to any one or more assignments of earnings for
4 the payment of a debt or debts arising from one or more
5 consumer credit sales, consumer leases or consumer loans,
6 or one or more sales as defined in section one hundred
7 two, article six of this chapter, may not exceed twenty-five
8 percent of his disposable earnings for that week.

9 (2) As used in this section:

10 (a) "Disposable earnings" means that part of the earn-
11 ings of an individual remaining after the deduction from
12 those earnings of amounts required by law to be withheld;
13 and

14 (b) "Assignment of earnings" includes all forms of
15 assignments, deductions, transfers, or sales of earnings to
16 another, either as payment or as security, and whether
17 stated to be revocable or nonrevocable, and includes any
18 deductions authorized under the provisions of section
19 three, article five, chapter twenty-one of this code, except
20 deductions for union or club dues, pension plans, payroll
21 savings plans, charities, stock purchase plans and hospital-
22 ization and medical insurance.

23 (3) Any assignment of earnings and any deduction
24 under said section three, article five, chapter twenty-one of
25 this code shall be revocable by the employee at will at any
26 time, notwithstanding any provision to the contrary.

27 (4) The priority of multiple assignments of earnings
28 shall be according to the date and time of each such as-
29 signment.

§46A-2-117. Authorization to confess judgment prohibited.

1 A consumer may not authorize any person to confess
2 judgment on a claim arising out of a consumer credit sale,
3 consumer lease or a consumer loan. An authorization in
4 violation of this section is void. The provisions of this
5 section shall not be construed as in any way impliedly
6 authorizing a confession of judgment in any other type of
7 transaction.

§46A-2-118. No garnishment before judgment.

1 Prior to entry of judgment in an action against the
2 debtor for debt arising from a consumer credit sale, con-
3 sumer lease or a consumer loan, the creditor may not
4 attach unpaid earnings of the debtor by garnishment or
5 like proceedings. The provisions of this section shall not
6 be construed as in any way impliedly authorizing garnish-
7 ment before judgment in any other type of transaction.

§46A-2-121. Unconscionability; inducement by unconscionable conduct.

1 (1) With respect to a transaction which is or gives rise
2 to a consumer credit sale, consumer lease or consumer
3 loan, if the court as a matter of law finds:

4 (a) The agreement or transaction to have been uncon-
5 scionable at the time it was made, or to have been induced
6 by unconscionable conduct, the court may refuse to en-
7 force the agreement, or

8 (b) Any term or part of the agreement or transaction
9 to have been unconscionable at the time it was made, the
10 court may refuse to enforce the agreement, or may en-
11 force the remainder of the agreement without the uncon-
12 scionable term or part, or may so limit the application of
13 any unconscionable term or part as to avoid any uncon-
14 scionable result.

15 (2) If it is claimed or appears to the court that the
16 agreement or transaction or any term or part thereof may
17 be unconscionable, the parties shall be afforded a reason-
18 able opportunity to present evidence as to its setting, pur-

19 pose and effect to aid the court in making the determina-
20 tion.

21 (3) For the purpose of this section, a charge or prac-
22 tice expressly permitted by this chapter is not unconscio-
23 nable.

§46A-2-122. Definitions.

1 For the purposes of this section and sections one hun-
2 dred twenty-three, one hundred twenty-four, one hundred
3 twenty-five, one hundred twenty-six, one hundred
4 twenty-seven, one hundred twenty-eight, one hundred
5 twenty-nine, and one hundred twenty-nine-a of this article,
6 the following terms shall have the following meanings:

7 (a) "Consumer" means any natural person obligated or
8 allegedly obligated to pay any debt.

9 (b) "Claim" means any obligation or alleged obliga-
10 tion of a consumer to pay money arising out of a transac-
11 tion in which the money, property, insurance or service
12 which is the subject of the transaction is primarily for
13 personal, family or household purposes, whether or not
14 such obligation has been reduced to judgment.

15 (c) "Debt collection" means any action, conduct or
16 practice of soliciting claims for collection or in the collec-
17 tion of claims owed or due or alleged to be owed or due
18 by a consumer.

19 (d) "Debt collector" means any person or organization
20 engaging directly or indirectly in debt collection. The
21 term includes any person or organization who sells or
22 offers to sell forms which are, or are represented to be, a
23 collection system, device or scheme, and are intended or
24 calculated to be used to collect claims.

§46A-2-130. Limitation on garnishment.

1 (1) For the purposes of the provisions in this chapter
2 relating to garnishment:

3 (a) "Disposable earnings" means that part of the earn-
4 ings of an individual remaining after the deduction from

5 those earnings of amounts required by law to be withheld;
6 and

7 (b) "Garnishment" means any legal or equitable proce-
8 dure through which the earnings of an individual are re-
9 quired to be withheld for payment of a debt.

10 (2) The maximum part of the aggregate disposable
11 earnings of an individual for any workweek which is sub-
12 jected to garnishment to enforce payment of a judgment
13 arising from a consumer credit sale or consumer loan may
14 not exceed the lesser of:

15 (a) Twenty percent of his disposable earnings for that
16 week, or

17 (b) The amount by which his disposable earnings for
18 that week exceed thirty times the federal minimum hourly
19 wage prescribed by section 6(a) (1) of the "Fair Labor
20 Standards Act of 1938," U.S.C. Title 19, Sec. 206(a)(1), in
21 effect at the time the earnings are payable.

22 (c) In the case of earnings for a pay period other than
23 a week, the commissioner shall prescribe by rule a multi-
24 ple of the federal minimum hourly wage equivalent in
25 effect to that set forth in subdivision (b), subsection (2) of
26 this section.

27 (3) No court may make, execute or enforce an order
28 or process in violation of this section. Any time after a
29 consumer's earnings have been executed upon pursuant to
30 article five-a or article five-b, chapter thirty-eight of this
31 code by a creditor resulting from a consumer credit sale,
32 consumer lease or consumer loan, such consumer may
33 petition any court having jurisdiction of such matter or the
34 circuit court of the county wherein he resides to reduce or
35 temporarily or permanently remove such execution upon
36 his earnings on the grounds that such execution causes or
37 will cause undue hardship to him or his family. When such
38 fact is proved to the satisfaction of such court, it may re-
39 duce or temporarily or permanently remove such execu-
40 tion.

41 (4) No garnishment governed by the provisions of this
42 section will be given priority over a voluntary assignment
43 of wages to fulfill a support obligation, a garnishment to
44 collect arrearages in support payments, or a notice of
45 withholding from wages of amounts payable as support,
46 notwithstanding the fact that the garnishment in question
47 or the judgment upon which it is based may have preced-
48 ed the support-related assignment, garnishment, or notice
49 of withholding in point of time or filing.

**§46A-2-131. No discharge or reprisal because of garnish-
ment.**

1 No employer shall discharge or take any other form
2 of reprisal against an employee for the reason that a credi-
3 tor of the employee has subjected or attempted to subject
4 unpaid earnings of the employee to garnishment or like
5 proceedings directed to the employer for the purpose of
6 paying a judgment arising from a consumer credit sale,
7 consumer lease or consumer loan.

§46A-2-136. Personal property exemptions.

1 Any consumer residing in this state may set apart and
2 hold personal property to be exempt from execution or
3 other judicial process resulting from consumer credit
4 transactions or consumer leases, except for the purchase
5 money due on such property, in such amounts as follows:
6 Clothing and other wearing apparel of the consumer, his
7 spouse and any dependents of such consumer, not to ex-
8 ceed the fair market value of two hundred dollars; furni-
9 ture, appliances, furnishings and fixtures regularly used
10 for family purposes in the consumer's residence, to the
11 extent of the fair market value of one thousand dollars;
12 children's books, pictures, toys and other such personal
13 property of children; all medical health equipment used
14 for health purposes by the consumer, his spouse and any
15 dependent of such consumer; tools of trade, including any
16 income-producing property used in the consumer's princi-
17 pal occupation, to the extent of the fair market value of
18 one thousand dollars; and any policy of life or endow-
19 ment insurance which is payable to the spouse or children

20 of the insured consumer or to a trustee for their benefit,
21 except the cash value of any accrued dividends thereon.
22 When a consumer claims personal property as exempt
23 under the provisions of this section, he shall deliver a list
24 containing all the personal property owned or claimed by
25 him and all items of such property he claims as exempt
26 hereunder, with the value of each separate item listed ac-
27 cording to his best knowledge, to the officer holding the
28 execution or other such process. Such list shall be sworn
29 to by affidavit. If the value of the property named in such
30 list exceeds the amounts specified in this section, the con-
31 sumer shall state at the foot thereof what part of such
32 property he claims as exempt. If such value does not
33 exceed the amounts specified in this section, the claim of
34 exemption shall be held to extend to the whole thereof
35 without stating more and, if no appraisal is demanded,
36 the property so claimed shall be set aside as exempt.
37 Where the consumer owning exempt property is absent or
38 incapable of acting or neglects or declines to act hereun-
39 der, the claim of exemption may be made, the list deliv-
40 ered and the affidavit made by his spouse with the same
41 effect as if the owner had done so. Upon receipt of such a
42 list, the officer to whom it is given shall immediately ex-
43 hibit such list to the creditor or his agent or attorney. The
44 rights granted and procedures provided for in article eight,
45 chapter thirty-eight of this code shall apply to any pro-
46 ceeding under this section, except that the provisions of
47 sections one and three of such article shall not apply.

ARTICLE 6. GENERAL CONSUMER PROTECTION.

§46A-6-102. Definitions.

1 When used in this article the following words, terms
2 and phrases, and any variations thereof required by the
3 context, shall have the meaning ascribed to them in this
4 article, except where the context indicates a different
5 meaning:

6 (a) "Advertisement" means the publication, dissemina-
7 tion or circulation of any matter, oral or written, including
8 labeling, which tends to induce, directly or indirectly, any

9 person to enter into any obligation, sign any contract, or
10 acquire any title or interest in any goods or services and
11 includes every word device to disguise any form of busi-
12 ness solicitation by using such terms as "renewal," "in-
13 voice," "bill," "statement" or "reminder," to create an im-
14 pression of existing obligation when there is none, or
15 other language to mislead any person in relation to any
16 sought-after commercial transaction.

17 (b) "Consumer" means a natural person to whom a sale
18 or lease is made in a consumer transaction, and a "con-
19 sumer transaction" means a sale or lease to a natural per-
20 son or persons for a personal, family, household or agri-
21 cultural purpose.

22 (c) "Merchantable" means, in addition to the qualities
23 prescribed in section three hundred fourteen, article two,
24 chapter forty-six of this code, that the goods conform in
25 all material respects to applicable state and federal statutes
26 and regulations establishing standards of quality and safe-
27 ty of goods and, in the case of goods with mechanical,
28 electrical or thermal components, that the goods are in
29 good working order and will operate properly in normal
30 usage for a reasonable period of time. (d) "Sale" includes
31 any sale, offer for sale or attempt to sell any goods for
32 cash or credit or any services or offer for services for cash
33 or credit.

34 (e) "Trade" or "commerce" means the advertising,
35 offering for sale, sale or distribution of any goods or ser-
36 vices and shall include any trade or commerce, directly or
37 indirectly, affecting the people of this state.

38 (f) "Unfair methods of competition and unfair or
39 deceptive acts or practices" means and includes, but is not
40 limited to, any one or more of the following:

41 (1) Passing off goods or services as those of another;

42 (2) Causing likelihood of confusion or of misunder-
43 standing as to the source, sponsorship, approval or certifi-
44 cation of goods or services;

45 (3) Causing likelihood of confusion or of misunder-
46 standing as to affiliation, connection or association with, or
47 certification by another;

48 (4) Using deceptive representations or designations of
49 geographic origin in connection with goods or services;

50 (5) Representing that goods or services have sponsor-
51 ship, approval, characteristics, ingredients, uses, benefits or
52 quantities that they do not have, or that a person has a
53 sponsorship, approval, status, affiliation or connection that
54 he does not have;

55 (6) Representing that goods are original or new if they
56 are deteriorated, altered, reconditioned, reclaimed, used or
57 secondhand;

58 (7) Representing that goods or services are of a partic-
59 ular standard, quality or grade, or that goods are of a par-
60 ticular style or model, if they are of another;

61 (8) Disparaging the goods, services or business of
62 another by false or misleading representation of fact;

63 (9) Advertising goods or services with intent not to sell
64 them as advertised;

65 (10) Advertising goods or services with intent not to
66 supply reasonably expectable public demand, unless the
67 advertisement discloses a limitation of quantity;

68 (11) Making false or misleading statements of fact
69 concerning the reasons for, existence of or amounts of
70 price reductions;

71 (12) Engaging in any other conduct which similarly
72 creates a likelihood of confusion or of misunderstanding;

73 (13) The act, use or employment by any person of
74 any deception, fraud, false pretense, false promise or mis-
75 representation, or the concealment, suppression or omis-
76 sion of any material fact with intent that others rely upon
77 such concealment, suppression or omission, in connection
78 with the sale or advertisement of any goods or services,
79 whether or not any person has in fact been misled, de-
80 ceived or damaged thereby;

81 (14) Advertising, printing, displaying, publishing,
82 distributing or broadcasting, or causing to be advertised,
83 printed, displayed, published, distributed or broadcast in
84 any manner, any statement or representation with regard
85 to the sale of goods or the extension of consumer credit
86 including the rates, terms or conditions for the sale of such
87 goods or the extension of such credit, which is false, mis-
88 leading, or deceptive, or which omits to state material in-
89 formation which is necessary to make the statements there-
90 in not false, misleading or deceptive;

91 (15) Representing that any person has won a prize,
92 one of a group of prizes or any other thing of value, if
93 receipt of the prize or thing of value is contingent upon
94 any payment of a service charge, mailing charge, handling
95 charge or any other similar charge by the person or upon
96 mandatory attendance by the person at a promotion or
97 sales presentation at the seller's place of business or any
98 other location: *Provided*, That a person may be offered
99 one item or the choice of several items conditioned on the
100 person listening to a sales promotion or entering a con-
101 sumer transaction if the true retail value and an accurate
102 description of the item or items are clearly and conspicu-
103 ously disclosed along with the person's obligations upon
104 accepting the item or items; such description and disclo-
105 sure shall be typewritten or printed in at least eight point
106 regular type, in upper or lower case, where appropriate; or

107 (16) Violating any provision or requirement of article
108 six-b of this chapter.

109 (g) "Warranty" means express and implied warranties
110 described and defined in sections three hundred thirteen,
111 three hundred fourteen and three hundred fifteen, article
112 two, chapter forty-six of this code and expressions or
113 actions of a merchant which assure the consumer that the
114 goods have described qualities or will perform in a de-
115 scribed manner.

**§46A-7-102. Power of attorney general; reliance on rules of
attorney general or commissioner of bank-
ing; duty to report.**

1 (1) In addition to other powers granted by this chap-
2 ter, the attorney general within the limitations provided by
3 law may:

4 (a) Receive and act on complaints, take action de-
5 signed to obtain voluntary compliance with this chapter or
6 commence proceedings on his own initiative;

7 (b) Counsel persons and groups on their rights and
8 duties under this chapter;

9 (c) Establish programs for the education of consumers
10 with respect to credit and leasing practices and problems;

11 (d) Make studies appropriate to effectuate the purpos-
12 es and policies of this chapter and make the results avail-
13 able to the public;

14 (e) Adopt, amend and repeal such reasonable rules
15 and regulations, in accordance with the provisions of
16 chapter twenty-nine-a of this code, as are necessary and
17 proper to effectuate the purposes of this chapter and to
18 prevent circumvention or evasion thereof; and

19 (f) Delegate his powers and duties under this chapter
20 to qualified personnel in his office, who shall act under the
21 direction and supervision of the attorney general and for
22 whose acts he shall be responsible.

23 (2) Except for refund of an excess charge, no liability
24 is imposed under this chapter for an act done or omitted
25 in conformity with a rule of the attorney general or com-
26 missioner, notwithstanding that after the act or omission
27 the rule may be amended or repealed or be determined by
28 judicial or other authority to be invalid for any reason.
29 Any form or procedure which has been submitted to the
30 commissioner and the attorney general in writing and
31 approved in writing by them shall not be deemed a viola-
32 tion of the penalty provisions of this chapter notwithstand-
33 ing that such approval may be subsequently amended or
34 rescinded or be determined by judicial or other authority
35 to be invalid for any reason.

36 (3) Except for refund of an excess charge, in any

37 action brought pursuant to the provisions of this chapter, it
38 shall be a defense that the act or omission complained of
39 was in conformity with a published opinion of the attor-
40 ney general issued in compliance with section one, article
41 three, chapter five of this code or in conformity with an
42 examination report issued by the commissioner to the
43 person against whom the action is brought pursuant to
44 section six, article two, chapter thirty-one-a of this code, or
45 a declaratory ruling issued to the person against whom the
46 action is brought pursuant to subdivision (9), subsection
47 (c), section four of said article.

48 (4) On or before the first day of December of each
49 year, the attorney general and commissioner shall jointly
50 or separately submit a report or reports to the governor
51 and to the Legislature on the operation of their offices, on
52 the use of consumer credit and on consumer protection
53 problems in the state, and on the problems of persons of
54 small means obtaining credit from persons regularly en-
55 gaged in extending sales or loan credit. For the purpose
56 of making such report or reports, the attorney general and
57 commissioner are authorized to conduct research and
58 make appropriate studies. The report or reports shall
59 include a description of the examination and investigation
60 procedures and policies of their offices, a statement of
61 policies followed in deciding whether to investigate or
62 examine the offices of credit suppliers subject to this
63 chapter, a statement of the number and percentages of
64 offices which are periodically investigated or examined, a
65 statement of the types of consumer credit and consumer
66 protection problems of both creditors and consumers
67 which have come to their attention through their examina-
68 tions and investigations and the disposition of them under
69 existing law, and a general statement of the activities of
70 their offices and of others to promote the purposes of this
71 chapter.

**§46A-7-109. Injunctions against unconscionable agreements
and fraudulent or unconscionable conduct.**

1 (1) The attorney general may bring a civil action to

2 restrain a creditor or a person acting in his behalf from
3 engaging in a course of:

4 (a) Making or enforcing unconscionable terms or
5 provisions of consumer credit sales, consumer leases or
6 consumer loans;

7 (b) Fraudulent or unconscionable conduct in induc-
8 ing consumers to enter into consumer credit sales, con-
9 sumer leases or consumer loans; or

10 (c) Fraudulent or unconscionable conduct in the
11 collection of debts arising from consumer credit sales,
12 consumer leases or consumer loans.

13 (2) In an action brought pursuant to this section the
14 court may grant relief only if it finds:

15 (a) That the respondent has made unconscionable
16 agreements or has engaged or is likely to engage in a
17 course of fraudulent or unconscionable conduct;

18 (b) That the agreements or conduct of the respondent
19 have caused or are likely to cause injury to consumers;
20 and

21 (c) That the respondent has been able to cause or will
22 be able to cause the injury primarily because the transac-
23 tions involved are credit or lease transactions.

24 (3) In applying this section, consideration shall be
25 given to each of the following factors, among others:

26 (a) Belief by the creditor at the time consumer credit
27 sales, consumer leases or consumer loans are made that
28 there was no reasonable probability of payment in full of
29 the obligation by the debtor;

30 (b) In the case of consumer credit sales, knowledge
31 by the seller at the time of the sale of the inability of the
32 buyer to receive substantial benefits from the property or
33 services sold;

34 (c) In the case of consumer credit sales, gross dispari-
35 ty between the price of the property or services sold and

36 the value of the property or services measured by the price
37 at which similar property or services are readily obtainable
38 in credit transactions by like buyers;

39 (d) The fact that the creditor contracted for or re-
40 ceived separate charges for insurance with respect to con-
41 sumer credit sales, consumer leases or consumer loans with
42 the effect of making the sales or loans, considered as a
43 whole, unconscionable; and

44 (e) The fact that the respondent has knowingly taken
45 advantage of the inability of the debtor reasonably to
46 protect his interests by reason of physical or mental infir-
47 mities, ignorance, illiteracy or inability to understand the
48 language of the agreement, or similar factors.

49 (4) In an action brought pursuant to this chapter, a
50 charge or practice expressly permitted by this chapter is
51 not unconscionable.

The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

Ray Spoonover
Chairman Senate Committee

Rudy Deacrist
Chairman House Committee

Originating in the House.

Takes effect ninety days from passage.

Carroll B. Holmes
Clerk of the Senate

Suzanne D. Gray
Clerk of the House of Delegates

Carl Key Tomblin
President of the Senate

Calvin P. Tomblin
Speaker of the House of Delegates

The within *is approved* this the *18th*
day of *April*, 1996.

Walter D. Rife
Governor

PRESENTED TO THE

GOVERNOR

Date 4/1/96

Time 11:12 am