

EIGHTH EDITION

THE LEGAL ENVIRONMENT OF BUSINESS

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TEXT AND CASES

Ethical, Regulatory, Global, and Corporate Issues



Cross ♦ Miller

In this book . . . **STUDY TOOLS** that help you make the grade

SHIFT AWAY FROM MANDATORY SENTENCING In 2005, the United States Supreme Court held that certain provisions of the federal sentencing guidelines were unconstitutional.

CASE IN POINT Freddie Booker was arrested with 92.5 grams of crack cocaine in his possession. Booker admitted to police that he had sold an additional 566 grams of crack cocaine, but he was never charged with, or tried for, possession of this additional quantity. Nevertheless, under the federal sentencing guidelines the judge was required to sentence Booker to twenty-two years in prison. The Court ruled that this sentence was unconstitutional because a jury did not find beyond a reasonable doubt that Booker had possessed the additional 566 grams of crack.²⁴

Essentially, the Court's ruling changed the federal sentencing guidelines from mandatory to advisory. Depending on the circumstances of the case, a federal trial judge may now depart from the guidelines if she or he believes that it is reasonable to do so.

◀ **Short Case in Point** examples in every chapter make it easy to remember important legal concepts.

▼ **Concept Summary** boxes located at key points in the chapters help you review more effectively for exams.



CONCEPT SUMMARY 2.2 Types of Courts

Type of Court	Description
Trial Courts	Trial courts are courts of original jurisdiction in which actions are initiated. 1. <i>State courts</i> —Courts of general jurisdiction can hear any case that has not been specifically designated for another court; courts of limited jurisdiction include domestic relations courts, probate courts, and small claims courts. 2. <i>Federal courts</i> —The federal district court is the equivalent of the state trial court. Federal courts of limited jurisdiction include the bankruptcy courts and others shown in Exhibit 2-2 on page 37.
Intermediate Appellate Courts	Courts of appeals are reviewing courts; generally, appellate courts do not have original jurisdiction. About three-fourths of the states have intermediate appellate courts; in the federal court system, the U.S. circuit courts of appeals are the intermediate appellate courts.
Supreme Courts	The highest state court is that state's supreme court (it may be called by another name). Appeal from state supreme courts to the United States Supreme Court is possible only if a federal question is involved. The United States Supreme Court is the highest court in the federal court system and the final arbiter of the Constitution and federal law.



QUESTIONS AND CASE PROBLEMS

2-1. Discovery Rules In the past, the rules of discovery were very restrictive, and trials often turned on elements of surprise. For example, a plaintiff would not necessarily know until the trial what the defendant's defense was going to be. In the last several decades, however, new rules of discovery have substantially changed this situation. Now each attorney can access practically all of the evidence that the other side intends to present at trial, with the exception of certain information—namely, the opposing attorney's work product. Work product is not a precise concept. Basically, it includes all of the attorney's thoughts on the case. Can you see any reason why such information should not be made available to the opposing attorney? Discuss fully.

2-2. QUESTION WITH SAMPLE ANSWER: Motions.

The defendant in a lawsuit

issued its "Findings of Fact and Conclusions of Law." The court found that the two purchase orders "required BSH to purchase 31,000 units of the burner at \$28.25 per unit." The court ruled that Detroit was entitled to \$418,261 for 18,114 unsold burners. BSH appealed to the U.S. Court of Appeals for the Sixth Circuit. Can an appellate court set aside a trial court's findings of fact? Can an appellate court come to its own conclusions of law? What should the court rule in this case? Explain. [Detroit Radiant Products Co. v. BSH Home Appliances Corp., 473 F.3d 623 (6th Cir. 2007)]

• To view a sample answer for Problem 2-4, go to this book's Web site at www.cengage.com/blaw/cross, select "Chapter 2," and click on "Case Problem with Sample Answer."

2-5. Discovery In October 2004, Rita Peatie filed a suit in a Connecticut state court against Wal-Mart Stores, Inc., to recover for injuries

Sample answers to selected Questions and Case Problems are available in this book's Appendix F and at the Companion Web Site.

At the end of every chapter in this book, you'll find a great variety of *Questions and Case Problems* that help you retain and apply what you've learned. We've provided sample answers at the back of the book and at www.cengage.com/blaw/cross to selected *Questions and Case Problems* so you can compare the authors' answers to yours.

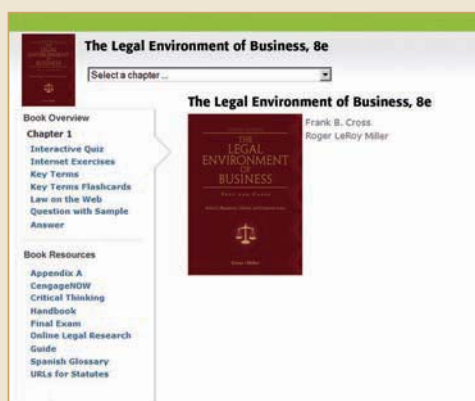
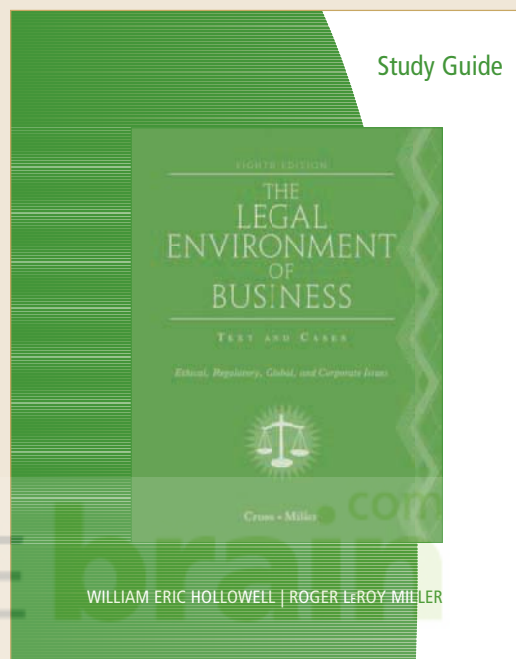
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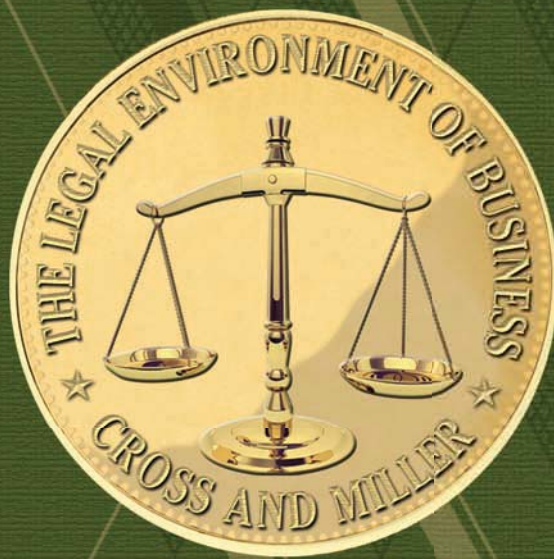
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Preface to the Instructor



The study of the legal environment of business has universal applicability. A student entering any field of business must have at least a passing understanding of business law in order to function in the real world. Additionally, students preparing for a career in accounting, government and political science, economics, and even medicine can use much of the information that they learn in a legal environment of business course. In fact, every individual throughout his or her lifetime can benefit from a knowledge of contracts, employment relationships, real property law, land-use control, and other legal topics. Consequently, we have fashioned this text as a useful “tool for living” for all of your students (including those taking the CPA exam).

For the Eighth Edition, we have spent a great deal of effort making this book more contemporary, exciting, and visually appealing than ever before. We have also added many new features and special pedagogical devices that focus on legal, ethical, global, and corporate issues, while addressing core curriculum requirements.

WHAT IS NEW IN THE EIGHTH EDITION

Instructors have come to rely on the coverage, accuracy, and applicability of *The Legal Environment of Business*. To make sure that our text engages your students, solidifies their understanding of legal concepts, and provides the best teaching tools available, we now offer the following items either in the text or in conjunction with the text:

➤ **New Shifting Legal Priorities for Business Feature**

For the Eighth Edition, we have created a new feature that shows students how legal priorities are shifting in the business world. Special emphasis is given to sustainability, ethical trends, and changing managerial responsibilities. Each discussion ends with a short section entitled *Managerial*

Implications that points out why the changing priorities examined are significant to businesspersons. Topics examined include:

- Prosecuting White-Collar Crime with the Honest-Services Fraud Law (Chapter 7)
- The National Export Initiative (Chapter 8)
- Fair Trade and Environmental Sustainability (Chapter 11)
- The Law of Building “Green”—Sustainable Real Estate Development (Chapter 26)
- SEC Disclosures and Climate Change (Chapter 29)

➤ **New Case in Point Feature**

Many instructors use cases to illustrate how the law applies to business. For this edition, we have expanded our in-text discussion of case law by adding at least one new *Case in Point* feature in every chapter. This feature presents, in paragraph format, the facts and issues of an actual case and then describes the court’s decision and rationale. Citations to the cases are included for further reference. The *Case in Point* features are integrated throughout the text to help students better understand how courts apply the principles under discussion in the real world.

➤ **New Debate This Feature**

To encourage student participation and motivate your students to think critically about the rationale underlying the law on a particular topic, we have created a special new feature for the Eighth Edition. Entitled *Debate This*, it consists of a brief statement or question concerning the chapter material that can be used to spur lively classroom or small group discussions, or can be a written assignment. This feature follows the *Reviewing* feature (discussed shortly) at the end of each chapter. **Suggested pro and con responses to the *Debate This* features can be found in both the *Instructor’s Manual* and the *Answers Manual* that accompany this text.** (The full title of this manual is *Answers to Questions*

and Case Problems and Alternate Problem Sets with Answers.)

➤ **New Chapter on Mortgages and Foreclosures after the Recession**

For the Eighth Edition, we have included an entirely new chapter (Chapter 16) titled *Mortgages and Foreclosures after the Recession*. This chapter examines some of the mortgage-lending practices that contributed to the latest recession and discusses the legal reforms enacted in response to it.

➤ **New Insight into Ethics Feature**

For the Eighth Edition, we have created many new *Insight into Ethics* features, which appear in selected chapters and examine the ethical implications of various topics. This feature provides valuable insights into how the courts and the law are dealing with specific ethical issues. Each discussion ends with a critical-thinking question that explores some cultural, environmental, political, social, or technological aspect of the issue. The following are some of the topics explored in this feature:

- Should Pharmaceutical Companies Be Allowed to Tweet? (Chapter 6)
- Some Consequences of Caps on Medical Malpractice Awards (Chapter 12)
- Warning Labels for Video Games (Chapter 13)
- Fiduciary Duties of LLC Managers (Chapter 18)

➤ **Managerial Implications in Selected Cases**

We have devised a special new item of case pedagogy for this edition. At the end of selected cases that have particular importance for business managers, we have included a new section entitled *Managerial Implications*. This section points out the significance of the court's ruling in the case for business owners and managers.

➤ **Emphasis on Critical Thinking and Legal Reasoning**

Today's business leaders must often think "outside the box" when making business decisions. For this reason, we have included **numerous critical-thinking elements** in the Eighth Edition that are designed to challenge students' understand-

ing of the materials beyond simple retention. Your students' critical-thinking and legal reasoning skills will be increased as they work through the numerous pedagogical aids in the book. The new *Debate This* feature (discussed previously) requires critical thinking. In addition, nearly every feature and every case presented in the text conclude with some type of critical-thinking question.

For the Eighth Edition, we continue to offer one longer excerpt—labeled an *Extended Case*—with two critical-thinking questions in every chapter. These *Extended Cases* may be used for case-briefing assignments and are also tied to the *Special Case Analysis* questions found in every unit of this text.

Because of the popularity of the case-ending questions, we've also included two questions for all cases. These questions may include:

- *What If the Facts Were Different?*
- *Impact of This Case on Today's Law*
- *The Ethical Dimension*
- *The E-Commerce Dimension*
- *The Global Dimension*
- *The Legal Environment Dimension*

Suggested answers to all questions following cases can be found in both the *Instructor's Manual* and the *Answers Manual* that accompany this text.

➤ **Special Case Analysis Questions**

Through the years, instructors have frequently requested that we help them teach their legal environment of business students how to analyze case law. We discuss the fundamental topic of how to read and understand case law in Chapter 1 and cover *How to Brief Cases and Analyze Case Problems* in Appendix A. For every unit in the text, in the *Questions and Case Problems* at the end of selected chapters, we also provide a *Special Case Analysis* question that is based on the *Extended Case* excerpt in that chapter. These questions are designed to build students' analytical skills.

The *Special Case Analysis* questions test students' ability to perform IRAC (Issue, Rule, Application, and Conclusion) case analysis. Students must identify the legal issue presented in the chapter's *Extended Case*, understand the rule of law, determine how the rule applies to the facts of the case, and describe the court's conclusion. Instructors can assign these questions as homework or use them in class to elicit student participation and teach case analysis.

➤ **Reviewing Feature in Every Chapter**

In the Eighth Edition of *The Legal Environment of Business*, we continue to offer the *Reviewing* feature at the end of every chapter to help solidify students' understanding of the chapter materials. Each *Reviewing* feature presents a hypothetical scenario and then asks a series of questions that require students to identify the issues and apply the legal concepts discussed in the chapter.

This feature is designed to help students review the chapter topics in a simple and interesting way and see how the legal principles discussed in the chapter affect the world in which they live. You can use this feature as the basis for in-class discussion or can encourage students to use it for self-study prior to completing homework assignments. **Suggested answers to the questions posed in the *Reviewing* feature can be found in both the *Instructor's Manual* and the *Answers Manual* that accompany this text.**

The *Reviewing* feature is also tied to a set of questions for each chapter in the Web-based CengageNOW system, to be discussed next. Students can read through the scenario in the text and then answer the four questions online (called Applications and Analysis questions). By using the CengageNOW system, students can receive instant feedback on their answers to these questions, and instructors will obtain automatically graded assignments that enable them to assess students' understanding of the materials.

➤ **Improved CengageNOW for *The Legal Environment of Business*: Interactive Assignment System**

To help students learn how to identify and apply the legal principles they study, we have created an easy-to-use Web-based product for this text. The system provides interactive, automatically graded assignments for every chapter and unit. For each of the twenty-nine chapters, we have devised several categories of multiple-choice questions that stress different aspects of the chapter materials. By using the optional **CengageNOW** system, students can complete the assignments from any location via the Internet and can receive instant feedback on why their answers to questions were incorrect or correct (if the instructor wishes to allow feedback). Instructors can customize the system to meet their own specifications and can track students' progress. CengageNOW offers all of the following:

- **Chapter Review Questions**—The first set of ten to fifteen questions reviews the basic concepts and principles discussed in the chapter. This set often includes questions based on the cases presented in the text.
- **Brief Hypotheticals**—The next group of seven to ten questions gives students practice in spotting the issue and rule of law in the context of a short factual scenario.
- **Legal Reasoning**—The third set contains five questions that require students to analyze the factual situation provided and apply the rules of law discussed in the chapter to arrive at an answer.
- **IRAC Case Analysis**—The next set of four questions for each chapter requires students to perform all the basic elements of legal reasoning (identify the *issue*, determine the *rule* of law, *apply* the rule to the facts presented, and arrive at a *conclusion*). These questions are based on the *Extended Case* excerpts that appear in each chapter.
- **Application and Analysis**—The final set of four questions is linked to the *Reviewing* feature (discussed previously) that appears in every chapter of the text. The student is required to read through the hypothetical scenario, analyze the facts presented, identify the issues in dispute, and apply the rules discussed in the chapter to answer the questions.
- **Essay Questions**—In addition to the multiple-choice questions, we now provide essay questions that allow students to compose and submit essays online. Students' essays are automatically recorded to the gradebook so that instructors can quickly and easily evaluate the essays and record grades.
- **Video Questions**—CengageNOW also provides links to the Business Law Digital Video Library (discussed shortly) for *The Legal Environment of Business* so that students can access and view the video clips and answer questions related to the topics in the chapter.
- **Cumulative Questions for Each Unit**—In addition to the questions relating to each chapter, the CengageNOW system provides a set of cumulative questions, entitled "Synthesizing Legal Concepts," for each of the six units in the text.
- **Additional Advantages of CengageNOW**—Instructors can utilize the system to upload their course syllabi, create and customize homework assignments, keep track of their students' progress, communicate with their students about assignments and due dates, and create reports

summarizing the data for an individual student or for the whole class.

➤ **Aplia for *The Legal Environment of Business*: Online Homework and Gradebook System**

Aplia is an online homework system dedicated to improving learning by increasing student effort and engagement. Aplia encourages legal environment of business students to read their text, stay engaged with course material, and master critical-thinking and legal reasoning skills that will serve them well in their future business careers.

Originally created by a professor to enhance his own courses, Aplia has been specially tailored to cover the topics in each chapter of this text. Immediate, detailed feedback for every question helps students learn and improves their performance. Aplia's numerous interactive features keep students interested in the legal environment, prepare them for classes, and connect the concepts they have learned across chapters. Aplia also allows instructors to spend more time teaching and less time reviewing and grading assignments. As your students complete assignments, their scores are imported automatically into your gradebook, where you can easily track class and individual student performance.

Aplia Text, an interactive textbook, contains all the contents of the printed textbook but takes advantage of the digital environment. Features such as flipbook-style navigation allow students to scan through the text easily. They can also highlight the text; listen to audio clips; and view movies, simulations, graphs, and slideshows.

➤ **CourseMate**

CourseMate brings the legal environment of business concepts to life with interactive learning, study, and exam preparation tools that support the printed textbook. Built-in engagement tracking tools allow you to assess the study activities of your students. Additionally, CourseMate includes an interactive online textbook, which contains the complete content of the printed textbook enhanced by the many advantages of a digital environment.

➤ **Improved Ethics Coverage**

For the Eighth Edition of *The Legal Environment of Business*, we have significantly revised and updated the chapter on ethics and business decision mak-

ing (Chapter 4). The chapter now presents a more practical, realistic case-study approach to business ethics and the dilemmas facing businesspersons today.

It also provides step-by-step guidance for making ethical business decisions. The emphasis on ethics is reiterated in materials throughout the text, particularly the *Insight into Ethics* feature, the *Focus on Ethics* feature that concludes every unit, and the pedagogy that accompanies selected cases and features. We also discuss **corporate governance issues** in the ethics chapter, the chapter on investor protection, and the *Focus on Ethics* feature at the end of Unit Six. Finally, each chapter includes a **Question of Ethics** case problem that provides a modern-day example of the kinds of ethical issues faced by businesspersons and explores the ways that courts can resolve them.

➤ **More on the Sarbanes-Oxley Act of 2002**

In a number of places in this text, we discuss the Sarbanes-Oxley Act of 2002 and the corporate scandals that led to the passage of that legislation. For example, Chapter 4 contains a section examining the requirements of the Sarbanes-Oxley Act relating to confidential reporting systems. In Chapter 29, we discuss this act in the context of securities law and present an exhibit (Exhibit 29-4) containing some of the key provisions of the act relating to corporate accountability with respect to securities transactions.

Because the Sarbanes-Oxley Act is a topic of significant concern in today's business climate, we include excerpts and explanatory comments on the act as Appendix E. Students and instructors alike will find it useful to have the provisions of the act immediately available for reference.

THE LEGAL ENVIRONMENT OF BUSINESS ON THE WEB

For the Eighth Edition of *The Legal Environment of Business*, we offer a Companion Web site so that users can easily locate the resources they seek.

Resources at *The Legal Environment of Business* Web Site

When you visit www.cengage.com/blaw/cross, you will find a broad array of teaching/learning resources, including the following:

- **Sample answers** to the *Case Problem with Sample Answer*, which appears in the *Questions and Case Problems* section at the end of every chapter. This problem/answer set is designed to help your students learn how to answer case problems by acquainting them with model answers to selected problems. In addition, we offer the answers to the hypothetical *Questions with Sample Answers* on the Web site, as well as in the text (Appendix F).
- **Videos** referenced in the *Video Questions* that appear in selected chapters.
- **Internet exercises** for every chapter in the text (at least two per chapter). These exercises have been refocused to provide more practical information to legal environment of business students on topics covered in the chapters and to acquaint students with the resources that are available online.
- **Interactive quizzes** for every chapter in this text.
- **Legal reference materials** including a “Statutes” page that offers links to the full text of selected statutes referenced in the text, a Spanish glossary, and links to other important legal resources available for free on the Web.
- **Law on the Web** features that provide links to URLs that discuss topics related to each chapter in the text.
- **Link to our Business Law Digital Video Library** that provides a compendium of more than seventy-five video scenarios (see below).
- **Online Legal Research Guide** that offers complete yet brief guidance to using the Internet and evaluating information obtained from the Internet, as well as hyperlinks to the Web sites discussed.
- **Court case updates** that present summaries of new cases from various legal publications are continually updated and are specifically keyed to chapters in this text.

Business Law Digital Video Library

Video Questions appear at the end of selected chapters of this text. In response to popular demand, we have created some new *Video Questions* for this edition. Each of these questions directs students to the text’s Web site at www.cengage.com/blaw/cross to view a video relevant to a topic covered in the chapter. This instruction is followed by a series of questions based on the video.

The videos can be used for homework assignments, discussion starters, or classroom demonstrations, and

are useful for generating student interest. Some of the new videos are clips from actual movies or television series, such as *Field of Dreams*, *Midnight Run*, and *Mary Tyler Moore*. Others are from a new Real World Legal series of videos. By watching a video and answering the questions, students will gain an understanding of how the legal concepts they have studied in the chapter apply to the real-life situation portrayed in the video.

The videos are part of our Business Law Digital Video Library. An access code for the videos can be packaged with each new copy of this textbook for no additional charge. If Business Law Digital Video Library access did not come packaged with the textbook, students can purchase it online at www.cengage.com/blaw/dvl.

Suggested answers for all of the Video Questions are given in both the Instructor’s Manual and the Answers Manual that accompany this text.

THE MOST COMPLETE SUPPLEMENTS PACKAGE AVAILABLE TODAY

This edition of *The Legal Environment of Business* is accompanied by a vast number of teaching and learning supplements. We have already mentioned CengageNOW, Aplia, CourseMate, and the supplemental resources available on the text’s Web site at www.cengage.com/blaw/cross. In addition, the complete teaching/learning package for the Eighth Edition contains numerous other supplements, including those listed below. For further information on *The Legal Environment of Business* teaching/learning package, contact your local sales representative or visit the text’s Web site.

Printed Supplements

- **Instructor’s Manual**—Includes sections titled “Additional Cases Addressing This Issue” at the end of selected case synopses. (Also available on the *Instructor’s Resource CD-ROM*, or IRCD.)
- **Study Guide**—Includes essay questions and sample CPA exam questions.
- **Two comprehensive Test Banks**—Offers a complete set of questions for every chapter to provide instructors with even greater flexibility in teaching. *Test Bank 1* and *Test Bank 2* each contain multiple-choice questions with answers, true/false questions with answers,

and two short essay questions per chapter. Additionally, there is one question for every *Shifting Legal Priorities for Business* and *Insight into Ethics* feature, and there are two multiple-choice questions for each *Focus on Ethics*. (Also available on the IRCD.)

- **Answers to Questions and Case Problems and Alternate Problem Sets with Answers**—Provides answers to all questions presented in the text, including the questions in each *Focus on Ethics*, the *Critical Thinking* questions concluding the *Insight into Ethics* feature, and alternate problem sets. (Also available on the IRCD.)

Software, Video, and Multimedia Supplements

- **Instructor's Resource CD-ROM (IRCD)**—The IRCD includes the following supplements: *Instructor's Manual*, *Answers Manual*, *Test Bank 1* and *Test Bank 2*, Case-Problem Cases, Case Printouts, Lecture Outline System, PowerPoint slides, ExamView, *Instructor's Manual* for the *Drama of the Law* video series, *Handbook of Landmark Cases and Statutes in Business Law and the Legal Environment*, *Handbook on Critical Thinking in Business Law and the Legal Environment*, and *A Guide to Personal Law*.
- **ExamView Testing Software** (also available on the IRCD).
- **Lecture Outline System** (also available on the IRCD).
- **PowerPoint slides** (also available on the IRCD).
- **WebTutor Advantage and WebTutor Toolbox**—Feature chat, discussion groups, testing, student progress tracking, and legal environment of business course materials.
- **Case-Problem Cases** (available only on the IRCD).
- **Transparency acetates** (available only on the IRCD).
- **Westlaw®**—Ten free hours for qualified adopters.
- **Business Law Digital Video Library**—Provides access to more than seventy-five videos, including the *Drama of the Law* videos and video clips from Hollywood movies. Access to our Business Law Digital Video Library is available in an optional package with each new text at no additional cost. If this access did not come with the textbook, your students can purchase it at www.cengage.com/blaw/dvl.

FOR USERS OF THE SEVENTH EDITION

First of all, we want to thank you for helping make *The Legal Environment of Business* the best-selling legal environment text in America today. Second, we want to make you aware of the numerous additions and changes that we have made in this new edition—many in response to comments from reviewers. For example, we have added more examples and new *Case in Point* features, and have incorporated the latest United States Supreme Court decisions throughout the text as appropriate.

Significantly Revised Chapters

Every chapter of the Eighth Edition has been revised as necessary to incorporate new developments in the law or to streamline the presentations. New trends in the law are also addressed in the cases and special features of the Eighth Edition. Other major changes and additions for this edition include the following:

- **Chapter 4 (Ethics and Business Decision Making)**—This chapter has been significantly revised, and a new section on the ethical transgressions of financial institutions discusses well-known companies, such as American International Group (AIG). The chapter also provides step-by-step guidance on making ethical business decisions, materials on global business ethics, and a new video question concerning marketing strategies in the pharmaceutical industry. The 2010 United States Supreme Court case involving Jeffrey Skilling, former CEO of Enron Corporation, is presented in the chapter. Other topics include recent bribery scandals, bribery by foreign companies, and Internet attacks on corporate reputations. A new *Shifting Legal Priorities for Business* feature titled *Corporate Social Responsibility May Mean Outbehaving the Competition* has been added.
- **Chapter 5 (Constitutional Law)**—This chapter has been thoroughly revised and updated to be more business oriented. New *Case in Point* examples have been added throughout, and the privacy materials have been updated to include a new subsection on pretexting.
- **Chapter 6 (Administrative Law)**—This chapter has been reworked to underscore the practical significance of administrative law for businesspersons. We present the United States Supreme

Court case on fleeting expletives in this chapter and an *Insight into Ethics* titled *Should Pharmaceutical Companies Be Allowed to Tweet?*

- Chapter 7 (Criminal Law and Cyber Crime)—This chapter has been streamlined and updated. We have added discussions of criminal negligence and strict liability. A *Shifting Legal Priorities for Business* feature titled *Prosecuting White-Collar Crime with Honest-Services Fraud Law* includes a discussion of how the Supreme Court limited the application of this federal law in 2010.
- Chapter 11 (Sales, Leases, and E-Contracts)—We have streamlined and simplified our coverage of the Uniform Commercial Code. We have added numerous new *Case in Point* features and examples throughout the chapter to increase student comprehension. We have also expanded our discussion of international sales and lease contracts.
- Chapter 12 (Torts and Cyber Torts)—Our torts coverage has been revised to be more up to date and business oriented. We have added new materials on tort reform, cyber torts, spam, and the U.S. Safe Web Act. We also have reorganized the presentation of causation and damages and included additional coverage on comparative negligence, as well as a new *Insight into Ethics* feature titled *Some Consequences of Caps on Medical Malpractice Awards*.
- Chapter 14 (Intellectual Property and Internet Law)—The materials on intellectual property rights have been thoroughly revised and updated to reflect the most current laws and trends. We have reworked our discussion of descriptive, generic, and suggestive trademarks for clarity and included an updated discussion of software and business process patents. We have also updated the materials on copyrights in digital information and added a description of cloud computing. The chapter also includes updates on international treaties protecting intellectual property and a *Shifting Legal Priorities for Business* feature on the Anti-Counterfeiting Trade Agreement.
- Chapter 15 (Creditor-Debtor Relations and Bankruptcy)—This chapter has been revised to be more up to date and streamlined to focus on materials that students need to know. The bankruptcy law materials have been substantially revised and include updated dollar amounts of various provisions of the Bankruptcy Code.
- Chapter 16 (Mortgages and Foreclosures after the Recession)—This chapter is entirely new to this edition and provides a timely look at the mortgage crisis, predatory lending practices, and the laws enacted to address some of the problems that became evident during the recession.
- Chapter 19 (Corporations)—This chapter has been substantially revised and updated to provide more practical information and recent examples. We have reworked our coverage to reflect modern trends in corporate law. The chapter includes a new *Shifting Legal Priorities for Business* feature titled *The Latest Recession Re-Ignites the Internet Taxation Debate*. We have updated the materials on the Sarbanes-Oxley Act and added discussions of new e-proxy rules and shareholder access.
- Chapter 21 (Employment Relationships), Chapter 22 (Employment Discrimination), and Chapter 23 (Immigration and Labor Law)—These three chapters covering employment law have been thoroughly updated to include discussions of legal issues facing employers today.
- Chapter 21 includes a new section on layoffs and the WARN Act and covers recent amendments to the FMLA. We have updated minimum wage figures, Social Security rates, and Medicare percentages, and include current information on privacy rights and genetic testing. The chapter also includes a new *Shifting Legal Priorities for Business* feature titled *The Online Creation and Modification of Employment Contracts*.
- Chapter 22 includes the latest developments in age and disability discrimination and equal pay legislation. We discuss relevant United States Supreme Court decisions and have reworked the text to simplify and add clarity.
- Chapter 23 includes coverage of labor law and new material on immigration law, which is of increasing importance to employers.
- Chapter 24 (Consumer Protection)—The materials on food labeling and credit cards have been significantly updated. This chapter discusses the Consumer Financial Protection Bureau, a new agency established by the 2010 financial reform package. A *Shifting Legal Priorities for Business* feature titled *New Health-Care Law Requires Caloric Information* is also included.
- Chapter 25 (Environmental Law)—The materials on air pollution and water pollution have been updated. New subsections discuss how environmental self-audits can help businesses minimize their liability and explain the innocent landowner, or third party, defense to Superfund liability.

- Chapter 26 (Real Property and Land-Use Control)—This chapter has been revised to include more discussion of zoning and includes a new *Shifting Legal Priorities for Business* feature titled *The Law of Building “Green”—Sustainable Real Estate Development*.
- Chapter 28 (Antitrust and Restraint of Trade)—We have added new examples and coverage of leading cases throughout the chapter, particularly in the discussions of price fixing, relevant product market, and relevant geographic market.
- Chapter 29 (Investor Protection and Corporate Governance)—The materials on securities law and investor protection were revamped to make this difficult topic more understandable to students. The chapter now includes revised materials on the registration process to account for well-known seasoned issuers and updated coverage of securities fraud.

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Our production manager and designer, Bill Stryker, made sure that we came out with an error-free, visually attractive Eighth Edition. We appreciate his efforts more than he can ever imagine. We are also indebted to the staff at Parkwood Composition, our compositor. Their ability to generate the pages for this text quickly and accurately made it possible for us to meet our ambitious printing schedule. We also wish to thank Joy Westberg for her creation of the visual preface.

We especially wish to thank Katherine Marie Silsbee for her management of the entire project, as well as for the application of her superb research and editorial skills. We also thank Lavina Leed Miller for her case research and Roger Meiners for his assistance in finding new case problems. We also wish to thank William Eric Hollowell, who co-

authored the *Instructor's Manual*, the *Study Guide*, and the two *Test Banks*, for his excellent research efforts. We were fortunate enough to have the copyediting of Jeanne Yost and the proofreading services of Susan Bradley and Pat Lewis. We are grateful for the efforts of Vickie Reiersen and Roxanna Lee for their proofreading and other assistance, which helped to ensure an accurate text. Finally, we thank Suzanne Jasin of K & M Consulting for her many special efforts on this project.

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Through the years, we have enjoyed an ongoing correspondence with many of you who have found points on which you wish to comment. We continue to welcome all comments and promise to respond promptly. By incorporating your ideas, we can continue to write a legal environment of business text that is best for you and best for your students.

F. B. C.
R. L. M.

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Preface to the Student



Welcome to the legal environment of business. You are about to embark on the study of one of the more important topics you can master in today's changing world. A solid understanding of the legal environment of business will, of course, help you if you are going into the world of business. If you decide on a career in accounting, economics, finance, political science, or history, understanding how the legal environment works is crucial.

Moreover, in your role as a consumer, you will be faced with some legal issues throughout your lifetime—renting an apartment, buying a house, obtaining a mortgage, and leasing a car, to mention only a few. In your role as an employee (if you don't go into business for yourself), you will need to know what rights you have and what rights you don't have. Even when you contemplate marriage, you will be faced with legal issues.

WHAT YOU WILL FIND IN THIS TEXT

As you thumb through the pages in this text, you will see that we have tried to make your study of the legal environment of business as efficient and enjoyable as possible. To this end, you will find the following aids on how to:

- **Master Terminology**—through *Key Terms* that are boldfaced, listed at the end of each chapter, and explained fully in the *Glossary* at the end of the book.
- **Understand Concepts**—through numerous *Concept Summaries* and *exhibits*.
- **Observe the Law in the Context of the Real World**—through new *Case in Point* examples within each chapter's text and the *Reviewing* feature at the end of every chapter.
- **See How Legal Issues Can Arise**—through *Video Questions* based on Web-available short videos, including some from Hollywood movies.
- **Figure out How the Law Is Evolving**—through a new feature called *Shifting Legal Priorities for Business*.

- **Determine How the Law Applies to Business Managers**—through the new *Managerial Implications* sections that appear in selected features and cases.
- **Gain Insight into How the Law Affects or Is Affected by Ethical Issues**—through the *Insight into Ethics* feature.

The above list, of course, is representative only. You will understand much more of what the legal environment of business is about as you read through the *court cases* presented in this book, including *Extended Case excerpts*, which will give you a feel for how the courts really decide cases. We present them in the courts' language (and provide bracketed definitions to clarify certain terms in the opinion).

IMPROVE YOUR ABILITY TO PERFORM LEGAL REASONING AND ANALYSIS

Although the legal environment of business may seem to be a mass of facts, your goal in taking this course should also be an increased ability to use legal reasoning and analysis to figure out how legal situations will be resolved. To this end, you will find the following key learning features to assist you in mastering legal reasoning and analysis:

- **Find and Analyze Case Law**—In Chapter 1, you will find a section with this title that explains:
 - Legal citations.
 - The standard elements of a case.
 - The different types of opinions a court can issue.
 - How to read and understand cases.
- **Brief a Case**—In Appendix A, you will see how to brief and analyze case problems. This explanation will teach you how to break down the elements of a case and will improve your ability to answer the *Case Problems* in each chapter.

- **Questions with Sample Answers**—At the end of each chapter, there is one hypothetical factual scenario that presents a legal question for which you can access a *sample answer* in Appendix F (and also on the text's Web site). This allows you to practice and to see if you are answering the hypothetical questions correctly.
- **Case Problems with Sample Answers**—Each chapter has a series of chapter-ending *Case Problems*. You can find an answer to one problem in each chapter on this book's Companion Student Web site (discussed below). You can easily compare your answer to the court's opinion in each real case.
- **Impact of This Case on Today's Law**—Each case that is considered a landmark concludes with a short section that explains the relevance of older case law to the way courts reason today.
- **What If the Facts Were Different?**—This section, found at the end of selected cases, encourages you to think about how the outcome of a case might be different if the facts were altered.
- **The Ethical [E-Commerce, Global, or Legal Environment] Dimension**—Every case in this text concludes with two critical-thinking questions. These *Dimension* questions ask you to explore the law in a variety of contexts to help you meet the specific curriculum requirements for legal environment students.
- **Managerial Implications**—When a case has particular importance for business managers, we point out its significance in these special sections.

THE COMPANION STUDENT WEB SITE

The Companion Student Web site at www.cengage.com/blaw/cross provides you with short videos on various legal topics and with sample answers to selected case problems. In addition, you will find the following:

- **Interactive quizzes** for every chapter.
- **Appendix A: How to Brief and Analyze Case Problems** that will help you analyze

cases. This useful appendix in the book can also be downloaded from the Web site.

- **Legal reference materials** including a "Statutes" page that offers links to the full text of selected statutes referenced in the text, a Spanish glossary, and links to other important legal resources available free on the Web.
- **Internet exercises** for every chapter in the text (at least two per chapter) that help you learn how to research the law online.
- **Law on the Web** features that provide links to Web sites that discuss topics related to each chapter in the text.
- **Online Legal Research Guide** that offers complete yet brief guidance to using the Internet and evaluating information obtained from the Internet, as well as hyperlinks to the Web sites discussed.
- **Court case updates** that follow up on decisions presented in the text.

INTERACTIVE ASSIGNMENTS ON THE WEB

Some of you may have instructors who provide assignments using either of our interactive Web-based systems: **Aplia or CengageNOW for The Legal Environment of Business: Interactive Assignment System**.

Both Aplia and CengageNOW allow you to improve your mastery of legal concepts and terminology, legal reasoning and analysis, and much more. Your instructor will give you further information if she or he decides to use a Web-based system.

Of course, whether or not you are using Aplia or CengageNOW, you will wish to consider purchasing the *Study Guide*, which can help you get a better grade in your course (see the inside cover for details).

The law is all around you—and will be for the rest of your life. We hope that you begin your first course in the legal environment of business with the same high degree of excitement that we, the authors, always have when we work on improving this text, now in its Eighth Edition. *The Legal Environment of Business* has withstood the test of time—hundreds of thousands of students before you have already used and benefited from it.

Dedication

To my parents and sisters.

F. B. C.

To Dave VanHoose,

You represent the highest
level of professionalism
and dedication to academic
standards that I have ever
encountered.

Thanks,

R. L. M.

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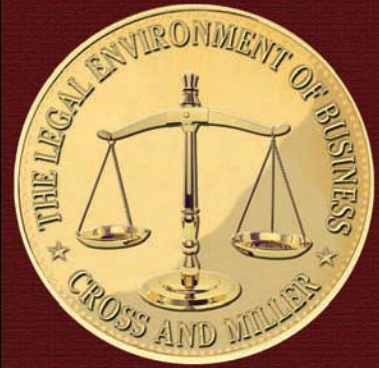
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APPENDIX A



How to Brief Cases and Analyze Case Problems



How to Brief Cases

To fully understand the law with respect to business, you need to be able to read and understand court decisions. To make this task easier, you can use a method of case analysis that is called *briefing*. There is a fairly standard procedure that you can follow when you “brief” any court case. You must first read the case opinion carefully. When you feel you understand the case, you can prepare a brief of it.

Although the format of the brief may vary, typically it will present the essentials of the case under headings such as those listed below.

1. **Citation.** Give the full citation for the case, including the name of the case, the date it was decided, and the court that decided it.
2. **Facts.** Briefly indicate (a) the reasons for the lawsuit; (b) the identity and arguments of the plaintiff(s) and defendant(s), respectively; and (c) the lower court’s decision—if appropriate.
3. **Issue.** Concisely phrase, in the form of a question, the essential issue before the court. (If more than one issue is involved, you may have two—or even more—questions here.)
4. **Decision.** Indicate here—with a “yes” or “no,” if possible—the court’s answer to the question (or questions) in the *Issue* section above.
5. **Reason.** Summarize as briefly as possible the reasons given by the court for its decision (or decisions) and the case or statutory law relied on by the court in arriving at its decision.

An Example of a Briefed Sample Court Case

As an example of the format used in briefing cases, we present here a briefed version of the sample court case that was presented in Chapter 1 in Exhibit 1–6 on pages 23–25.

SINGER v. RAEMISCH

United States Court of Appeals, Seventh Circuit,
593 F.3d 529 (2010).

FACTS Kevin Singer, an inmate at Wisconsin’s Waupun Correctional Institution, is a devoted player of Dungeons and Dragons (D&D), a fantasy role-playing game. In November 2004, the prison’s gang expert received an anonymous letter stating that Singer and three other inmates were trying to recruit others to join a “gang” dedicated to playing D&D. Prison officials searched Singer’s cell, confiscated all of his D&D materials, and prohibited him and other inmates from playing D&D. Singer filed a suit in a federal district court against the prison, alleging, in part, that the officials’ actions violated his right to free speech under the First Amendment to the U.S. Constitution. The court concluded that the D&D ban was rationally related to a legitimate government interest and issued a judgment in the prison’s favor. Singer appealed to the U.S. Court of Appeals for the Seventh Circuit.

ISSUE Can a prison, consistent with the First Amendment, restrict inmates’ speech, when that restriction is reasonably viewed as promoting prison security?

DECISION Yes. The U.S. Court of Appeals for the Seventh Circuit affirmed the lower court’s judgment.

REASON The court acknowledged that the prison’s D&D ban was a restriction of Singer’s and the other inmates’ constitutional rights. But the court explained, “Prison regulations that restrict inmates’ constitutional rights are nevertheless valid if they are reasonably related to legitimate penological interests,”¹ which concern prison management and the treatment of inmates. In this case, the

1. *Penological interests* relate to the branch of criminology dealing with prison management and the treatment of offenders.

D&D ban “bears a rational relationship” to those interests. The ban promotes prison security because games such as D&D can “mimic the organization of gangs and lead to their development.” The court pointed out that this conclusion was based on the prison gang expert’s testimony that D&D can “foster an inmate’s obsession with escaping from the real life, correctional environment, fostering hostility, violence and escape behavior.” This “can compromise not only the inmate’s rehabilitation and effects of positive programming but also endanger the public and jeopardize the safety and security of the institution.”

Review of Sample Court Case

Here, we provide a review of the briefed version to indicate the kind of information that is contained in each section.

CITATION The name of the case is *Singer v. Raemisch*. Singer is the plaintiff; Raemisch is the defendant. The U.S. Court of Appeals for the Seventh Circuit decided this case in 2010. The citation states that this case can be found in Volume 593 of the *Federal Reporter, Third Series*, on page 529.

FACTS The *Facts* section identifies the plaintiff and the defendant, describes the events leading up to this suit, the allegations made by the plaintiff in the initial suit, and the lower court’s ruling and the party appealing (because this case is a decision of one of the federal appellate courts). The appellant’s contention on appeal is also sometimes included here.

ISSUE The *Issue* section presents the central issue (or issues) decided by the court. In this case, the U.S. Court of Appeals for the Seventh Circuit considers whether a prison can restrict the speech of its inmates if that restriction is reasonably viewed as promoting prison security.

DECISION The *Decision* section includes the court’s decision on the issues before it. The decision reflects the opinion of the judge or justice hearing the case. Decisions by appellate courts frequently are phrased in reference to the lower court’s decision. That is, the appellate court may “affirm” the lower court’s ruling or “reverse” it. Here, the court determined that the belief of the prison officials with respect to the effect of unrestricted speech was reasonable. The officials thought that unrestricted speech would compromise prison security. On that basis, the prison could legitimately ban the playing of D&D. The appellate court affirmed the ruling in the prison’s favor.

REASON The *Reason* section includes references to the relevant laws and legal principles that were applied in coming to the conclusion arrived at in the case before the court. The relevant law here included the principle that prison regulations restricting inmates’ constitutional rights are valid if they reasonably relate to legitimate penological interests. This section also explains the court’s application of the law to the facts in this case.

Analyzing Case Problems

In addition to learning how to brief cases, students of business law and the legal environment also find it helpful to know how to analyze case problems. Part of the study of business law and the legal environment usually involves analyzing case problems, such as those included in this text at the end of each chapter.

For each case problem in this book, we provide the relevant background and facts of the lawsuit and the issue before the court. When you are assigned one of these problems, your job will be to determine how the court should decide the issue, and why. In other words, you will need to engage in legal analysis and reasoning. Here, we offer some suggestions on how to make this task less daunting. We begin by presenting a sample problem:

While Janet Lawson, a famous pianist, was shopping in Quality Market, she slipped and fell on a wet floor in one of the aisles. The floor had recently been mopped by one of the store’s employees, but there were no signs warning customers that the floor in that area was wet. As a result of the fall, Lawson injured her right arm and was unable to perform piano concerts for the next six months. Had she been able to perform the scheduled concerts, she would have earned approximately \$60,000 over that period of time. Lawson sued Quality Market for this amount, plus another \$10,000 in medical expenses. She claimed that the store’s failure to warn customers of the wet floor constituted negligence and therefore the market was liable for her injuries. Will the court agree with Lawson? Discuss.

Understand the Facts

This may sound obvious, but before you can analyze or apply the relevant law to a specific set of facts, you must clearly understand those facts. In other words, you should read through the case problem carefully—more than once, if necessary—to make sure you understand the identity of the plaintiff(s) and defendant(s) in the case and the progression of events that led to the lawsuit.

In the sample case problem just given, the identity of the parties is fairly obvious. Janet Lawson is the one bringing the suit; therefore, she is the plaintiff. Quality Market, against whom she is bringing the suit, is the defendant. Some of the case problems you may work on have multiple plaintiffs or defendants. Often, it is helpful to use abbreviations for the parties. To indicate a reference to a plaintiff, for example, the *pi* symbol— π —is often used, and a defendant is denoted by a *delta*— Δ —a triangle.

The events leading to the lawsuit are also fairly straightforward. Lawson slipped and fell on a wet floor, and she contends that Quality Market should be liable for her injuries because it was negligent in not posting a sign warning customers of the wet floor.

When you are working on case problems, realize that the facts should be accepted as they are given. For example, in our sample problem, it should be accepted that the floor was wet and that there was no sign. In other words, avoid making conjectures, such as “Maybe the floor wasn’t too

wet,” or “Maybe an employee was getting a sign to put up,” or “Maybe someone stole the sign.” Questioning the facts as they are presented only adds confusion to your analysis.

Legal Analysis and Reasoning

Once you understand the facts given in the case problem, you can begin to analyze the case. Recall from Chapter 1 that the IRAC method is a helpful tool to use in the legal analysis and reasoning process. IRAC is an acronym for Issue, Rule, Application, Conclusion. Applying this method to our sample problem would involve the following steps:

1. First, you need to decide what legal **issue** is involved in the case. In our sample case, the basic issue is whether Quality Market’s failure to warn customers of the wet floor constituted negligence. As discussed in Chapter 12, negligence is a *tort*—a civil wrong. In a tort lawsuit, the plaintiff seeks to be compensated for another’s wrongful act. A defendant will be deemed negligent if he or she breached a duty of care owed to the plaintiff and the breach of that duty caused the plaintiff to suffer harm.
2. Once you have identified the issue, the next step is to determine what **rule of law** applies to the issue. To make this determination, you will want to review carefully the text of the chapter in which the relevant rule of law for the problem appears. Our sample case problem involves the tort of negligence, which is covered in Chapter 12. The applicable rule of law is the tort law principle that business owners owe a duty to exercise reasonable care to protect their customers (“business invitees”). Reasonable care, in this context, includes either removing—or warning customers of—*foreseeable* risks about which the owner *knew* or *should have known*. Business owners need not warn customers of “open and obvious” risks, however. If a business owner breaches

this duty of care (fails to exercise the appropriate degree of care toward customers), and the breach of duty causes a customer to be injured, the business owner will be liable to the customer for the customer’s injuries.

3. The next—and usually the most difficult—step in analyzing case problems is the **application** of the relevant rule of law to the specific facts of the case you are studying. In our sample problem, applying the tort law principle just discussed presents few difficulties. An employee of the store had mopped the floor in the aisle where Lawson slipped and fell, but no sign was present indicating that the floor was wet. That a customer might fall on a wet floor is clearly a foreseeable risk. Therefore, the failure to warn customers about the wet floor was a breach of the duty of care owed by the business owner to the store’s customers.
4. Once you have completed Step 3 in the IRAC method, you should be ready to draw your **conclusion**. In our sample problem, Quality Market is liable to Lawson for her injuries, because the market’s breach of its duty of care caused Lawson’s injuries.

The fact patterns in the case problems presented in this text are not always as simple as those presented in our sample problem. Often, for example, a case has more than one plaintiff or defendant. A case may also involve more than one issue and have more than one applicable rule of law. Furthermore, in some case problems the facts may indicate that the general rule of law should not apply. For example, suppose that a store employee advised Lawson not to walk on the floor in the aisle because it was wet, but Lawson decided to walk on it anyway. This fact could alter the outcome of the case because the store could then raise the defense of assumption of risk (see Chapter 12). Nonetheless, a careful review of the chapter should always provide you with the knowledge you need to analyze the problem thoroughly and arrive at accurate conclusions.



APPENDIX B



The Constitution of the United States

Preamble

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

Article I

Section 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section 2. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

Section 3. The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.

Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.

No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust, or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment, and Punishment, according to Law.

Section 4. The Times, Places and Manner of holding Elections for Senators and Representatives, shall be

prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

Section 5. Each House shall be the Judge of the Elections, Returns, and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behavior, and, with the Concurrence of two thirds, expel a Member.

Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

Section 6. The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

Section 7. All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to the House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined

by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return in which Case it shall not be a Law.

Every Order, Resolution, or Vote, to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

Section 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish a uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Section 9. The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

No Bill of Attainder or ex post facto Law shall be passed.

No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.

No Tax or Duty shall be laid on Articles exported from any State.

No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State be obliged to enter, clear, or pay Duties in another.

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

Section 10. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in

time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

Article II

Section 1. The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows:

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress; but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; A quorum for this Purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greater Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice President.

The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

No person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

In Case of the Removal of the President from Office, or of his Death, Resignation or Inability to discharge

the Powers and Duties of the said Office, the same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation: "I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

Section 2. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

Section 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

Section 4. The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

Article III

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section 3. Treason against the United States, shall consist only in levying War against them, or, in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attained.

Article IV

Section 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Section 2. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

Section 3. New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

Section 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

Article V

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

Article VI

All Debts contracted and Engagements entered into, before the Adoption of this Constitution shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious

Test shall ever be required as a Qualification to any Office or public Trust under the United States.

Article VII

The Ratification of the Conventions of nine States shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.

Amendment I [1791]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assembly, and to petition the Government for a redress of grievances.

Amendment II [1791]

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

Amendment III [1791]

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

Amendment IV [1791]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V [1791]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI [1791]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment VII [1791]

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise

re-examined in any Court of the United States, than according to the rules of the common law.

Amendment VIII [1791]

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment IX [1791]

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment X [1791]

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Amendment XI [1798]

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Amendment XII [1804]

The Electors shall meet in their respective states, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;—The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President.—The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a

majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

Amendment XIII [1865]

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

Amendment XIV [1868]

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection

or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Amendment XV [1870]

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

Amendment XVI [1913]

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

Amendment XVII [1913]

Section 1. The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

Section 2. When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided*, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

Section 3. This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

Amendment XVIII [1919]

Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

Section 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

Amendment XIX [1920]

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

Amendment XX [1933]

Section 1. The terms of the President and Vice President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3d day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

Section 2. The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.

Section 3. If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President. If the President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.

Section 4. The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the Senate may choose a Vice President whenever the right of choice shall have devolved upon them.

Section 5. Sections 1 and 2 shall take effect on the 15th day of October following the ratification of this article.

Section 6. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission.

Amendment XXI [1933]

Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

Section 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

Amendment XXII [1951]

Section 1. No person shall be elected to the office of the President more than twice, and no person who has

held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of President more than once. But this Article shall not apply to any person holding the office of President when this Article was proposed by the Congress, and shall not prevent any person who may be holding the office of President, or acting as President, during the term within which this Article becomes operative from holding the office of President or acting as President during the remainder of such term.

Section 2. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission to the States by the Congress.

Amendment XXIII [1961]

Section 1. The District constituting the seat of Government of the United States shall appoint in such manner as the Congress may direct:

A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State, but in no event more than the least populous state; they shall be in addition to those appointed by the states, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a state; and they shall meet in the District and perform such duties as provided by the twelfth article of amendment.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

Amendment XXIV [1964]

Section 1. The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States, or any State by reason of failure to pay any poll tax or other tax.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

Amendment XXV [1967]

Section 1. In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

Section 2. Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.

Section 3. Whenever the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President.

Section 4. Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive department or of such other body as Congress may by law provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.

Amendment XXVI [1971]

Section 1. The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

Amendment XXVII [1992]

No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened.



APPENDIX C

The Uniform Commercial Code (Excerpts)

(Adopted in fifty-two jurisdictions—all fifty States, although Louisiana has adopted only Articles 1, 3, 4, 7, 8, and 9; the District of Columbia; and the Virgin Islands.) The Uniform Commercial Code consists of the following articles; however, this appendix only features Articles 2 & 2A.

Art.

1. General Provisions
2. Sales
- 2A. Leases
3. Negotiable Instruments
4. Bank Deposits and Collections
- 4A. Funds Transfers
5. Letters of Credit
6. Repealer of Article 6—Bulk Transfers and [Revised] Article 6—Bulk Sales
7. Warehouse Receipts, Bills of Lading and Other Documents of Title
8. Investment Securities
9. Secured Transactions
10. Effective Date and Repealer
11. Effective Date and Transition Provisions

Article 2

SALES

Part 1 Short Title, General Construction and Subject Matter

§ 2-101. Short Title.

This Article shall be known and may be cited as Uniform Commercial Code—Sales.

§ 2-102. Scope; Certain Security and Other Transactions Excluded From This Article.

Unless the context otherwise requires, this Article applies to transactions in goods; it does not apply to any transaction

which although in the form of an unconditional contract to sell or present sale is intended to operate only as a security transaction nor does this Article impair or repeal any statute regulating sales to consumers, farmers or other specified classes of buyers.

§ 2-103. Definitions and Index of Definitions.

- (1) In this Article unless the context otherwise requires
 - (a) “Buyer” means a person who buys or contracts to buy goods.
 - (b) “Good faith” in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.
 - (c) “Receipt” of goods means taking physical possession of them.
 - (d) “Seller” means a person who sells or contracts to sell goods.
- (2) Other definitions applying to this Article or to specified Parts thereof, and the sections in which they appear are:
 - “Acceptance”. Section 2-606.
 - “Banker’s credit”. Section 2-325.
 - “Between merchants”. Section 2-104.
 - “Cancellation”. Section 2-106(4).
 - “Commercial unit”. Section 2-105.
 - “Confirmed credit”. Section 2-325.
 - “Conforming to contract”. Section 2-106.
 - “Contract for sale”. Section 2-106.
 - “Cover”. Section 2-712.
 - “Entrusting”. Section 2-403.
 - “Financing agency”. Section 2-104.
 - “Future goods”. Section 2-105.
 - “Goods”. Section 2-105.
 - “Identification”. Section 2-501.
 - “Installment contract”. Section 2-612.
 - “Letter of Credit”. Section 2-325.
 - “Lot”. Section 2-105.
 - “Merchant”. Section 2-104.
 - “Overseas”. Section 2-323.
 - “Person in position of seller”. Section 2-707.
 - “Present sale”. Section 2-106.
 - “Sale”. Section 2-106.
 - “Sale on approval”. Section 2-326.

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"Sale or return". Section 2-326.

"Termination". Section 2-106.

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

"Check". Section 3-104.

"Consignee". Section 7-102.

"Consignor". Section 7-102.

"Consumer goods". Section 9-109.

"Dishonor". Section 3-507.

"Draft". Section 3-104.

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

As amended in 1994 and 1999.

§ 2-104. Definitions: "Merchant"; "Between Merchants"; "Financing Agency".

(1) "Merchant" means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.

(2) "Financing agency" means a bank, finance company or other person who in the ordinary course of business makes advances against goods or documents of title or who by arrangement with either the seller or the buyer intervenes in ordinary course to make or collect payment due or claimed under the contract for sale, as by purchasing or paying the seller's draft or making advances against it or by merely taking it for collection whether or not documents of title accompany the draft. "Financing agency" includes also a bank or other person who similarly intervenes between persons who are in the position of seller and buyer in respect to the goods (Section 2-707).

(3) "Between merchants" means in any transaction with respect to which both parties are chargeable with the knowledge or skill of merchants.

§ 2-105. Definitions: Transferability; "Goods"; "Future" Goods; "Lot"; "Commercial Unit".

(1) "Goods" means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Article 8) and things in action. "Goods" also includes the unborn young of animals and growing crops and other identified things attached to realty as described in the section on goods to be severed from realty (Section 2-107).

(2) Goods must be both existing and identified before any interest in them can pass. Goods which are not both existing and identified are "future" goods. A purported present sale of future goods or of any interest therein operates as a contract to sell.

(3) There may be a sale of a part interest in existing identified goods.

(4) An undivided share in an identified bulk of fungible goods is sufficiently identified to be sold although the quantity of the bulk is not determined. Any agreed proportion of such a bulk or any quantity thereof agreed upon by number, weight or other measure may to the extent of the seller's interest in the bulk be sold to the buyer who then becomes an owner in common.

(5) "Lot" means a parcel or a single article which is the subject matter of a separate sale or delivery, whether or not it is sufficient to perform the contract.

(6) "Commercial unit" means such a unit of goods as by commercial usage is a single whole for purposes of sale and division of which materially impairs its character or value on the market or in use. A commercial unit may be a single article (as a machine) or a set of articles (as a suite of furniture or an assortment of sizes) or a quantity (as a bale, gross, or carload) or any other unit treated in use or in the relevant market as a single whole.

§ 2-106. Definitions: "Contract"; "Agreement"; "Contract for Sale"; "Sale"; "Present Sale"; "Conforming" to Contract; "Termination"; "Cancellation".

(1) In this Article unless the context otherwise requires "contract" and "agreement" are limited to those relating to the present or future sale of goods. "Contract for sale" includes both a present sale of goods and a contract to sell goods at a future time. A "sale" consists in the passing of title from the seller to the buyer for a price (Section 2-401). A "present sale" means a sale which is accomplished by the making of the contract.

(2) Goods or conduct including any part of a performance are "conforming" or conform to the contract when they are in accordance with the obligations under the contract.

(3) "Termination" occurs when either party pursuant to a power created by agreement or law puts an end to the contract otherwise than for its breach. On "termination" all obligations which are still executory on both sides are discharged but any right based on prior breach or performance survives.

(4) "Cancellation" occurs when either party puts an end to the contract for breach by the other and its effect is the same as that of "termination" except that the cancelling party also retains any remedy for breach of the whole contract or any unperformed balance.

§ 2-107. Goods to Be Severed From Realty: Recording.

(1) A contract for the sale of minerals or the like (including oil and gas) or a structure or its materials to be removed from realty is a contract for the sale of goods within this Article if they are to be severed by the seller but until severance a purported present sale thereof which is not effective as a transfer of an interest in land is effective only as a contract to sell.

(2) A contract for the sale apart from the land of growing crops or other things attached to realty and capable of severance without material harm thereto but not described in subsection (1) or of timber to be cut is a contract for the sale

of goods within this Article whether the subject matter is to be severed by the buyer or by the seller even though it forms part of the realty at the time of contracting, and the parties can by identification effect a present sale before severance.

(3) The provisions of this section are subject to any third party rights provided by the law relating to realty records, and the contract for sale may be executed and recorded as a document transferring an interest in land and shall then constitute notice to third parties of the buyer's rights under the contract for sale.

As amended in 1972.

Part 2 Form, Formation and Readjustment of Contract

§ 2-201. Formal Requirements; Statute of Frauds.

(1) Except as otherwise provided in this section a contract for the sale of goods for the price of \$500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing.

(2) Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of subsection (1) against such party unless written notice of objection to its contents is given within ten days after it is received.

(3) A contract which does not satisfy the requirements of subsection (1) but which is valid in other respects is enforceable

(a) if the goods are to be specially manufactured for the buyer and are not suitable for sale to others in the ordinary course of the seller's business and the seller, before notice of repudiation is received and under circumstances which reasonably indicate that the goods are for the buyer, has made either a substantial beginning of their manufacture or commitments for their procurement; or

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

(c) with respect to goods for which payment has been made and accepted or which have been received and accepted (Sec. 2-606).

§ 2-202. Final Written Expression: Parol or Extrinsic Evidence.

Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of

their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented

(a) by course of dealing or usage of trade (Section 1-205) or by course of performance (Section 2-208); and

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

§ 2-203. Seals Inoperative.

The affixing of a seal to a writing evidencing a contract for sale or an offer to buy or sell goods does not constitute the writing a sealed instrument and the law with respect to sealed instruments does not apply to such a contract or offer.

§ 2-204. Formation in General.

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

(2) An agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined.

(3) Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy.

§ 2-205. Firm Offers.

An offer by a merchant to buy or sell goods in a signed writing which by its terms gives assurance that it will be held open is not revocable, for lack of consideration, during the time stated or if no time is stated for a reasonable time, but in no event may such period of irrevocability exceed three months; but any such term of assurance on a form supplied by the offeree must be separately signed by the offeror.

§ 2-206. Offer and Acceptance in Formation of Contract.

(1) Unless other unambiguously indicated by the language or circumstances

(a) an offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances;

(b) an order or other offer to buy goods for prompt or current shipment shall be construed as inviting acceptance either by a prompt promise to ship or by the prompt or current shipment of conforming or nonconforming goods, but such a shipment of nonconforming goods does not constitute an acceptance if the seller seasonably notifies the buyer that the shipment is offered only as an accommodation to the buyer.

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

§ 2-207. Additional Terms in Acceptance or Confirmation.

(1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

(2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:

- (a) the offer expressly limits acceptance to the terms of the offer;
- (b) they materially alter it; or
- (c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

(3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act.

§ 2-208. Course of Performance or Practical Construction.

(1) Where the contract for sale involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection shall be relevant to determine the meaning of the agreement.

(2) The express terms of the agreement and any such course of performance, as well as any course of dealing and usage of trade, shall be construed whenever reasonable as consistent with each other; but when such construction is unreasonable, express terms shall control course of performance and course of performance shall control both course of dealing and usage of trade (Section 1-205).

(3) Subject to the provisions of the next section on modification and waiver, such course of performance shall be relevant to show a waiver or modification of any term inconsistent with such course of performance.

§ 2-209. Modification, Rescission and Waiver.

(1) An agreement modifying a contract within this Article needs no consideration to be binding.

(2) A signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded, but except as between merchants such a requirement on a form supplied by the merchant must be separately signed by the other party.

(3) The requirements of the statute of frauds section of this Article (Section 2-201) must be satisfied if the contract as modified is within its provisions.

(4) Although an attempt at modification or rescission does not satisfy the requirements of subsection (2) or (3) it can operate as a waiver.

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

§ 2-210. Delegation of Performance; Assignment of Rights.

(1) A party may perform his duty through a delegate unless otherwise agreed or unless the other party has a substantial interest in having his original promisor perform or control the acts required by the contract. No delegation of performance relieves the party delegating of any duty to perform or any liability for breach.

(2) Except as otherwise provided in Section 9-406, unless otherwise agreed, all rights of either seller or buyer can be assigned except where the assignment would materially change the duty of the other party, or increase materially the burden or risk imposed on him by his contract, or impair materially his chance of obtaining return performance. A right to damages for breach of the whole contract or a right arising out of the assignor's due performance of his entire obligation can be assigned despite agreement otherwise.

(3) The creation, attachment, perfection, or enforcement of a security interest in the seller's interest under a contract is not a transfer that materially changes the duty of or increases materially the burden or risk imposed on the buyer or impairs materially the buyer's chance of obtaining return performance within the purview of subsection (2) unless, and then only to the extent that, enforcement actually results in a delegation of material performance of the seller. Even in that event, the creation, attachment, perfection, and enforcement of the security interest remain effective, but (i) the seller is liable to the buyer for damages caused by the delegation to the extent that the damages could not reasonably be prevented by the buyer, and (ii) a court having jurisdiction may grant other appropriate relief, including cancellation of the contract for sale or an injunction against enforcement of the security interest or consummation of the enforcement.

(4) Unless the circumstances indicate the contrary a prohibition of assignment of "the contract" is to be construed as barring only the delegation to the assignee of the assignor's performance.

(5) An assignment of "the contract" or of "all my rights under the contract" or an assignment in similar general terms is an assignment of rights and unless the language or the circumstances (as in an assignment for security) indicate the contrary, it is a delegation of performance of the duties of the assignor and its acceptance by the assignee constitutes a promise by him to perform those duties. This promise is enforceable by either the assignor or the other party to the original contract.

(6) The other party may treat any assignment which delegates performance as creating reasonable grounds for insecurity and may without prejudice to his rights against the assignor demand assurances from the assignee (Section 2-609).

As amended in 1999.

Part 3 General Obligation and Construction of Contract

§ 2-301. General Obligations of Parties.

The obligation of the seller is to transfer and deliver and that of the buyer is to accept and pay in accordance with the contract.

§ 2-302. Unconscionable Contract or Clause.

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

(2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

§ 2-303. Allocations or Division of Risks.

Where this Article allocates a risk or a burden as between the parties "unless otherwise agreed", the agreement may not only shift the allocation but may also divide the risk or burden.

§ 2-304. Price Payable in Money, Goods, Realty, or Otherwise.

(1) The price can be made payable in money or otherwise. If it is payable in whole or in part in goods each party is a seller of the goods which he is to transfer.

(2) Even though all or part of the price is payable in an interest in realty the transfer of the goods and the seller's obligations with reference to them are subject to this Article, but not the transfer of the interest in realty or the transferor's obligations in connection therewith.

§ 2-305. Open Price Term.

(1) The parties if they so intend can conclude a contract for sale even though the price is not settled. In such a case the price is a reasonable price at the time for delivery if

- (a) nothing is said as to price; or
- (b) the price is left to be agreed by the parties and they fail to agree; or
- (c) the price is to be fixed in terms of some agreed market or other standard as set or recorded by a third person or agency and it is not so set or recorded.

(2) A price to be fixed by the seller or by the buyer means a price for him to fix in good faith.

(3) When a price left to be fixed otherwise than by agreement of the parties fails to be fixed through fault of one party the other may at his option treat the contract as cancelled or himself fix a reasonable price.

(4) Where, however, the parties intend not to be bound unless the price be fixed or agreed and it is not fixed or agreed there is no contract. In such a case the buyer must return any goods already received or if unable so to do must pay their reasonable value at the time of delivery and the seller must return any portion of the price paid on account.

§ 2-306. Output, Requirements and Exclusive Dealings.

(1) A term which measures the quantity by the output of the seller or the requirements of the buyer means such actual output or requirements as may occur in good faith, except that no quantity unreasonably disproportionate to any stated estimate or in the absence of a stated estimate to any normal or otherwise comparable prior output or requirements may be tendered or demanded.

(2) A lawful agreement by either the seller or the buyer for exclusive dealing in the kind of goods concerned imposes unless otherwise agreed an obligation by the seller to use best efforts to supply the goods and by the buyer to use best efforts to promote their sale.

§ 2-307. Delivery in Single Lot or Several Lots.

Unless otherwise agreed all goods called for by a contract for sale must be tendered in a single delivery and payment is due only on such tender but where the circumstances give either party the right to make or demand delivery in lots the price if it can be apportioned may be demanded for each lot.

§ 2-308. Absence of Specified Place for Delivery.

Unless otherwise agreed

- (a) the place for delivery of goods is the seller's place of business or if he has none his residence; but
- (b) in a contract for sale of identified goods which to the knowledge of the parties at the time of contracting are in some other place, that place is the place for their delivery; and
- (c) documents of title may be delivered through customary banking channels.

§ 2-309. Absence of Specific Time Provisions; Notice of Termination.

(1) The time for shipment or delivery or any other action under a contract if not provided in this Article or agreed upon shall be a reasonable time.

(2) Where the contract provides for successive performances but is indefinite in duration it is valid for a reasonable time but unless otherwise agreed may be terminated at any time by either party.

(3) Termination of a contract by one party except on the happening of an agreed event requires that reasonable notification be received by the other party and an

agreement dispensing with notification is invalid if its operation would be unconscionable.

§ 2-310. Open Time for Payment or Running of Credit; Authority to Ship Under Reservation.

Unless otherwise agreed

- (a) payment is due at the time and place at which the buyer is to receive the goods even though the place of shipment is the place of delivery; and
- (b) if the seller is authorized to send the goods he may ship them under reservation, and may tender the documents of title, but the buyer may inspect the goods after their arrival before payment is due unless such inspection is inconsistent with the terms of the contract (Section 2-513); and
- (c) if delivery is authorized and made by way of documents of title otherwise than by subsection (b) then payment is due at the time and place at which the buyer is to receive the documents regardless of where the goods are to be received; and
- (d) where the seller is required or authorized to ship the goods on credit the credit period runs from the time of shipment but post-dating the invoice or delaying its dispatch will correspondingly delay the starting of the credit period.

§ 2-311. Options and Cooperation Respecting Performance.

- (1) An agreement for sale which is otherwise sufficiently definite (subsection (3) of Section 2-204) to be a contract is not made invalid by the fact that it leaves particulars of performance to be specified by one of the parties. Any such specification must be made in good faith and within limits set by commercial reasonableness.
- (2) Unless otherwise agreed specifications relating to assortment of the goods are at the buyer's option and except as otherwise provided in subsections (1)(c) and (3) of Section 2-319 specifications or arrangements relating to shipment are at the seller's option.
- (3) Where such specification would materially affect the other party's performance but is not seasonably made or where one party's cooperation is necessary to the agreed performance of the other but is not seasonably forthcoming, the other party in addition to all other remedies
 - (a) is excused for any resulting delay in his own performance; and
 - (b) may also either proceed to perform in any reasonable manner or after the time for a material part of his own performance treat the failure to specify or to cooperate as a breach by failure to deliver or accept the goods.

§ 2-312. Warranty of Title and Against Infringement; Buyer's Obligation Against Infringement.

- (1) Subject to subsection (2) there is in a contract for sale a warranty by the seller that

- (a) the title conveyed shall be good, and its transfer rightful; and
- (b) the goods shall be delivered free from any security interest or other lien or encumbrance of which the buyer at the time of contracting has no knowledge.

(2) A warranty under subsection (1) will be excluded or modified only by specific language or by circumstances which give the buyer reason to know that the person selling does not claim title in himself or that he is purporting to sell only such right or title as he or a third person may have.

(3) Unless otherwise agreed a seller who is a merchant regularly dealing in goods of the kind warrants that the goods shall be delivered free of the rightful claim of any third person by way of infringement or the like but a buyer who furnishes specifications to the seller must hold the seller harmless against any such claim which arises out of compliance with the specifications.

§ 2-313. Express Warranties by Affirmation, Promise, Description, Sample.

- (1) Express warranties by the seller are created as follows:
 - (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
 - (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.
 - (c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.
- (2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

§ 2-314. Implied Warranty: Merchantability; Usage of Trade.

- (1) Unless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.
- (2) Goods to be merchantable must be at least such as
 - (a) pass without objection in the trade under the contract description; and
 - (b) in the case of fungible goods, are of fair average quality within the description; and
 - (c) are fit for the ordinary purposes for which such goods are used; and

- (d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
- (e) are adequately contained, packaged, and labeled as the agreement may require; and
- (f) conform to the promises or affirmations of fact made on the container or label if any.

(3) Unless excluded or modified (Section 2-316) other implied warranties may arise from course of dealing or usage of trade.

§ 2-315. Implied Warranty: Fitness for Particular Purpose.

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

§ 2-316. Exclusion or Modification of Warranties.

(1) Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this Article on parol or extrinsic evidence (Section 2-202) negation or limitation is inoperative to the extent that such construction is unreasonable.

(2) Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."

(3) Notwithstanding subsection (2)

- (a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is", "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty; and
- (b) when the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him; and
- (c) an implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade.

(4) Remedies for breach of warranty can be limited in accordance with the provisions of this Article on liquidation or limitation of damages and on contractual modification of remedy (Sections 2-718 and 2-719).

§ 2-317. Cumulation and Conflict of Warranties Express or Implied.

Warranties whether express or implied shall be construed as consistent with each other and as cumulative, but if such construction is unreasonable the intention of the parties shall determine which warranty is dominant. In ascertaining that intention the following rules apply:

- (a) Exact or technical specifications displace an inconsistent sample or model or general language of description.
- (b) A sample from an existing bulk displaces inconsistent general language of description.
- (c) Express warranties displace inconsistent implied warranties other than an implied warranty of fitness for a particular purpose.

§ 2-318. Third Party Beneficiaries of Warranties Express or Implied.

Note: If this Act is introduced in the Congress of the United States this section should be omitted. (States to select one alternative.)

Alternative A

A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.

Alternative B

A seller's warranty whether express or implied extends to any natural person who may reasonably be expected to use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.

Alternative C

A seller's warranty whether express or implied extends to any person who may reasonably be expected to use, consume or be affected by the goods and who is injured by breach of the warranty. A seller may not exclude or limit the operation of this section with respect to injury to the person of an individual to whom the warranty extends.

As amended 1966.

§ 2-319. F.O.B. and F.A.S. Terms.

(1) Unless otherwise agreed the term F.O.B. (which means "free on board") at a named place, even though used only in connection with the stated price, is a delivery term under which

- (a) when the term is F.O.B. the place of shipment, the seller must at that place ship the goods in the manner provided in this Article (Section 2-504) and bear the expense and risk of putting them into the possession of the carrier; or
- (b) when the term is F.O.B. the place of destination, the seller must at his own expense and risk transport the goods to that place and there tender delivery of

them in the manner provided in this Article (Section 2-503);

(c) when under either (a) or (b) the term is also F.O.B. vessel, car or other vehicle, the seller must in addition at his own expense and risk load the goods on board. If the term is F.O.B. vessel the buyer must name the vessel and in an appropriate case the seller must comply with the provisions of this Article on the form of bill of lading (Section 2-323).

(2) Unless otherwise agreed the term F.A.S. vessel (which means “free alongside”) at a named port, even though used only in connection with the stated price, is a delivery term under which the seller must

- (a) at his own expense and risk deliver the goods alongside the vessel in the manner usual in that port or on a dock designated and provided by the buyer; and
- (b) obtain and tender a receipt for the goods in exchange for which the carrier is under a duty to issue a bill of lading.

(3) Unless otherwise agreed in any case falling within subsection (1)(a) or (c) or subsection (2) the buyer must seasonably give any needed instructions for making delivery, including when the term is F.A.S. or F.O.B. the loading berth of the vessel and in an appropriate case its name and sailing date. The seller may treat the failure of needed instructions as a failure of cooperation under this Article (Section 2-311). He may also at his option move the goods in any reasonable manner preparatory to delivery or shipment.

(4) Under the term F.O.B. vessel or F.A.S. unless otherwise agreed the buyer must make payment against tender of the required documents and the seller may not tender nor the buyer demand delivery of the goods in substitution for the documents.

§ 2-320. C.I.F. and C. & F. Terms.

(1) The term C.I.F. means that the price includes in a lump sum the cost of the goods and the insurance and freight to the named destination. The term C. & F. or C.F. means that the price so includes cost and freight to the named destination.

(2) Unless otherwise agreed and even though used only in connection with the stated price and destination, the term C.I.F. destination or its equivalent requires the seller at his own expense and risk to

- (a) put the goods into the possession of a carrier at the port for shipment and obtain a negotiable bill or bills of lading covering the entire transportation to the named destination; and
- (b) load the goods and obtain a receipt from the carrier (which may be contained in the bill of lading) showing that the freight has been paid or provided for; and
- (c) obtain a policy or certificate of insurance, including any war risk insurance, of a kind and on terms then current at the port of shipment in the usual amount, in the currency of the contract, shown to cover

the same goods covered by the bill of lading and providing for payment of loss to the order of the buyer or for the account of whom it may concern; but the seller may add to the price the amount of the premium for any such war risk insurance; and

(d) prepare an invoice of the goods and procure any other documents required to effect shipment or to comply with the contract; and

(e) forward and tender with commercial promptness all the documents in due form and with any indorsement necessary to perfect the buyer's rights.

(3) Unless otherwise agreed the term C. & F. or its equivalent has the same effect and imposes upon the seller the same obligations and risks as a C.I.F. term except the obligation as to insurance.

(4) Under the term C.I.F. or C. & F. unless otherwise agreed the buyer must make payment against tender of the required documents and the seller may not tender nor the buyer demand delivery of the goods in substitution for the documents.

§ 2-321. C.I.F. or C. & F.: “Net Landed Weights”; “Payment on Arrival”; Warranty of Condition on Arrival.

Under a contract containing a term C.I.F. or C. & F.

(1) Where the price is based on or is to be adjusted according to “net landed weights”, “delivered weights”, “out turn” quantity or quality or the like, unless otherwise agreed the seller must reasonably estimate the price. The payment due on tender of the documents called for by the contract is the amount so estimated, but after final adjustment of the price a settlement must be made with commercial promptness.

(2) An agreement described in subsection (1) or any warranty of quality or condition of the goods on arrival places upon the seller the risk of ordinary deterioration, shrinkage and the like in transportation but has no effect on the place or time of identification to the contract for sale or delivery or on the passing of the risk of loss.

(3) Unless otherwise agreed where the contract provides for payment on or after arrival of the goods the seller must before payment allow such preliminary inspection as is feasible; but if the goods are lost delivery of the documents and payment are due when the goods should have arrived.

§ 2-322. Delivery “Ex-Ship”.

(1) Unless otherwise agreed a term for delivery of goods “ex-ship” (which means from the carrying vessel) or in equivalent language is not restricted to a particular ship and requires delivery from a ship which has reached a place at the named port of destination where goods of the kind are usually discharged.

(2) Under such a term unless otherwise agreed

- (a) the seller must discharge all liens arising out of the carriage and furnish the buyer with a direction which puts the carrier under a duty to deliver the goods; and

(b) the risk of loss does not pass to the buyer until the goods leave the ship's tackle or are otherwise properly unloaded.

§ 2-323. Form of Bill of Lading Required in Overseas Shipment; "Overseas".

(1) Where the contract contemplates overseas shipment and contains a term C.I.F. or C. & F. or F.O.B. vessel, the seller unless otherwise agreed must obtain a negotiable bill of lading stating that the goods have been loaded on board or, in the case of a term C.I.F. or C. & F., received for shipment.

(2) Where in a case within subsection (1) a bill of lading has been issued in a set of parts, unless otherwise agreed if the documents are not to be sent from abroad the buyer may demand tender of the full set; otherwise only one part of the bill of lading need be tendered. Even if the agreement expressly requires a full set

(a) due tender of a single part is acceptable within the provisions of this Article on cure of improper delivery (subsection (1) of Section 2-508); and

(b) even though the full set is demanded, if the documents are sent from abroad the person tendering an incomplete set may nevertheless require payment upon furnishing an indemnity which the buyer in good faith deems adequate.

(3) A shipment by water or by air or a contract contemplating such shipment is "overseas" insofar as by usage of trade or agreement it is subject to the commercial, financing or shipping practices characteristic of international deep water commerce.

§ 2-324. "No Arrival, No Sale" Term.

Under a term "no arrival, no sale" or terms of like meaning, unless otherwise agreed,

(a) the seller must properly ship conforming goods and if they arrive by any means he must tender them on arrival but he assumes no obligation that the goods will arrive unless he has caused the non-arrival; and

(b) where without fault of the seller the goods are in part lost or have so deteriorated as no longer to conform to the contract or arrive after the contract time, the buyer may proceed as if there had been casualty to identified goods (Section 2-613).

§ 2-325. "Letter of Credit" Term; "Confirmed Credit".

(1) Failure of the buyer seasonably to furnish an agreed letter of credit is a breach of the contract for sale.

(2) The delivery to seller of a proper letter of credit suspends the buyer's obligation to pay. If the letter of credit is dishonored, the seller may on reasonable notification to the buyer require payment directly from him.

(3) Unless otherwise agreed the term "letter of credit" or "banker's credit" in a contract for sale means an irrevocable credit issued by a financing agency of good repute and, where the shipment is overseas, of good international

repute. The term "confirmed credit" means that the credit must also carry the direct obligation of such an agency which does business in the seller's financial market.

§ 2-326. Sale on Approval and Sale or Return; Rights of Creditors.

(1) Unless otherwise agreed, if delivered goods may be returned by the buyer even though they conform to the contract, the transaction is

(a) a "sale on approval" if the goods are delivered primarily for use, and

(b) a "sale or return" if the goods are delivered primarily for resale.

(2) Goods held on approval are not subject to the claims of the buyer's creditors until acceptance; goods held on sale or return are subject to such claims while in the buyer's possession.

(3) Any "or return" term of a contract for sale is to be treated as a separate contract for sale within the statute of frauds section of this Article (Section 2-201) and as contradicting the sale aspect of the contract within the provisions of this Article or on parol or extrinsic evidence (Section 2-202).

As amended in 1999.

§ 2-327. Special Incidents of Sale on Approval and Sale or Return.

(1) Under a sale on approval unless otherwise agreed

(a) although the goods are identified to the contract the risk of loss and the title do not pass to the buyer until acceptance; and

(b) use of the goods consistent with the purpose of trial is not acceptance but failure seasonably to notify the seller of election to return the goods is acceptance, and if the goods conform to the contract acceptance of any part is acceptance of the whole; and

(c) after due notification of election to return, the return is at the seller's risk and expense but a merchant buyer must follow any reasonable instructions.

(2) Under a sale or return unless otherwise agreed

(a) the option to return extends to the whole or any commercial unit of the goods while in substantially their original condition, but must be exercised seasonably; and

(b) the return is at the buyer's risk and expense.

§ 2-328. Sale by Auction.

(1) In a sale by auction if goods are put up in lots each lot is the subject of a separate sale.

(2) A sale by auction is complete when the auctioneer so announces by the fall of the hammer or in other customary manner. Where a bid is made while the hammer is falling in acceptance of a prior bid the auctioneer may in his discretion reopen the bidding or declare the goods sold under the bid on which the hammer was falling.

(3) Such a sale is with reserve unless the goods are in explicit terms put up without reserve. In an auction with reserve the auctioneer may withdraw the goods at any time

until he announces completion of the sale. In an auction without reserve, after the auctioneer calls for bids on an article or lot, that article or lot cannot be withdrawn unless no bid is made within a reasonable time. In either case a bidder may retract his bid until the auctioneer's announcement of completion of the sale, but a bidder's retraction does not revive any previous bid.

(4) If the auctioneer knowingly receives a bid on the seller's behalf or the seller makes or procures such a bid, and notice has not been given that liberty for such bidding is reserved, the buyer may at his option avoid the sale or take the goods at the price of the last good faith bid prior to the completion of the sale. This subsection shall not apply to any bid at a forced sale.

Part 4 Title, Creditors and Good Faith Purchasers

§ 2-401. Passing of Title; Reservation for Security; Limited Application of This Section.

Each provision of this Article with regard to the rights, obligations and remedies of the seller, the buyer, purchasers or other third parties applies irrespective of title to the goods except where the provision refers to such title. Insofar as situations are not covered by the other provisions of this Article and matters concerning title became material the following rules apply:

(1) Title to goods cannot pass under a contract for sale prior to their identification to the contract (Section 2-501), and unless otherwise explicitly agreed the buyer acquires by their identification a special property as limited by this Act. Any retention or reservation by the seller of the title (property) in goods shipped or delivered to the buyer is limited in effect to a reservation of a security interest. Subject to these provisions and to the provisions of the Article on Secured Transactions (Article 9), title to goods passes from the seller to the buyer in any manner and on any conditions explicitly agreed on by the parties.

(2) Unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods, despite any reservation of a security interest and even though a document of title is to be delivered at a different time or place; and in particular and despite any reservation of a security interest by the bill of lading

(a) if the contract requires or authorizes the seller to send the goods to the buyer but does not require him to deliver them at destination, title passes to the buyer at the time and place of shipment; but

(b) if the contract requires delivery at destination, title passes on tender there.

(3) Unless otherwise explicitly agreed where delivery is to be made without moving the goods,

(a) if the seller is to deliver a document of title, title passes at the time when and the place where he delivers such documents; or

(b) if the goods are at the time of contracting already identified and no documents are to be delivered, title passes at the time and place of contracting.

(4) A rejection or other refusal by the buyer to receive or retain the goods, whether or not justified, or a justified revocation of acceptance revests title to the goods in the seller. Such revesting occurs by operation of law and is not a "sale".

§ 2-402. Rights of Seller's Creditors Against Sold Goods.

(1) Except as provided in subsections (2) and (3), rights of unsecured creditors of the seller with respect to goods which have been identified to a contract for sale are subject to the buyer's rights to recover the goods under this Article (Sections 2-502 and 2-716).

(2) A creditor of the seller may treat a sale or an identification of goods to a contract for sale as void if as against him a retention of possession by the seller is fraudulent under any rule of law of the state where the goods are situated, except that retention of possession in good faith and current course of trade by a merchant-seller for a commercially reasonable time after a sale or identification is not fraudulent.

(3) Nothing in this Article shall be deemed to impair the rights of creditors of the seller

(a) under the provisions of the Article on Secured Transactions (Article 9); or

(b) where identification to the contract or delivery is made not in current course of trade but in satisfaction of or as security for a pre-existing claim for money, security or the like and is made under circumstances which under any rule of law of the state where the goods are situated would apart from this Article constitute the transaction a fraudulent transfer or voidable preference.

§ 2-403. Power to Transfer; Good Faith Purchase of Goods; "Entrusting".

(1) A purchaser of goods acquires all title which his transferor had or had power to transfer except that a purchaser of a limited interest acquires rights only to the extent of the interest purchased. A person with voidable title has power to transfer a good title to a good faith purchaser for value. When goods have been delivered under a transaction of purchase the purchaser has such power even though

(a) the transferor was deceived as to the identity of the purchaser, or

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

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

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

(2) Any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in ordinary course of business.

(3) “Entrusting” includes any delivery and any acquiescence in retention of possession regardless of any condition expressed between the parties to the delivery or acquiescence and regardless of whether the procurement of the entrusting or the possessor’s disposition of the goods have been such as to be larcenous under the criminal law.

(4) The rights of other purchasers of goods and of lien creditors are governed by the Articles on Secured Transactions (Article 9), Bulk Transfers (Article 6) and Documents of Title (Article 7).

As amended in 1988.

Part 5 Performance

§ 2-501. Insurable Interest in Goods; Manner of Identification of Goods.

(1) The buyer obtains a special property and an insurable interest in goods by identification of existing goods as goods to which the contract refers even though the goods so identified are non-conforming and he has an option to return or reject them. Such identification can be made at any time and in any manner explicitly agreed to by the parties. In the absence of explicit agreement identification occurs

(a) when the contract is made if it is for the sale of goods already existing and identified;

(b) if the contract is for the sale of future goods other than those described in paragraph (c), when goods are shipped, marked or otherwise designated by the seller as goods to which the contract refers;

(c) when the crops are planted or otherwise become growing crops or the young are conceived if the contract is for the sale of unborn young to be born within twelve months after contracting or for the sale of crops to be harvested within twelve months or the next normal harvest season after contracting whichever is longer.

(2) The seller retains an insurable interest in goods so long as title to or any security interest in the goods remains in him and where the identification is by the seller alone he may until default or insolvency or notification to the buyer that the identification is final substitute other goods for those identified.

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

§ 2-502. Buyer’s Right to Goods on Seller’s Insolvency.

(1) Subject to subsections (2) and (3) and even though the goods have not been shipped a buyer who has paid a part or all of the price of goods in which he has a special property under the provisions of the immediately preceding section may on making and keeping good a tender of any unpaid portion of their price recover them from the seller if:

(a) in the case of goods bought for personal, family, or household purposes, the seller repudiates or fails to deliver as required by the contract; or

(b) in all cases, the seller becomes insolvent within ten days after receipt of the first installment on their price.

(2) The buyer’s right to recover the goods under subsection (1)(a) vests upon acquisition of a special property, even if the seller had not then repudiated or failed to deliver.

(3) If the identification creating his special property has been made by the buyer he acquires the right to recover the goods only if they conform to the contract for sale.

As amended in 1999.

§ 2-503. Manner of Seller’s Tender of Delivery.

(1) Tender of delivery requires that the seller put and hold conforming goods at the buyer’s disposition and give the buyer any notification reasonably necessary to enable him to take delivery. The manner, time and place for tender are determined by the agreement and this Article, and in particular

(a) tender must be at a reasonable hour, and if it is of goods they must be kept available for the period reasonably necessary to enable the buyer to take possession; but

(b) unless otherwise agreed the buyer must furnish facilities reasonably suited to the receipt of the goods.

(2) Where the case is within the next section respecting shipment tender requires that the seller comply with its provisions.

(3) Where the seller is required to deliver at a particular destination tender requires that he comply with subsection (1) and also in any appropriate case tender documents as described in subsections (4) and (5) of this section.

(4) Where goods are in the possession of a bailee and are to be delivered without being moved

(a) tender requires that the seller either tender a negotiable document of title covering such goods or procure acknowledgment by the bailee of the buyer’s right to possession of the goods; but

(b) tender to the buyer of a non-negotiable document of title or of a written direction to the bailee to deliver is sufficient tender unless the buyer seasonably objects, and receipt by the bailee of notification of the buyer’s rights fixes those rights as against the bailee and all third persons; but risk of loss of the goods and of any failure by the bailee to honor the non-negotiable document of title or to obey the direction remains on the seller until the buyer has had a reasonable time to present the document or direction, and a refusal by the bailee to honor the document or to obey the direction defeats the tender.

(5) Where the contract requires the seller to deliver documents

(a) he must tender all such documents in correct form, except as provided in this Article with respect to bills of lading in a set (subsection (2) of Section 2-323); and

(b) tender through customary banking channels is sufficient and dishonor of a draft accompanying the documents constitutes non-acceptance or rejection.

§ 2-504. Shipment by Seller.

Where the seller is required or authorized to send the goods to the buyer and the contract does not require him to deliver them at a particular destination, then unless otherwise agreed he must

- (a) put the goods in the possession of such a carrier and make such a contract for their transportation as may be reasonable having regard to the nature of the goods and other circumstances of the case; and
- (b) obtain and promptly deliver or tender in due form any document necessary to enable the buyer to obtain possession of the goods or otherwise required by the agreement or by usage of trade; and
- (c) promptly notify the buyer of the shipment.

Failure to notify the buyer under paragraph (c) or to make a proper contract under paragraph (a) is a ground for rejection only if material delay or loss ensues.

§ 2-505. Seller's Shipment under Reservation.

(1) Where the seller has identified goods to the contract by or before shipment:

- (a) his procurement of a negotiable bill of lading to his own order or otherwise reserves in him a security interest in the goods. His procurement of the bill to the order of a financing agency or of the buyer indicates in addition only the seller's expectation of transferring that interest to the person named.
- (b) a non-negotiable bill of lading to himself or his nominee reserves possession of the goods as security but except in a case of conditional delivery (subsection (2) of Section 2-507) a non-negotiable bill of lading naming the buyer as consignee reserves no security interest even though the seller retains possession of the bill of lading.

(2) When shipment by the seller with reservation of a security interest is in violation of the contract for sale it constitutes an improper contract for transportation within the preceding section but impairs neither the rights given to the buyer by shipment and identification of the goods to the contract nor the seller's powers as a holder of a negotiable document.

§ 2-506. Rights of Financing Agency.

(1) A financing agency by paying or purchasing for value a draft which relates to a shipment of goods acquires to the extent of the payment or purchase and in addition to its own rights under the draft and any document of title securing it any rights of the shipper in the goods including the right to stop delivery and the shipper's right to have the draft honored by the buyer.

(2) The right to reimbursement of a financing agency which has in good faith honored or purchased the draft under commitment to or authority from the buyer is not impaired by subsequent discovery of defects with reference

to any relevant document which was apparently regular on its face.

§ 2-507. Effect of Seller's Tender; Delivery on Condition.

(1) Tender of delivery is a condition to the buyer's duty to accept the goods and, unless otherwise agreed, to his duty to pay for them. Tender entitles the seller to acceptance of the goods and to payment according to the contract.

(2) Where payment is due and demanded on the delivery to the buyer of goods or documents of title, his right as against the seller to retain or dispose of them is conditional upon his making the payment due.

§ 2-508. Cure by Seller of Improper Tender or Delivery; Replacement.

(1) Where any tender or delivery by the seller is rejected because non-conforming and the time for performance has not yet expired, the seller may seasonably notify the buyer of his intention to cure and may then within the contract time make a conforming delivery.

(2) Where the buyer rejects a non-conforming tender which the seller had reasonable grounds to believe would be acceptable with or without money allowance the seller may if he seasonably notifies the buyer have a further reasonable time to substitute a conforming tender.

§ 2-509. Risk of Loss in the Absence of Breach.

(1) Where the contract requires or authorizes the seller to ship the goods by carrier

- (a) if it does not require him to deliver them at a particular destination, the risk of loss passes to the buyer when the goods are duly delivered to the carrier even though the shipment is under reservation (Section 2-505); but
- (b) if it does require him to deliver them at a particular destination and the goods are there duly tendered while in the possession of the carrier, the risk of loss passes to the buyer when the goods are there duly so tendered as to enable the buyer to take delivery.

(2) Where the goods are held by a bailee to be delivered without being moved, the risk of loss passes to the buyer

- (a) on his receipt of a negotiable document of title covering the goods; or
- (b) on acknowledgment by the bailee of the buyer's right to possession of the goods; or
- (c) after his receipt of a non-negotiable document of title or other written direction to deliver, as provided in subsection (4)(b) of Section 2-503.

(3) In any case not within subsection (1) or (2), the risk of loss passes to the buyer on his receipt of the goods if the seller is a merchant; otherwise the risk passes to the buyer on tender of delivery.

(4) The provisions of this section are subject to contrary agreement of the parties and to the provisions of this Article on sale on approval (Section 2-327) and on effect of breach on risk of loss (Section 2-510).

§ 2-510. Effect of Breach on Risk of Loss.

- (1) Where a tender or delivery of goods so fails to conform to the contract as to give a right of rejection the risk of their loss remains on the seller until cure or acceptance.
- (2) Where the buyer rightfully revokes acceptance he may to the extent of any deficiency in his effective insurance coverage treat the risk of loss as having rested on the seller from the beginning.
- (3) Where the buyer as to conforming goods already identified to the contract for sale repudiates or is otherwise in breach before risk of their loss has passed to him, the seller may to the extent of any deficiency in his effective insurance coverage treat the risk of loss as resting on the buyer for a commercially reasonable time.

§ 2-511. Tender of Payment by Buyer; Payment by Check.

- (1) Unless otherwise agreed tender of payment is a condition to the seller's duty to tender and complete any delivery.
- (2) Tender of payment is sufficient when made by any means or in any manner current in the ordinary course of business unless the seller demands payment in legal tender and gives any extension of time reasonably necessary to procure it.
- (3) Subject to the provisions of this Act on the effect of an instrument on an obligation (Section 3-310), payment by check is conditional and is defeated as between the parties by dishonor of the check on due presentment.

As amended in 1994.

§ 2-512. Payment by Buyer Before Inspection.

- (1) Where the contract requires payment before inspection non-conformity of the goods does not excuse the buyer from so making payment unless
 - (a) the non-conformity appears without inspection; or
 - (b) despite tender of the required documents the circumstances would justify injunction against honor under this Act (Section 5-109(b)).
- (2) Payment pursuant to subsection (1) does not constitute an acceptance of goods or impair the buyer's right to inspect or any of his remedies.

As amended in 1995.

§ 2-513. Buyer's Right to Inspection of Goods.

- (1) Unless otherwise agreed and subject to subsection (3), where goods are tendered or delivered or identified to the contract for sale, the buyer has a right before payment or acceptance to inspect them at any reasonable place and time and in any reasonable manner. When the seller is required or authorized to send the goods to the buyer, the inspection may be after their arrival.
- (2) Expenses of inspection must be borne by the buyer but may be recovered from the seller if the goods do not conform and are rejected.
- (3) Unless otherwise agreed and subject to the provisions of this Article on C.I.F. contracts (subsection (3) of Section

2-321), the buyer is not entitled to inspect the goods before payment of the price when the contract provides

- (a) for delivery "C.O.D." or on other like terms; or
- (b) for payment against documents of title, except where such payment is due only after the goods are to become available for inspection.

(4) A place or method of inspection fixed by the parties is presumed to be exclusive but unless otherwise expressly agreed it does not postpone identification or shift the place for delivery or for passing the risk of loss. If compliance becomes impossible, inspection shall be as provided in this section unless the place or method fixed was clearly intended as an indispensable condition failure of which avoids the contract.

§ 2-514. When Documents Deliverable on Acceptance; When on Payment.

Unless otherwise agreed documents against which a draft is drawn are to be delivered to the drawee on acceptance of the draft if it is payable more than three days after presentment; otherwise, only on payment.

§ 2-515. Preserving Evidence of Goods in Dispute.

In furtherance of the adjustment of any claim or dispute

- (a) either party on reasonable notification to the other and for the purpose of ascertaining the facts and preserving evidence has the right to inspect, test and sample the goods including such of them as may be in the possession or control of the other; and
- (b) the parties may agree to a third party inspection or survey to determine the conformity or condition of the goods and may agree that the findings shall be binding upon them in any subsequent litigation or adjustment.

Part 6 Breach, Repudiation and Excuse

§ 2-601. Buyer's Rights on Improper Delivery.

Subject to the provisions of this Article on breach in installment contracts (Section 2-612) and unless otherwise agreed under the sections on contractual limitations of remedy (Sections 2-718 and 2-719), if the goods or the tender of delivery fail in any respect to conform to the contract, the buyer may

- (a) reject the whole; or
- (b) accept the whole; or
- (c) accept any commercial unit or units and reject the rest.

§ 2-602. Manner and Effect of Rightful Rejection.

- (1) Rejection of goods must be within a reasonable time after their delivery or tender. It is ineffective unless the buyer seasonably notifies the seller.
- (2) Subject to the provisions of the two following sections on rejected goods (Sections 2-603 and 2-604),

(a) after rejection any exercise of ownership by the buyer with respect to any commercial unit is wrongful as against the seller; and

(b) if the buyer has before rejection taken physical possession of goods in which he does not have a security interest under the provisions of this Article (subsection (3) of Section 2-711), he is under a duty after rejection to hold them with reasonable care at the seller's disposition for a time sufficient to permit the seller to remove them; but

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

(3) The seller's rights with respect to goods wrongfully rejected are governed by the provisions of this Article on Seller's remedies in general (Section 2-703).

§ 2-603. Merchant Buyer's Duties as to Rightfully Rejected Goods.

(1) Subject to any security interest in the buyer (subsection (3) of Section 2-711), when the seller has no agent or place of business at the market of rejection a merchant buyer is under a duty after rejection of goods in his possession or control to follow any reasonable instructions received from the seller with respect to the goods and in the absence of such instructions to make reasonable efforts to sell them for the seller's account if they are perishable or threaten to decline in value speedily. Instructions are not reasonable if on demand indemnity for expenses is not forthcoming.

(2) When the buyer sells goods under subsection (1), he is entitled to reimbursement from the seller or out of the proceeds for reasonable expenses of caring for and selling them, and if the expenses include no selling commission then to such commission as is usual in the trade or if there is none to a reasonable sum not exceeding ten per cent on the gross proceeds.

(3) In complying with this section the buyer is held only to good faith and good faith conduct hereunder is neither acceptance nor conversion nor the basis of an action for damages.

§ 2-604. Buyer's Options as to Salvage of Rightfully Rejected Goods.

Subject to the provisions of the immediately preceding section on perishables if the seller gives no instructions within a reasonable time after notification of rejection the buyer may store the rejected goods for the seller's account or reship them to him or resell them for the seller's account with reimbursement as provided in the preceding section. Such action is not acceptance or conversion.

§ 2-605. Waiver of Buyer's Objections by Failure to Particularize.

(1) The buyer's failure to state in connection with rejection a particular defect which is ascertainable by reasonable inspection precludes him from relying on the unstated defect to justify rejection or to establish breach

(a) where the seller could have cured it if stated seasonably; or

(b) between merchants when the seller has after rejection made a request in writing for a full and final written statement of all defects on which the buyer proposes to rely.

(2) Payment against documents made without reservation of rights precludes recovery of the payment for defects apparent on the face of the documents.

§ 2-606. What Constitutes Acceptance of Goods.

(1) Acceptance of goods occurs when the buyer

(a) after a reasonable opportunity to inspect the goods signifies to the seller that the goods are conforming or that he will take or retain them in spite of their nonconformity; or

(b) fails to make an effective rejection (subsection (1) of Section 2-602), but such acceptance does not occur until the buyer has had a reasonable opportunity to inspect them; or

(c) does any act inconsistent with the seller's ownership; but if such act is wrongful as against the seller it is an acceptance only if ratified by him.

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

§ 2-607. Effect of Acceptance; Notice of Breach; Burden of Establishing Breach After Acceptance; Notice of Claim or Litigation to Person Answerable Over.

(1) The buyer must pay at the contract rate for any goods accepted.

(2) Acceptance of goods by the buyer precludes rejection of the goods accepted and if made with knowledge of a non-conformity cannot be revoked because of it unless the acceptance was on the reasonable assumption that the non-conformity would be seasonably cured but acceptance does not of itself impair any other remedy provided by this Article for non-conformity.

(3) Where a tender has been accepted

(a) the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy; and

(b) if the claim is one for infringement or the like (subsection (3) of Section 2-312) and the buyer is sued as a result of such a breach he must so notify the seller within a reasonable time after he receives notice of the litigation or be barred from any remedy over for liability established by the litigation.

(4) The burden is on the buyer to establish any breach with respect to the goods accepted.

(5) Where the buyer is sued for breach of a warranty or other obligation for which his seller is answerable over

(a) he may give his seller written notice of the litigation. If the notice states that the seller may come in and defend and that if the seller does not do so he will be bound in any action against him by his buyer by any determination of fact common to the two litigations,

then unless the seller after seasonable receipt of the notice does come in and defend he is so bound.

(b) if the claim is one for infringement or the like (subsection (3) of Section 2-312) the original seller may demand in writing that his buyer turn over to him control of the litigation including settlement or else be barred from any remedy over and if he also agrees to bear all expense and to satisfy any adverse judgment, then unless the buyer after seasonable receipt of the demand does turn over control the buyer is so barred.

(6) The provisions of subsections (3), (4) and (5) apply to any obligation of a buyer to hold the seller harmless against infringement or the like (subsection (3) of Section 2-312).

§ 2-608. Revocation of Acceptance in Whole or in Part.

(1) The buyer may revoke his acceptance of a lot or commercial unit whose non-conformity substantially impairs its value to him if he has accepted it

(a) on the reasonable assumption that its nonconformity would be cured and it has not been seasonably cured; or

(b) without discovery of such non-conformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances.

(2) Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects. It is not effective until the buyer notifies the seller of it.

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

§ 2-609. Right to Adequate Assurance of Performance.

(1) A contract for sale imposes an obligation on each party that the other's expectation of receiving due performance will not be impaired. When reasonable grounds for insecurity arise with respect to the performance of either party the other may in writing demand adequate assurance of due performance and until he receives such assurance may if commercially reasonable suspend any performance for which he has not already received the agreed return.

(2) Between merchants the reasonableness of grounds for insecurity and the adequacy of any assurance offered shall be determined according to commercial standards.

(3) Acceptance of any improper delivery or payment does not prejudice the party's right to demand adequate assurance of future performance.

(4) After receipt of a justified demand failure to provide within a reasonable time not exceeding thirty days such assurance of due performance as is adequate under the circumstances of the particular case is a repudiation of the contract.

§ 2-610. Anticipatory Repudiation.

When either party repudiates the contract with respect to a performance not yet due the loss of which will substantially impair the value of the contract to the other, the aggrieved party may

(a) for a commercially reasonable time await performance by the repudiating party; or

(b) resort to any remedy for breach (Section 2-703 or Section 2-711), even though he has notified the repudiating party that he would await the latter's performance and has urged retraction; and

(c) in either case suspend his own performance or proceed in accordance with the provisions of this Article on the seller's right to identify goods to the contract notwithstanding breach or to salvage unfinished goods (Section 2-704).

§ 2-611. Retraction of Anticipatory Repudiation.

(1) Until the repudiating party's next performance is due he can retract his repudiation unless the aggrieved party has since the repudiation cancelled or materially changed his position or otherwise indicated that he considers the repudiation final.

(2) Retraction may be by any method which clearly indicates to the aggrieved party that the repudiating party intends to perform, but must include any assurance justifiably demanded under the provisions of this Article (Section 2-609).

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

§ 2-612. "Installment Contract"; Breach.

(1) An "installment contract" is one which requires or authorizes the delivery of goods in separate lots to be separately accepted, even though the contract contains a clause "each delivery is a separate contract" or its equivalent.

(2) The buyer may reject any installment which is non-conforming if the non-conformity substantially impairs the value of that installment and cannot be cured or if the non-conformity is a defect in the required documents; but if the non-conformity does not fall within subsection (3) and the seller gives adequate assurance of its cure the buyer must accept that installment.

(3) Whenever non-conformity or default with respect to one or more installments substantially impairs the value of the whole contract there is a breach of the whole. But the aggrieved party reinstates the contract if he accepts a non-conforming installment without seasonably notifying of cancellation or if he brings an action with respect only to past installments or demands performance as to future installments.

§ 2-613. Casualty to Identified Goods.

Where the contract requires for its performance goods identified when the contract is made, and the goods suffer casualty without fault of either party before the risk of loss

passes to the buyer, or in a proper case under a “no arrival, no sale” term (Section 2-324) then

- (a) if the loss is total the contract is avoided; and
- (b) if the loss is partial or the goods have so deteriorated as no longer to conform to the contract the buyer may nevertheless demand inspection and at his option either treat the contract as voided or accept the goods with due allowance from the contract price for the deterioration or the deficiency in quantity but without further right against the seller.

§ 2-614. Substituted Performance.

(1) Where without fault of either party the agreed berthing, loading, or unloading facilities fail or an agreed type of carrier becomes unavailable or the agreed manner of delivery otherwise becomes commercially impracticable but a commercially reasonable substitute is available, such substitute performance must be tendered and accepted.

(2) If the agreed means or manner of payment fails because of domestic or foreign governmental regulation, the seller may withhold or stop delivery unless the buyer provides a means or manner of payment which is commercially a substantial equivalent. If delivery has already been taken, payment by the means or in the manner provided by the regulation discharges the buyer's obligation unless the regulation is discriminatory, oppressive or predatory.

§ 2-615. Excuse by Failure of Presupposed Conditions.

Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance:

- (a) Delay in delivery or non-delivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the nonoccurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.
- (b) Where the causes mentioned in paragraph (a) affect only a part of the seller's capacity to perform, he must allocate production and deliveries among his customers but may at his option include regular customers not then under contract as well as his own requirements for further manufacture. He may so allocate in any manner which is fair and reasonable.
- (c) The seller must notify the buyer seasonably that there will be delay or non-delivery and, when allocation is required under paragraph (b), of the estimated quota thus made available for the buyer.

§ 2-616. Procedure on Notice Claiming Excuse.

(1) Where the buyer receives notification of a material or indefinite delay or an allocation justified under the preceding section he may by written notification to the seller as to any delivery concerned, and where the prospective deficiency

substantially impairs the value of the whole contract under the provisions of this Article relating to breach of installment contracts (Section 2-612), then also as to the whole,

- (a) terminate and thereby discharge any unexecuted portion of the contract; or
 - (b) modify the contract by agreeing to take his available quota in substitution.
- (2) If after receipt of such notification from the seller the buyer fails so to modify the contract within a reasonable time not exceeding thirty days the contract lapses with respect to any deliveries affected.
- (3) The provisions of this section may not be negated by agreement except in so far as the seller has assumed a greater obligation under the preceding section.

Part 7 Remedies

§ 2-701. Remedies for Breach of Collateral Contracts Not Impaired.

Remedies for breach of any obligation or promise collateral or ancillary to a contract for sale are not impaired by the provisions of this Article.

§ 2-702. Seller's Remedies on Discovery of Buyer's Insolvency.

- (1) Where the seller discovers the buyer to be insolvent he may refuse delivery except for cash including payment for all goods theretofore delivered under the contract, and stop delivery under this Article (Section 2-705).
- (2) Where the seller discovers that the buyer has received goods on credit while insolvent he may reclaim the goods upon demand made within ten days after the receipt, but if misrepresentation of solvency has been made to the particular seller in writing within three months before delivery the ten day limitation does not apply. Except as provided in this subsection the seller may not base a right to reclaim goods on the buyer's fraudulent or innocent misrepresentation of solvency or of intent to pay.
- (3) The seller's right to reclaim under subsection (2) is subject to the rights of a buyer in ordinary course or other good faith purchaser under this Article (Section 2-403). Successful reclamation of goods excludes all other remedies with respect to them.

§ 2-703. Seller's Remedies in General.

Where the buyer wrongfully rejects or revokes acceptance of goods or fails to make a payment due on or before delivery or repudiates with respect to a part or the whole, then with respect to any goods directly affected and, if the breach is of the whole contract (Section 2-612), then also with respect to the whole undelivered balance, the aggrieved seller may

- (a) withhold delivery of such goods;
- (b) stop delivery by any bailee as hereafter provided (Section 2-705);
- (c) proceed under the next section respecting goods still unidentified to the contract;
- (d) resell and recover damages as hereafter provided (Section 2-706);

- (e) recover damages for non-acceptance (Section 2-708) or in a proper case the price (Section 2-709);
- (f) cancel.

§ 2-704. Seller's Right to Identify Goods to the Contract Notwithstanding Breach or to Salvage Unfinished Goods.

- (1) An aggrieved seller under the preceding section may
 - (a) identify to the contract conforming goods not already identified if at the time he learned of the breach they are in his possession or control;
 - (b) treat as the subject of resale goods which have demonstrably been intended for the particular contract even though those goods are unfinished.
- (2) Where the goods are unfinished an aggrieved seller may in the exercise of reasonable commercial judgment for the purposes of avoiding loss and of effective realization either complete the manufacture and wholly identify the goods to the contract or cease manufacture and resell for scrap or salvage value or proceed in any other reasonable manner.

§ 2-705. Seller's Stoppage of Delivery in Transit or Otherwise.

- (1) The seller may stop delivery of goods in the possession of a carrier or other bailee when he discovers the buyer to be insolvent (Section 2-702) and may stop delivery of carload, truckload, planeload or larger shipments of express or freight when the buyer repudiates or fails to make a payment due before delivery or if for any other reason the seller has a right to withhold or reclaim the goods.
- (2) As against such buyer the seller may stop delivery until
 - (a) receipt of the goods by the buyer; or
 - (b) acknowledgment to the buyer by any bailee of the goods except a carrier that the bailee holds the goods for the buyer; or
 - (c) such acknowledgment to the buyer by a carrier by reshipment or as warehouseman; or
 - (d) negotiation to the buyer of any negotiable document of title covering the goods.
- (3) (a) To stop delivery the seller must so notify as to enable the bailee by reasonable diligence to prevent delivery of the goods.
 - (b) After such notification the bailee must hold and deliver the goods according to the directions of the seller but the seller is liable to the bailee for any ensuing charges or damages.
 - (c) If a negotiable document of title has been issued for goods the bailee is not obliged to obey a notification to stop until surrender of the document.
- (d) A carrier who has issued a non-negotiable bill of lading is not obliged to obey a notification to stop received from a person other than the consignor.

§ 2-706. Seller's Resale Including Contract for Resale.

- (1) Under the conditions stated in Section 2-703 on seller's remedies, the seller may resell the goods concerned or the undelivered balance thereof. Where the resale is made in good

faith and in a commercially reasonable manner the seller may recover the difference between the resale price and the contract price together with any incidental damages allowed under the provisions of this Article (Section 2-710), but less expenses saved in consequence of the buyer's breach.

- (2) Except as otherwise provided in subsection (3) or unless otherwise agreed resale may be at public or private sale including sale by way of one or more contracts to sell or of identification to an existing contract of the seller. Sale may be as a unit or in parcels and at any time and place and on any terms but every aspect of the sale including the method, manner, time, place and terms must be commercially reasonable. The resale must be reasonably identified as referring to the broken contract, but it is not necessary that the goods be in existence or that any or all of them have been identified to the contract before the breach.

- (3) Where the resale is at private sale the seller must give the buyer reasonable notification of his intention to resell.

- (4) Where the resale is at public sale

- (a) only identified goods can be sold except where there is a recognized market for a public sale of futures in goods of the kind; and

- (b) it must be made at a usual place or market for public sale if one is reasonably available and except in the case of goods which are perishable or threaten to decline in value speedily the seller must give the buyer reasonable notice of the time and place of the resale; and

- (c) if the goods are not to be within the view of those attending the sale the notification of sale must state the place where the goods are located and provide for their reasonable inspection by prospective bidders; and

- (d) the seller may buy.

- (5) A purchaser who buys in good faith at a resale takes the goods free of any rights of the original buyer even though the seller fails to comply with one or more of the requirements of this section.

- (6) The seller is not accountable to the buyer for any profit made on any resale. A person in the position of a seller (Section 2-707) or a buyer who has rightfully rejected or justifiably revoked acceptance must account for any excess over the amount of his security interest, as hereinafter defined (subsection (3) of Section 2-711).

§ 2-707. "Person in the Position of a Seller".

- (1) A "person in the position of a seller" includes as against a principal an agent who has paid or become responsible for the price of goods on behalf of his principal or anyone who otherwise holds a security interest or other right in goods similar to that of a seller.

- (2) A person in the position of a seller may as provided in this Article withhold or stop delivery (Section 2-705) and resell (Section 2-706) and recover incidental damages (Section 2-710).

§ 2-708. Seller's Damages for Non-Acceptance or Repudiation.

- (1) Subject to subsection (2) and to the provisions of this Article with respect to proof of market price (Section 2-723),

the measure of damages for non-acceptance or repudiation by the buyer is the difference between the market price at the time and place for tender and the unpaid contract price together with any incidental damages provided in this Article (Section 2-710), but less expenses saved in consequence of the buyer's breach.

(2) If the measure of damages provided in subsection (1) is inadequate to put the seller in as good a position as performance would have done then the measure of damages is the profit (including reasonable overhead) which the seller would have made from full performance by the buyer, together with any incidental damages provided in this Article (Section 2-710), due allowance for costs reasonably incurred and due credit for payments or proceeds of resale.

§ 2-709. Action for the Price.

(1) When the buyer fails to pay the price as it becomes due the seller may recover, together with any incidental damages under the next section, the price

- (a) of goods accepted or of conforming goods lost or damaged within a commercially reasonable time after risk of their loss has passed to the buyer; and
- (b) of goods identified to the contract if the seller is unable after reasonable effort to resell them at a reasonable price or the circumstances reasonably indicate that such effort will be unavailing.

(2) Where the seller sues for the price he must hold for the buyer any goods which have been identified to the contract and are still in his control except that if resale becomes possible he may resell them at any time prior to the collection of the judgment. The net proceeds of any such resale must be credited to the buyer and payment of the judgment entitles him to any goods not resold.

(3) After the buyer has wrongfully rejected or revoked acceptance of the goods or has failed to make a payment due or has repudiated (Section 2-610), a seller who is held not entitled to the price under this section shall nevertheless be awarded damages for non-acceptance under the preceding section.

§ 2-710. Seller's Incidental Damages.

Incidental damages to an aggrieved seller include any commercially reasonable charges, expenses or commissions incurred in stopping delivery, in the transportation, care and custody of goods after the buyer's breach, in connection with return or resale of the goods or otherwise resulting from the breach.

§ 2-711. Buyer's Remedies in General; Buyer's Security Interest in Rejected Goods.

(1) Where the seller fails to make delivery or repudiates or the buyer rightfully rejects or justifiably revokes acceptance then with respect to any goods involved, and with respect to the whole if the breach goes to the whole contract (Section 2-612), the buyer may cancel and whether or not he has done so may in addition to recovering so much of the price as has been paid

- (a) "cover" and have damages under the next section as to all the goods affected whether or not they have been identified to the contract; or

(b) recover damages for non-delivery as provided in this Article (Section 2-713).

(2) Where the seller fails to deliver or repudiates the buyer may also

- (a) if the goods have been identified recover them as provided in this Article (Section 2-502); or
- (b) in a proper case obtain specific performance or replevy the goods as provided in this Article (Section 2-716).

(3) On rightful rejection or justifiable revocation of acceptance a buyer has a security interest in goods in his possession or control for any payments made on their price and any expenses reasonably incurred in their inspection, receipt, transportation, care and custody and may hold such goods and resell them in like manner as an aggrieved seller (Section 2-706).

§ 2-712. "Cover"; Buyer's Procurement of Substitute Goods.

(1) After a breach within the preceding section the buyer may "cover" by making in good faith and without unreasonable delay any reasonable purchase of or contract to purchase goods in substitution for those due from the seller.

(2) The buyer may recover from the seller as damages the difference between the cost of cover and the contract price together with any incidental or consequential damages as hereinafter defined (Section 2-715), but less expenses saved in consequence of the seller's breach.

(3) Failure of the buyer to effect cover within this section does not bar him from any other remedy.

§ 2-713. Buyer's Damages for Non-Delivery or Repudiation.

(1) Subject to the provisions of this Article with respect to proof of market price (Section 2-723), the measure of damages for non-delivery or repudiation by the seller is the difference between the market price at the time when the buyer learned of the breach and the contract price together with any incidental and consequential damages provided in this Article (Section 2-715), but less expenses saved in consequence of the seller's breach.

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

§ 2-714. Buyer's Damages for Breach in Regard to Accepted Goods.

(1) Where the buyer has accepted goods and given notification (subsection (3) of Section 2-607) he may recover as damages for any non-conformity of tender the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable.

(2) The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.

(3) In a proper case any incidental and consequential damages under the next section may also be recovered.

§ 2-715. Buyer's Incidental and Consequential Damages.

(1) Incidental damages resulting from the seller's breach include expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach.

(2) Consequential damages resulting from the seller's breach include

- (a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and
- (b) injury to person or property proximately resulting from any breach of warranty.

§ 2-716. Buyer's Right to Specific Performance or Replevin.

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

(2) The decree for specific performance may include such terms and conditions as to payment of the price, damages, or other relief as the court may deem just.

(3) The buyer has a right of replevin for goods identified to the contract if after reasonable effort he is unable to effect cover for such goods or the circumstances reasonably indicate that such effort will be unavailing or if the goods have been shipped under reservation and satisfaction of the security interest in them has been made or tendered. In the case of goods bought for personal, family, or household purposes, the buyer's right of replevin vests upon acquisition of a special property, even if the seller had not then repudiated or failed to deliver.

As amended in 1999.

§ 2-717. Deduction of Damages From the Price.

The buyer on notifying the seller of his intention to do so may deduct all or any part of the damages resulting from any breach of the contract from any part of the price still due under the same contract.

§ 2-718. Liquidation or Limitation of Damages; Deposits.

(1) Damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void as a penalty.

(2) Where the seller justifiably withholds delivery of goods because of the buyer's breach, the buyer is entitled to

restitution of any amount by which the sum of his payments exceeds

(a) the amount to which the seller is entitled by virtue of terms liquidating the seller's damages in accordance with subsection (1), or

(b) in the absence of such terms, twenty per cent of the value of the total performance for which the buyer is obligated under the contract or \$500, whichever is smaller.

(3) The buyer's right to restitution under subsection (2) is subject to offset to the extent that the seller establishes

(a) a right to recover damages under the provisions of this Article other than subsection (1), and

(b) the amount or value of any benefits received by the buyer directly or indirectly by reason of the contract.

(4) Where a seller has received payment in goods their reasonable value or the proceeds of their resale shall be treated as payments for the purposes of subsection (2); but if the seller has notice of the buyer's breach before reselling goods received in part performance, his resale is subject to the conditions laid down in this Article on resale by an aggrieved seller (Section 2-706).

§ 2-719. Contractual Modification or Limitation of Remedy.

(1) Subject to the provisions of subsections (2) and (3) of this section and of the preceding section on liquidation and limitation of damages,

(a) the agreement may provide for remedies in addition to or in substitution for those provided in this Article and may limit or alter the measure of damages recoverable under this Article, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of nonconforming goods or parts; and

(b) resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.

(2) Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Act.

(3) Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is *prima facie* unconscionable but limitation of damages where the loss is commercial is not.

§ 2-720. Effect of "Cancellation" or "Rescission" on Claims for Antecedent Breach.

Unless the contrary intention clearly appears, expressions of "cancellation" or "rescission" of the contract or the like shall not be construed as a renunciation or discharge of any claim in damages for an antecedent breach.

§ 2-721. Remedies for Fraud.

Remedies for material misrepresentation or fraud include all remedies available under this Article for non-fraudulent

breach. Neither rescission or a claim for rescission of the contract for sale nor rejection or return of the goods shall bar or be deemed inconsistent with a claim for damages or other remedy.

§ 2-722. Who Can Sue Third Parties for Injury to Goods.

Where a third party so deals with goods which have been identified to a contract for sale as to cause actionable injury to a party to that contract

- (a) a right of action against the third party is in either party to the contract for sale who has title to or a security interest or a special property or an insurable interest in the goods; and if the goods have been destroyed or converted a right of action is also in the party who either bore the risk of loss under the contract for sale or has since the injury assumed that risk as against the other;
- (b) if at the time of the injury the party plaintiff did not bear the risk of loss as against the other party to the contract for sale and there is no arrangement between them for disposition of the recovery, his suit or settlement is, subject to his own interest, as a fiduciary for the other party to the contract;
- (c) either party may with the consent of the other sue for the benefit of whom it may concern.

§ 2-723. Proof of Market Price: Time and Place.

- (1) If an action based on anticipatory repudiation comes to trial before the time for performance with respect to some or all of the goods, any damages based on market price (Section 2-708 or Section 2-713) shall be determined according to the price of such goods prevailing at the time when the aggrieved party learned of the repudiation.
- (2) If evidence of a price prevailing at the times or places described in this Article is not readily available the price prevailing within any reasonable time before or after the time described or at any other place which in commercial judgment or under usage of trade would serve as a reasonable substitute for the one described may be used, making any proper allowance for the cost of transporting the goods to or from such other place.
- (3) Evidence of a relevant price prevailing at a time or place other than the one described in this Article offered by one party is not admissible unless and until he has given the other party such notice as the court finds sufficient to prevent unfair surprise.

§ 2-724. Admissibility of Market Quotations.

Whenever the prevailing price or value of any goods regularly bought and sold in any established commodity market is in issue, reports in official publications or trade journals or in newspapers or periodicals of general circulation published as the reports of such market shall be admissible in evidence. The circumstances of the preparation of such a report may be shown to affect its weight but not its admissibility.

§ 2-725. Statute of Limitations in Contracts for Sale.

- (1) An action for breach of any contract for sale must be commenced within four years after the cause of action has

accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it.

- (2) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.

- (3) Where an action commenced within the time limited by subsection (1) is so terminated as to leave available a remedy by another action for the same breach such other action may be commenced after the expiration of the time limited and within six months after the termination of the first action unless the termination resulted from voluntary discontinuance or from dismissal for failure or neglect to prosecute.

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

Article 2A

LEASES

Part 1 General Provisions

§ 2A-101. Short Title.

This Article shall be known and may be cited as the Uniform Commercial Code—Leases.

§ 2A-102. Scope.

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

§ 2A-103. Definitions and Index of Definitions.

- (1) In this Article unless the context otherwise requires:
 - (a) "Buyer in ordinary course of business" means a person who in good faith and without knowledge that the sale to him [or her] is in violation of the ownership rights or security interest or leasehold interest of a third party in the goods buys in ordinary course from a person in the business of selling goods of that kind but does not include a pawnbroker. "Buying" may be for cash or by exchange of other property or on secured or unsecured credit and includes receiving goods or documents of title under a pre-existing contract for sale but does not include a transfer in bulk or as security for or in total or partial satisfaction of a money debt.
 - (b) "Cancellation" occurs when either party puts an end to the lease contract for default by the other party.
 - (c) "Commercial unit" means such a unit of goods as by commercial usage is a single whole for purposes of lease and division of which materially impairs its character or value on the market or in use. A

commercial unit may be a single article, as a machine, or a set of articles, as a suite of furniture or a line of machinery, or a quantity, as a gross or carload, or any other unit treated in use or in the relevant market as a single whole.

(d) “Conforming” goods or performance under a lease contract means goods or performance that are in accordance with the obligations under the lease contract.

(e) “Consumer lease” means a lease that a lessor regularly engaged in the business of leasing or selling makes to a lessee who is an individual and who takes under the lease primarily for a personal, family, or household purpose [, if the total payments to be made under the lease contract, excluding payments for options to renew or buy, do not exceed \$_____].

(f) “Fault” means wrongful act, omission, breach, or default.

(g) “Finance lease” means a lease with respect to which:

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

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

(iii) one of the following occurs:

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

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

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

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

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

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

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

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

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

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

(m) “Leasehold interest” means the interest of the lessor or the lessee under a lease contract.

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

(o) “Lessee in ordinary course of business” means a person who in good faith and without knowledge that the lease to him [or her] is in violation of the ownership rights or security interest or leasehold interest of a third party in the goods, leases in ordinary course from a person in the business of selling or leasing goods of that kind but does not include a pawnbroker. “Leasing” may be for cash or by exchange of other property or on secured or unsecured credit and includes receiving goods or documents of title under a pre-existing lease contract but does not include a transfer in bulk or as security for or in total or partial satisfaction of a money debt.

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

(q) “Lessor’s residual interest” means the lessor’s interest in the goods after expiration, termination, or cancellation of the lease contract.

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

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

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

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

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

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

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

(y) “Supply contract” means a contract under which a lessor buys or leases goods to be leased.

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

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

“Accessions”. Section 2A-310(1).

“Construction mortgage”. Section 2A-309(1)(d).

“Encumbrance”. Section 2A-309(1)(e).

“Fixtures”. Section 2A-309(1)(a).

“Fixture filing”. Section 2A-309(1)(b).

“Purchase money lease”. Section 2A-309(1)(c).

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

“Accounts”. Section 9-106.

“Between merchants”. Section 2-104(3).

“Buyer”. Section 2-103(1)(a).

“Chattel paper”. Section 9-105(1)(b).

“Consumer goods”. Section 9-109(1).

“Document”. Section 9-105(1)(f).

“Entrusting”. Section 2-403(3).

“General intangibles”. Section 9-106.

“Good faith”. Section 2-103(1)(b).

“Instrument”. Section 9-105(1)(i).

“Merchant”. Section 2-104(1).

“Mortgage”. Section 9-105(1)(j).

“Pursuant to commitment”. Section 9-105(1)(k).

“Receipt”. Section 2-103(1)(c).

“Sale”. Section 2-106(1).

“Sale on approval”. Section 2-326.

“Sale or return”. Section 2-326.

“Seller”. Section 2-103(1)(d).

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

As amended in 1990 and 1999.

§ 2A-104. Leases Subject to Other Law.

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

(a) certificate of title statute of this State: (list any certificate of title statutes covering automobiles, trailers, mobile homes, boats, farm tractors, and the like);

(b) certificate of title statute of another jurisdiction (Section 2A-105); or

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

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

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

As amended in 1990.

§ 2A-105. Territorial Application of Article to Goods Covered by Certificate of Title.

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

§ 2A-106. Limitation on Power of Parties to Consumer Lease to Choose Applicable Law and Judicial Forum.

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

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

§ 2A-107. Waiver or Renunciation of Claim or Right After Default.

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

§ 2A-108. Unconscionability.

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

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

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

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

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

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

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

§ 2A-109. Option to Accelerate at Will.

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

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

Part 2 Formation and Construction of Lease Contract

§ 2A-201. Statute of Frauds.

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

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

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

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

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

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

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

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

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

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

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

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

(c) a reasonable lease term.

§ 2A-202. Final Written Expression: Parol or Extrinsic Evidence.

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

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

(b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as

a complete and exclusive statement of the terms of the agreement.

§ 2A-203. Seals Inoperative.

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

§ 2A-204. Formation in General.

- (1) A lease contract may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of a lease contract.
- (2) An agreement sufficient to constitute a lease contract may be found although the moment of its making is undetermined.
- (3) Although one or more terms are left open, a lease contract does not fail for indefiniteness if the parties have intended to make a lease contract and there is a reasonably certain basis for giving an appropriate remedy.

§ 2A-205. Firm Offers.

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

§ 2A-206. Offer and Acceptance in Formation of Lease Contract.

- (1) Unless otherwise unambiguously indicated by the language or circumstances, an offer to make a lease contract must be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances.
- (2) If the beginning of a requested performance is a reasonable mode of acceptance, an offeror who is not notified of acceptance within a reasonable time may treat the offer as having lapsed before acceptance.

§ 2A-207. Course of Performance or Practical Construction.

- (1) If a lease contract involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection is relevant to determine the meaning of the lease agreement.
- (2) The express terms of a lease agreement and any course of performance, as well as any course of dealing and usage of trade, must be construed whenever reasonable as consistent with each other; but if that construction is unreasonable, express terms control course of performance, course of performance controls both course of dealing and usage of trade, and course of dealing controls usage of trade.
- (3) Subject to the provisions of Section 2A-208 on modification and waiver, course of performance is relevant to

show a waiver or modification of any term inconsistent with the course of performance.

§ 2A-208. Modification, Rescission and Waiver.

- (1) An agreement modifying a lease contract needs no consideration to be binding.
- (2) A signed lease agreement that excludes modification or rescission except by a signed writing may not be otherwise modified or rescinded, but, except as between merchants, such a requirement on a form supplied by a merchant must be separately signed by the other party.
- (3) Although an attempt at modification or rescission does not satisfy the requirements of subsection (2), it may operate as a waiver.
- (4) A party who has made a waiver affecting an executory portion of a lease contract may retract the waiver by reasonable notification received by the other party that strict performance will be required of any term waived, unless the retraction would be unjust in view of a material change of position in reliance on the waiver.

§ 2A-209. Lessee under Finance Lease as Beneficiary of Supply Contract.

- (1) The benefit of the supplier's promises to the lessor under the supply contract and of all warranties, whether express or implied, including those of any third party provided in connection with or as part of the supply contract, extends to the lessee to the extent of the lessee's leasehold interest under a finance lease related to the supply contract, but is subject to the terms warranty and of the supply contract and all defenses or claims arising therefrom.
- (2) The extension of the benefit of supplier's promises and of warranties to the lessee (Section 2A-209(1)) does not: (i) modify the rights and obligations of the parties to the supply contract, whether arising therefrom or otherwise, or (ii) impose any duty or liability under the supply contract on the lessee.
- (3) Any modification or rescission of the supply contract by the supplier and the lessor is effective between the supplier and the lessee unless, before the modification or rescission, the supplier has received notice that the lessee has entered into a finance lease related to the supply contract. If the modification or rescission is effective between the supplier and the lessee, the lessor is deemed to have assumed, in addition to the obligations of the lessor to the lessee under the lease contract, promises of the supplier to the lessor and warranties that were so modified or rescinded as they existed and were available to the lessee before modification or rescission.
- (4) In addition to the extension of the benefit of the supplier's promises and of warranties to the lessee under subsection (1), the lessee retains all rights that the lessee may have against the supplier which arise from an agreement between the lessee and the supplier or under other law.

As amended in 1990.

§ 2A-210. Express Warranties.

- (1) Express warranties by the lessor are created as follows:
 - (a) Any affirmation of fact or promise made by the lessor to the lessee which relates to the goods and

becomes part of the basis of the bargain creates an express warranty that the goods will conform to the affirmation or promise.

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

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

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

§ 2A-211. Warranties Against Interference and Against Infringement; Lessee’s Obligation Against Infringement.

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

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

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

§ 2A-212. Implied Warranty of Merchantability.

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

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

- (a) pass without objection in the trade under the description in the lease agreement;
- (b) in the case of fungible goods, are of fair average quality within the description;
- (c) are fit for the ordinary purposes for which goods of that type are used;
- (d) run, within the variation permitted by the lease agreement, of even kind, quality, and quantity within each unit and among all units involved;
- (e) are adequately contained, packaged, and labeled as the lease agreement may require; and
- (f) conform to any promises or affirmations of fact made on the container or label.

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

§ 2A-213. Implied Warranty of Fitness for Particular Purpose.

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

§ 2A-214. Exclusion or Modification of Warranties.

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

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

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

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

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

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

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

§ 2A-215. Cumulation and Conflict of Warranties Express or Implied.

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

- (a) Exact or technical specifications displace an inconsistent sample or model or general language of description.
- (b) A sample from an existing bulk displaces inconsistent general language of description.
- (c) Express warranties displace inconsistent implied warranties other than an implied warranty of fitness for a particular purpose.

§ 2A-216. Third-Party Beneficiaries of Express and Implied Warranties.

Alternative A

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

Alternative B

A warranty to or for the benefit of a lessee under this Article, whether express or implied, extends to any natural person who may reasonably be expected to use, consume, or be affected by the goods and who is injured in person by breach of the warranty. This section does not displace principles of law and equity that extend a warranty to or for the benefit of a lessee to other persons. The operation of this section may not be excluded, modified, or limited, but an exclusion, modification, or limitation of the warranty, including any with respect to rights and remedies, effective against the lessee is also effective against the beneficiary designated under this section.

Alternative C

A warranty to or for the benefit of a lessee under this Article, whether express or implied, extends to any person who may reasonably be expected to use, consume, or be affected by the goods and who is injured by breach of the warranty. The operation of this section may not be excluded, modified, or limited with respect to injury to the person of an individual to whom the warranty extends, but an exclusion, modification, or limitation of the warranty, including any with respect to rights and remedies, effective against the lessee is also effective against the beneficiary designated under this section.

§ 2A-217. Identification.

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

- (a) when the lease contract is made if the lease contract is for a lease of goods that are existing and identified;
- (b) when the goods are shipped, marked, or otherwise designated by the lessor as goods to which the lease contract refers, if the lease contract is for a lease of goods that are not existing and identified; or
- (c) when the young are conceived, if the lease contract is for a lease of unborn young of animals.

§ 2A-218. Insurance and Proceeds.

- (1) A lessee obtains an insurable interest when existing goods are identified to the lease contract even though the goods identified are nonconforming and the lessee has an option to reject them.
- (2) If a lessee has an insurable interest only by reason of the lessor's identification of the goods, the lessor, until default or insolvency or notification to the lessee that identification is final, may substitute other goods for those identified.
- (3) Notwithstanding a lessee's insurable interest under subsections (1) and (2), the lessor retains an insurable interest until an option to buy has been exercised by the lessee and risk of loss has passed to the lessee.
- (4) Nothing in this section impairs any insurable interest recognized under any other statute or rule of law.
- (5) The parties by agreement may determine that one or more parties have an obligation to obtain and pay for insurance covering the goods and by agreement may determine the beneficiary of the proceeds of the insurance.

§ 2A-219. Risk of Loss.

- (1) Except in the case of a finance lease, risk of loss is retained by the lessor and does not pass to the lessee. In the case of a finance lease, risk of loss passes to the lessee.
- (2) Subject to the provisions of this Article on the effect of default on risk of loss (Section 2A-220), if risk of loss is to pass to the lessee and the time of passage is not stated, the following rules apply:
 - (a) If the lease contract requires or authorizes the goods to be shipped by carrier
 - (i) and it does not require delivery at a particular destination, the risk of loss passes to the lessee when the goods are duly delivered to the carrier; but
 - (ii) if it does require delivery at a particular destination and the goods are there duly tendered while in the possession of the carrier, the risk of loss passes to the lessee when the goods are there duly so tendered as to enable the lessee to take delivery.
 - (b) If the goods are held by a bailee to be delivered without being moved, the risk of loss passes to the lessee on acknowledgment by the bailee of the lessee's right to possession of the goods.
 - (c) In any case not within subsection (a) or (b), the risk of loss passes to the lessee on the lessee's receipt of the

goods if the lessor, or, in the case of a finance lease, the supplier, is a merchant; otherwise the risk passes to the lessee on tender of delivery.

§ 2A-220. Effect of Default on Risk of Loss.

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

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

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

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

§ 2A-221. Casualty to Identified Goods.

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

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

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

Part 3 Effect of Lease Contract

§ 2A-301. Enforceability of Lease Contract.

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

§ 2A-302. Title to and Possession of Goods.

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

§ 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) As used in this section, "creation of a security interest" includes the sale of a lease contract that is subject to Article 9, Secured Transactions, by reason of Section 9-109(a)(3).

(2) Except as provided in subsections (3) and Section 9-407, a provision in a lease agreement which (i) prohibits the voluntary or involuntary transfer, including a transfer by sale, sublease, creation or enforcement of a security interest, or attachment, levy, or other judicial process, of an interest of a party under the lease contract or of the lessor's residual interest in the goods, or (ii) makes such a transfer an event of default, gives rise to the rights and remedies provided in subsection (4), but a transfer that is prohibited or is an event of default under the lease agreement is otherwise effective.

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

(4) Subject to subsection (3) and Section 9-407:

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

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

(5) A transfer of "the lease" or of "all my rights under the lease", or a transfer in similar general terms, is a transfer of rights and, unless the language or the circumstances, as in a transfer for security, indicate the contrary, the transfer is a delegation of duties by the transferor to the transferee. Acceptance by the transferee constitutes a promise by the

transferee to perform those duties. The promise is enforceable by either the transferor or the other party to the lease contract.

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

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

As amended in 1990 and 1999.

§ 2A-304. Subsequent Lease of Goods by Lessor.

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

- (a) the lessor's transferor was deceived as to the identity of the lessor;
- (b) the delivery was in exchange for a check which is later dishonored;
- (c) it was agreed that the transaction was to be a "cash sale"; or
- (d) the delivery was procured through fraud punishable as larcenous under the criminal law.

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

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

As amended in 1990.

§ 2A-305. Sale or Sublease of Goods by Lessee.

(1) Subject to the provisions of Section 2A-303, a buyer or sublessee from the lessee of goods under an existing lease contract obtains, to the extent of the interest transferred, the leasehold interest in the goods that the lessee had or had power to transfer, and except as provided in subsection (2) and Section 2A-511(4), takes subject to the existing lease contract. A lessee with a voidable leasehold interest has

power to transfer a good leasehold interest to a good faith buyer for value or a good faith sublessee for value, but only to the extent set forth in the preceding sentence. When goods have been delivered under a transaction of lease the lessee has that power even though:

- (a) the lessor was deceived as to the identity of the lessee;
- (b) the delivery was in exchange for a check which is later dishonored; or
- (c) the delivery was procured through fraud punishable as larcenous under the criminal law.

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

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

§ 2A-306. Priority of Certain Liens Arising by Operation of Law.

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

§ 2A-307. Priority of Liens Arising by Attachment or Levy on, Security Interests in, and Other Claims to Goods.

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

(2) Except as otherwise provided in subsection (3) and in Sections 2A-306 and 2A-308, a creditor of a lessor takes subject to the lease contract unless the creditor holds a lien that attached to the goods before the lease contract became enforceable.

(3) Except as otherwise provided in Sections 9-317, 9-321, and 9-323, a lessee takes a leasehold interest subject to a security interest held by a creditor of the lessor.

As amended in 1990 and 1999.

§ 2A-308. Special Rights of Creditors.

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

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

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

§ 2A-309. Lessor's and Lessee's Rights When Goods Become Fixtures.

(1) In this section:

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

(b) a "fixture filing" is the filing, in the office where a mortgage on the real estate would be filed or recorded, of a financing statement covering goods that are or are to become fixtures and conforming to the requirements of Section 9-502(a) and (b);

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

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

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

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

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

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

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

(b) the interest of the lessor is perfected by a fixture filing before the interest of the encumbrancer or owner

is of record, the lessor's interest has priority over any conflicting interest of a predecessor in title of the encumbrancer or owner, and the lessee has an interest of record in the real estate or is in possession of the real estate.

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

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

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

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

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

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

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

(8) If the interest of a lessor of fixtures, including the lessor's residual interest, has priority over all conflicting interests of all owners and encumbrancers of the real estate, the lessor or the lessee may (i) on default, expiration, termination, or cancellation of the lease agreement but subject to the agreement and this Article, or (ii) if necessary to enforce other rights and remedies of the lessor or lessee under this Article, remove the goods from the real estate, free and clear of all conflicting interests of all owners and encumbrancers of the real estate, but the lessor or lessee must reimburse any encumbrancer or owner of the real estate who is not the lessee and who has not otherwise agreed for the cost of repair of any physical injury, but not for any diminution in value of the real estate caused by the absence of the goods removed or by any necessity of replacing them. A person entitled to reimbursement

may refuse permission to remove until the party seeking removal gives adequate security for the performance of this obligation.

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

As amended in 1990 and 1999.

§ 2A-310. Lessor's and Lessee's Rights When Goods Become Accessions.

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

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

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

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

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

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

(5) When under subsections (2) or (3) and (4) a lessor or a lessee of accessions holds an interest that is superior to all interests in the whole, the lessor or the lessee may (a) on default, expiration, termination, or cancellation of the lease contract by the other party but subject to the provisions of the lease contract and this Article, or (b) if necessary to enforce his [or her] other rights and remedies under this Article, remove the goods from the whole, free and clear of all interests in the whole, but he [or she] must reimburse any holder of an interest in the whole who is not the lessee and who has not otherwise agreed for the cost of repair of any physical injury but not for any diminution in value of the whole caused by the absence of the goods removed or by any necessity for replacing them. A person entitled to reimbursement may refuse permission to remove until the party seeking removal gives adequate security for the performance of this obligation.

§ 2A-311. Priority Subject to Subordination.

Nothing in this Article prevents subordination by agreement by any person entitled to priority.

As added in 1990.

Part 4 Performance of Lease Contract: Repudiated, Substituted and Excused

§ 2A-401. Insecurity: Adequate Assurance of Performance.

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

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

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

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

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

§ 2A-402. Anticipatory Repudiation.

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

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

(b) make demand pursuant to Section 2A-401 and await assurance of future performance adequate under the circumstances of the particular case; or

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

§ 2A-403. Retraction of Anticipatory Repudiation.

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

(2) Retraction may be by any method that clearly indicates to the aggrieved party that the repudiating party intends to

perform under the lease contract and includes any assurance demanded under Section 2A-401.

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

§ 2A-404. Substituted Performance.

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

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

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

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

§ 2A-405. Excused Performance.

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

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

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

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

§ 2A-406. Procedure on Excused Performance.

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

(a) terminate the lease contract (Section 2A-505(2)); or

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

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

§ 2A-407. Irrevocable Promises: Finance Leases.

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

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

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

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

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

As amended in 1990.

Part 5 Default

A. In General

§ 2A-501. Default: Procedure.

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

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

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

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

(5) If the lease agreement covers both real property and goods, the party seeking enforcement may proceed under this Part as to the goods, or under other applicable law

as to both the real property and the goods in accordance with that party's rights and remedies in respect of the real property, in which case this Part does not apply.

As amended in 1990.

§ 2A-502. Notice After Default.

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

§ 2A-503. Modification or Impairment of Rights and Remedies.

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

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

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

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

As amended in 1990.

§ 2A-504. Liquidation of Damages.

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

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

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

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

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

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

- (a) a right to recover damages under the provisions of this Article other than subsection (1); and
- (b) the amount or value of any benefits received by the lessee directly or indirectly by reason of the lease contract.

§ 2A-505. Cancellation and Termination and Effect of Cancellation, Termination, Rescission, or Fraud on Rights and Remedies.

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

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

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

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

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

§ 2A-506. Statute of Limitations.

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

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

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

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

§ 2A-507. Proof of Market Rent: Time and Place.

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

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

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

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

As amended in 1990.

B. Default by Lessor

§ 2A-508. Lessee's Remedies.

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

- (a) cancel the lease contract (Section 2A-505(1));
- (b) recover so much of the rent and security as has been paid and is just under the circumstances;
- (c) cover and recover damages as to all goods affected whether or not they have been identified to the lease contract (Sections 2A-518 and 2A-520), or recover damages for nondelivery (Sections 2A-519 and 2A-520);

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

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

- (a) if the goods have been identified, recover them (Section 2A-522); or
- (b) in a proper case, obtain specific performance or replevy the goods (Section 2A-521).

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

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

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

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

As amended in 1990.

§ 2A-509. Lessee's Rights on Improper Delivery; Rightful Rejection.

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

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

§ 2A-510. Installment Lease Contracts: Rejection and Default.

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

(2) Whenever nonconformity or default with respect to one or more deliveries substantially impairs the value of the installment lease contract as a whole there is a default with respect to the whole. But, the aggrieved party reinstates the installment lease contract as a whole if the aggrieved party accepts a nonconforming delivery without seasonably notifying of cancellation or brings an action

with respect only to past deliveries or demands performance as to future deliveries.

§ 2A-511. Merchant Lessee's Duties as to Rightfully Rejected Goods.

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

(2) If a merchant lessee (subsection (1)) or any other lessee (Section 2A-512) disposes of goods, he [or she] is entitled to reimbursement either from the lessor or the supplier or out of the proceeds for reasonable expenses of caring for and disposing of the goods and, if the expenses include no disposition commission, to such commission as is usual in the trade, or if there is none, to a reasonable sum not exceeding 10 percent of the gross proceeds.

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

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

§ 2A-512. Lessee's Duties as to Rightfully Rejected Goods.

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

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

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

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

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

§ 2A-513. Cure by Lessor of Improper Tender or Delivery; Replacement.

(1) If any tender or delivery by the lessor or the supplier is rejected because nonconforming and the time for perfor-

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

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

§ 2A-514. Waiver of Lessee's Objections.

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

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

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

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

§ 2A-515. Acceptance of Goods.

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

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

(b) the lessee fails to make an effective rejection of the goods (Section 2A-509(2)).

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

§ 2A-516. Effect of Acceptance of Goods; Notice of Default; Burden of Establishing Default after Acceptance; Notice of Claim or Litigation to Person Answerable Over.

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

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

(3) If a tender has been accepted:

- (a) within a reasonable time after the lessee discovers or should have discovered any default, the lessee shall notify the lessor and the supplier, if any, or be barred from any remedy against the party notified;
- (b) except in the case of a consumer lease, within a reasonable time after the lessee receives notice of litigation for infringement or the like (Section 2A-211) the lessee shall notify the lessor or be barred from any remedy over for liability established by the litigation; and
- (c) the burden is on the lessee to establish any default.

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

- (a) The lessee may give the lessor or the supplier, or both, written notice of the litigation. If the notice states that the person notified may come in and defend and that if the person notified does not do so that person will be bound in any action against that person by the lessee by any determination of fact common to the two litigations, then unless the person notified after seasonable receipt of the notice does come in and defend that person is so bound.
- (b) The lessor or the supplier may demand in writing that the lessee turn over control of the litigation including settlement if the claim is one for infringement or the like (Section 2A-211) or else be barred from any remedy over. If the demand states that the lessor or the supplier agrees to bear all expense and to satisfy any adverse judgment, then unless the lessee after seasonable receipt of the demand does turn over control the lessee is so barred.

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

As amended in 1990.

§ 2A-517. Revocation of Acceptance of Goods.

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

- (a) except in the case of a finance lease, on the reasonable assumption that its nonconformity would be cured and it has not been seasonably cured; or
- (b) without discovery of the nonconformity if the lessee's acceptance was reasonably induced either by the lessor's assurances or, except in the case of a finance lease, by the difficulty of discovery before acceptance.

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

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

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

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

As amended in 1990.

§ 2A-518. Cover; Substitute Goods.

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

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

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

As amended in 1990.

§ 2A-519. Lessee's Damages for Non-Delivery, Repudiation, Default, and Breach of Warranty in Regard to Accepted Goods.

(1) Except as otherwise provided with respect to damages liquidated in the lease agreement (Section 2A-504) or otherwise determined pursuant to agreement of the parties (Sections 1-102(3) and 2A-503), if a lessee elects not to cover or a lessee elects to cover and the cover is by lease agreement that for any reason does not qualify for treatment under Section 2A-518(2), or is by purchase or otherwise, the measure of damages for non-delivery or repudiation by the lessor or for rejection or revocation of acceptance by the lessee is the present value, as of the

date of the default, of the then market rent minus the present value as of the same date of the original rent, computed for the remaining lease term of the original lease agreement, together with incidental and consequential damages, less expenses saved in consequence of the lessor's default.

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

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

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

As amended in 1990.

§ 2A-520. Lessee's Incidental and Consequential Damages.

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

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

- (a) any loss resulting from general or particular requirements and needs of which the lessor at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and
- (b) injury to person or property proximately resulting from any breach of warranty.

§ 2A-521. Lessee's Right to Specific Performance or Replevin.

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

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

(3) A lessee has a right of replevin, detinue, sequestration, claim and delivery, or the like for goods identified to the

lease contract if after reasonable effort the lessee is unable to effect cover for those goods or the circumstances reasonably indicate that the effort will be unavailing.

§ 2A-522. Lessee's Right to Goods on Lessor's Insolvency.

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

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

C. Default by Lessee

§ 2A-523. Lessor's Remedies.

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

- (a) cancel the lease contract (Section 2A-505(1));
- (b) proceed respecting goods not identified to the lease contract (Section 2A-524);
- (c) withhold delivery of the goods and take possession of goods previously delivered (Section 2A-525);
- (d) stop delivery of the goods by any bailee (Section 2A-526);
- (e) dispose of the goods and recover damages (Section 2A-527), or retain the goods and recover damages (Section 2A-528), or in a proper case recover rent (Section 2A-529)
- (f) exercise any other rights or pursue any other remedies provided in the lease contract.

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

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

- (a) if the default substantially impairs the value of the lease contract to the lessor, the lessor may exercise the

rights and pursue the remedies provided in subsections (1) or (2); or

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

As amended in 1990.

§ 2A-524. Lessor's Right to Identify Goods to Lease Contract.

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

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

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

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

As amended in 1990.

§ 2A-525. Lessor's Right to Possession of Goods.

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

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

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

As amended in 1990.

§ 2A-526. Lessor's Stoppage of Delivery in Transit or Otherwise.

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

to withhold or take possession of the goods.

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

(a) receipt of the goods by the lessee;

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

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

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

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

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

§ 2A-527. Lessor's Rights to Dispose of Goods.

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

(2) Except as otherwise provided with respect to damages liquidated in the lease agreement (Section 2A-504) or otherwise determined pursuant to agreement of the parties (Sections 1-102(3) and 2A-503), if the disposition is by lease agreement substantially similar to the original lease agreement and the new lease agreement is made in good faith and in a commercially reasonable manner, the lessor may recover from the lessee as damages (i) accrued and unpaid rent as of the date of the commencement of the term of the new lease agreement, (ii) the present value, as of the same date, of the total rent for the then remaining lease term of the original lease agreement minus the present value, as of the same date, of the rent under the new lease agreement applicable to that period of the new lease term which is comparable to the then remaining term of the original lease agreement, and (iii) any incidental damages allowed under Section 2A-530, less expenses saved in consequence of the lessee's default.

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

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

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

As amended in 1990.

§ 2A-528. Lessor's Damages for Non-acceptance, Failure to Pay, Repudiation, or Other Default.

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

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

As amended in 1990.

§ 2A-529. Lessor's Action for the Rent.

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

(a) for goods accepted by the lessee and not repossessed by or tendered to the lessor, and for conforming goods lost or damaged within a commercially reasonable time after risk of loss passes to the lessee (Section 2A-219), (i) accrued and unpaid rent as of the date of entry of judgment in favor of the lessor (ii) the present value as of the same date of the rent for the then remaining lease term of the lease agreement, and

(iii) any incidental damages allowed under Section 2A-530, less expenses saved in consequence of the lessee's default; and

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

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

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

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

(5) After default by the lessee under the lease contract of the type described in Section 2A-523(1) or Section 2A-523(3)(a) or, if agreed, after other default by the lessee, a lessor who is held not entitled to rent under this section must nevertheless be awarded damages for non-acceptance under Sections 2A-527 and 2A-528.

As amended in 1990.

§ 2A-530. Lessor's Incidental Damages.

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

§ 2A-531. Standing to Sue Third Parties for Injury to Goods.

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

- (i) has a security interest in the goods;
- (ii) has an insurable interest in the goods; or

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

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

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

§ 2A-532. Lessor's Rights to Residual Interest.

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

As added in 1990.

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APPENDIX D

The United Nations Convention on Contracts for the International Sale of Goods (Excerpts)



Part I. SPHERE OF APPLICATION AND GENERAL PROVISIONS

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Chapter II—General Provisions

* * * *

Article 8

(1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.

(2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.

(3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.

Article 9

(1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.

(2) The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.

* * * *

Article 11

A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses.

* * * *

Part II. FORMATION OF THE CONTRACT

Article 14

(1) A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. A proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price.

(2) A proposal other than one addressed to one or more specific persons is to be considered merely as an invitation to make offers, unless the contrary is clearly indicated by the person making the proposal.

Article 15

(1) An offer becomes effective when it reaches the offeree.

(2) An offer, even if it is irrevocable, may be withdrawn if the withdrawal reaches the offeree before or at the same time as the offer.

Article 16

(1) Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance.

(2) However, an offer cannot be revoked:

(a) If it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or

(b) If it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.

Article 17

An offer, even if it is irrevocable, is terminated when a rejection reaches the offeror.

Article 18

(1) A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. Silence or inactivity does not in itself amount to acceptance.

(2) An acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror. An acceptance is not effective if the indication of assent does not reach the offeror within the time he has fixed or, if no time is fixed, within a reasonable time, due account being taken of the circumstances of the transaction, including the rapidity of the means of communication employed by the offeror. An oral offer must be accepted immediately unless the circumstances indicate otherwise.

(3) However, if, by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent by performing an act, such as one relating to the dispatch of the goods or payment of the price, without notice to the offeror, the acceptance is effective at the moment the act is performed, provided that the act is performed within the period of time laid down in the preceding paragraph.

Article 19

(1) A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.

(2) However, a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.

(3) Additional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially.

* * * *

Article 22

An acceptance may be withdrawn if the withdrawal reaches the offeror before or at the same time as the acceptance would have become effective.

* * * *

Part III. SALE OF GOODS

Chapter I—General Provisions

Article 25

A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.

* * * *

Article 28

If, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgment for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention.

Article 29

(1) A contract may be modified or terminated by the mere agreement of the parties.

(2) A contract in writing which contains a provision requiring any modification or termination by agreement to be in writing may not be otherwise modified or terminated by agreement. However, a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct.

* * * *

Chapter II—Obligations of the Seller

* * * *

Section II. Conformity of the Goods and Third Party Claims

Article 35

(1) The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract.

(2) Except where the parties have agreed otherwise, the goods do not conform with the contract unless they:

(a) Are fit for the purposes for which goods of the same description would ordinarily be used;

(b) Are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgment;

(c) Possess the qualities of goods which the seller has held out to the buyer as a sample or model;

(d) Are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods.

(3) The seller is not liable under subparagraphs (a) to (d) of the preceding paragraph for any lack of conformity of the goods if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such lack of conformity.

* * * *

Article 64

(1) The seller may declare the contract avoided:

- (a) If the failure by the buyer to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract; or
 - (b) If the buyer does not, within the additional period of time fixed by the seller in accordance with paragraph (1) of article 63, perform his obligation to pay the price or take delivery of the goods, or if he declares that he will not do so within the period so fixed.
- (2) However, in cases where the buyer has paid the price, the seller loses the right to declare the contract avoided unless he does so:
- (a) In respect of late performance by the buyer, before the seller has become aware that performance has been rendered; or
 - (b) In respect of any breach other than late performance by the buyer, within a reasonable time:
 - (i) After the seller knew or ought to have known of the breach; or
 - (ii) After the expiration of any additional period of time fixed by the seller in accordance with paragraph (1) of article 63, or after the buyer has declared that he will not perform his obligations within such an additional period.

* * * *

Chapter IV—Passing of Risk

* * * *

Article 67

- (1) If the contract of sale involves carriage of the goods and the seller is not bound to hand them over at a particular place, the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer in accordance with the contract of sale. If the seller is bound to hand the goods over to a carrier at a particular place, the risk does not pass to the buyer until the goods are handed over to the carrier at that place. The fact that the seller is authorized to retain documents controlling the disposition of the goods does not affect the passage of the risk.
- (2) Nevertheless, the risk does not pass to the buyer until the goods are clearly identified to the contract, whether by markings on the goods, by shipping documents, by notice given to the buyer or otherwise.

* * * *

Chapter V—Provisions Common to the Obligations of the Seller and of the Buyer

Section I. Anticipatory Breach and Instalment Contracts

Article 71

- (1) A party may suspend the performance of his obligations if, after the conclusion of the contract, it becomes apparent that the other party will not perform a substantial part of his obligations as a result of:

- (a) A serious deficiency in his ability to perform or in his creditworthiness; or
 - (b) His conduct in preparing to perform or in performing the contract.
- (2) If the seller has already dispatched the goods before the grounds described in the preceding paragraph become evident, he may prevent the handing over of the goods to the buyer even though the buyer holds a document which entitles him to obtain them. The present paragraph relates only to the rights in the goods as between the buyer and the seller.
- (3) A party suspending performance, whether before or after dispatch of the goods, must immediately give notice of the suspension to the other party and must continue with performance if the other party provides adequate assurance of his performance.

Article 72

- (1) If prior to the date for performance of the contract it is clear that one of the parties will commit a fundamental breach of contract, the other party may declare the contract avoided.
- (2) If time allows, the party intending to declare the contract avoided must give reasonable notice to the other party in order to permit him to provide adequate assurance of his performance.
- (3) The requirements of the preceding paragraph do not apply if the other party has declared that he will not perform his obligations.

Article 73

- (1) In the case of a contract for delivery of goods by instalments, if the failure of one party to perform any of his obligations in respect of any instalment constitutes a fundamental breach of contract with respect to that instalment, the other party may declare the contract avoided with respect to that instalment.
- (2) If one party's failure to perform any of his obligations in respect of any instalment gives the other party good grounds to conclude that a fundamental breach of contract will occur with respect to future instalments, he may declare the contract avoided for the future, provided that he does so within a reasonable time.
- (3) A buyer who declares the contract avoided in respect of any delivery may, at the same time, declare it avoided in respect of deliveries already made or of future deliveries if, by reason of their interdependence, those deliveries could not be used for the purpose contemplated by the parties at the time of the conclusion of the contract.

Section II. Damages

Article 74

Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach

foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract.

Article 75

If the contract is avoided and if, in a reasonable manner and within a reasonable time after avoidance, the buyer has bought goods in replacement or the seller has resold the goods, the party claiming damages may recover the difference between the contract price and the price in the substitute transaction as well as any further damages recoverable under article 74.

Article 76

(1) If the contract is avoided and there is a current price for the goods, the party claiming damages may, if he has not made a purchase or resale under article 75, recover the difference between the price fixed by the contract and the current price at the time of avoidance as well as any

further damages recoverable under article 74. If, however, the party claiming damages has avoided the contract after taking over the goods, the current price at the time of such taking over shall be applied instead of the current price at the time of avoidance.

(2) For the purposes of the preceding paragraph, the current price is the price prevailing at the place where delivery of the goods should have been made or, if there is no current price at that place, the price at such other place as serves as a reasonable substitute, making due allowance for differences in the cost of transporting the goods.

Article 77

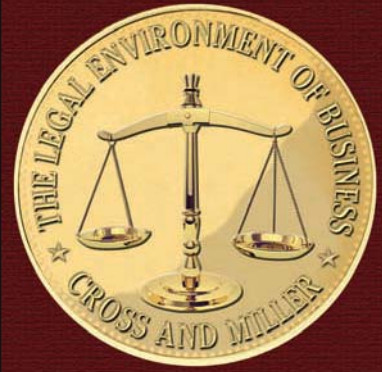
A party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated.

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APPENDIX E



The Sarbanes-Oxley Act of 2002 (Excerpts and Explanatory Comments)



Note: The authors' explanatory comments appear in italics following the excerpt from each section.

* * * *

SECTION 302

Corporate responsibility for financial reports¹

(a) Regulations required

The Commission shall, by rule, require, for each company filing periodic reports under section 13(a) or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m, 78o(d)), that the principal executive officer or officers and the principal financial officer or officers, or persons performing similar functions, certify in each annual or quarterly report filed or submitted under either such section of such Act that—

- (1) the signing officer has reviewed the report;
- (2) based on the officer's knowledge, the report does not contain any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which such statements were made, not misleading;
- (3) based on such officer's knowledge, the financial statements, and other financial information included in the report, fairly present in all material respects the financial condition and results of operations of the issuer as of, and for, the periods presented in the report;
- (4) the signing officers—
 - (A) are responsible for establishing and maintaining internal controls;
 - (B) have designed such internal controls to ensure that material information relating to the issuer and its consolidated subsidiaries is made known to such officers by others within those entities, particularly during the period in which the periodic reports are being prepared;
 - (C) have evaluated the effectiveness of the issuer's internal controls as of a date within 90 days prior to the report; and

(D) have presented in the report their conclusions about the effectiveness of their internal controls based on their evaluation as of that date;

(5) the signing officers have disclosed to the issuer's auditors and the audit committee of the board of directors (or persons fulfilling the equivalent function)—

(A) all significant deficiencies in the design or operation of internal controls which could adversely affect the issuer's ability to record, process, summarize, and report financial data and have identified for the issuer's auditors any material weaknesses in internal controls; and

(B) any fraud, whether or not material, that involves management or other employees who have a significant role in the issuer's internal controls; and

(6) the signing officers have indicated in the report whether or not there were significant changes in internal controls or in other factors that could significantly affect internal controls subsequent to the date of their evaluation, including any corrective actions with regard to significant deficiencies and material weaknesses.

(b) Foreign reincorporations have no effect

Nothing in this section shall be interpreted or applied in any way to allow any issuer to lessen the legal force of the statement required under this section, by an issuer having reincorporated or having engaged in any other transaction that resulted in the transfer of the corporate domicile or offices of the issuer from inside the United States to outside of the United States.

(c) Deadline

The rules required by subsection (a) of this section shall be effective not later than 30 days after July 30, 2002.

* * * *

EXPLANATORY COMMENTS: *Section 302 requires the chief executive officer (CEO) and chief financial officer (CFO) of each public company to certify that they have reviewed the company's quarterly and annual reports to be filed with the Securities and Exchange Commission (SEC). The CEO and CFO must certify that, based on their knowledge, the reports do not contain any untrue statement of a material fact or any half-truth that would make the report misleading, and that the*

1. This section of the Sarbanes-Oxley Act is codified at 15 U.S.C. Section 7241.

information contained in the reports fairly presents the company's financial condition.

In addition, this section also requires the CEO and CFO to certify that they have created and designed an internal control system for their company and have recently evaluated that system to ensure that it is effectively providing them with relevant and accurate financial information. If the signing officers have found any significant deficiencies or weaknesses in the company's system or have discovered any evidence of fraud, they must have reported the situation, and any corrective actions they have taken, to the auditors and the audit committee.

SECTION 306

Insider trades during pension fund blackout periods²

(a) Prohibition of insider trading during pension fund blackout periods

(1) In general

Except to the extent otherwise provided by rule of the Commission pursuant to paragraph (3), it shall be unlawful for any director or executive officer of an issuer of any equity security (other than an exempted security), directly or indirectly, to purchase, sell, or otherwise acquire or transfer any equity security of the issuer (other than an exempted security) during any blackout period with respect to such equity security if such director or officer acquires such equity security in connection with his or her service or employment as a director or executive officer.

(2) Remedy

(A) In general

Any profit realized by a director or executive officer referred to in paragraph (1) from any purchase, sale, or other acquisition or transfer in violation of this subsection shall inure to and be recoverable by the issuer, irrespective of any intention on the part of such director or executive officer in entering into the transaction.

(B) Actions to recover profits

An action to recover profits in accordance with this subsection may be instituted at law or in equity in any court of competent jurisdiction by the issuer, or by the owner of any security of the issuer in the name and in behalf of the issuer if the issuer fails or refuses to bring such action within 60 days after the date of request, or fails diligently to prosecute the action thereafter, except that no such suit shall be brought more than 2 years after the date on which such profit was realized.

(3) Rulemaking authorized

The Commission shall, in consultation with the Secretary of Labor, issue rules to clarify the application of this subsection and to prevent evasion thereof. Such rules shall provide for the application of the requirements of paragraph (1) with respect to entities treated as a single employer with respect to an issuer under section 414(b), (c), (m), or (o) of Title 26 to the extent necessary to clarify the application of such requirements and to prevent evasion thereof. Such rules may also provide for appropriate exceptions from the requirements of this subsection, including exceptions for purchases pursuant to an automatic dividend reinvestment program or purchases or sales made pursuant to an advance election.

(4) Blackout period

For purposes of this subsection, the term "blackout period", with respect to the equity securities of any issuer—

(A) means any period of more than 3 consecutive business days during which the ability of not fewer than 50 percent of the participants or beneficiaries under all individual account plans maintained by the issuer to purchase, sell, or otherwise acquire or transfer an interest in any equity of such issuer held in such an individual account plan is temporarily suspended by the issuer or by a fiduciary of the plan; and

(B) does not include, under regulations which shall be prescribed by the Commission—

(i) a regularly scheduled period in which the participants and beneficiaries may not purchase, sell, or otherwise acquire or transfer an interest in any equity of such issuer, if such period is—

(I) incorporated into the individual account plan; and

(II) timely disclosed to employees before becoming participants under the individual account plan or as a subsequent amendment to the plan; or

(ii) any suspension described in subparagraph (A) that is imposed solely in connection with persons becoming participants or beneficiaries, or ceasing to be participants or beneficiaries, in an individual account plan by reason of a corporate merger, acquisition, divestiture, or similar transaction involving the plan or plan sponsor.

(5) Individual account plan

For purposes of this subsection, the term "individual account plan" has the meaning provided in section 1002(34) of Title 29, except that such term shall not include a one-participant retirement plan (within the meaning of section 1021(i)(8)(B) of Title 29).

(6) Notice to directors, executive officers, and the Commission

2. Codified at 15 U.S.C. Section 7244.

In any case in which a director or executive officer is subject to the requirements of this subsection in connection with a blackout period (as defined in paragraph (4)) with respect to any equity securities, the issuer of such equity securities shall timely notify such director or officer and the Securities and Exchange Commission of such blackout period.

* * * *

EXPLANATORY COMMENTS: *Corporate pension funds typically prohibit employees from trading shares of the corporation during periods when the pension fund is undergoing significant change. Prior to 2002, however, these blackout periods did not affect the corporation's executives, who frequently received shares of the corporate stock as part of their compensation. During the collapse of Enron, for example, its pension plan was scheduled to change administrators at a time when Enron's stock price was falling. Enron's employees therefore could not sell their shares while the price was dropping, but its executives could and did sell their stock, consequently avoiding some of the losses. Section 306 was Congress's solution to the basic unfairness of this situation. This section of the act required the SEC to issue rules that prohibit any director or executive officer from trading during pension fund blackout periods. (The SEC later issued these rules, entitled Regulation Blackout Trading Restriction, or Reg BTR.) Section 306 also provided shareholders with a right to file a shareholder's derivative suit against officers and directors who have profited from trading during these blackout periods (provided that the corporation has failed to bring a suit). The officer or director can be forced to return to the corporation any profits received, regardless of whether the director or officer acted with bad intent.*

SECTION 402

Periodical and other reports³

* * * *

(i) Accuracy of financial reports

Each financial report that contains financial statements, and that is required to be prepared in accordance with (or reconciled to) generally accepted accounting principles under this chapter and filed with the Commission shall reflect all material correcting adjustments that have been identified by a registered public accounting firm in accordance with generally accepted accounting principles and the rules and regulations of the Commission.

(j) Off-balance sheet transactions

Not later than 180 days after July 30, 2002, the Commission shall issue final rules providing that each annual and quarterly financial report required to be filed with the Commission shall disclose all material off-balance sheet transactions, arrangements, obligations (including contingent obligations), and other relationships of the issuer

with unconsolidated entities or other persons, that may have a material current or future effect on financial condition, changes in financial condition, results of operations, liquidity, capital expenditures, capital resources, or significant components of revenues or expenses.

(k) Prohibition on personal loans to executives

(1) In general

It shall be unlawful for any issuer (as defined in section 7201 of this title), directly or indirectly, including through any subsidiary, to extend or maintain credit, to arrange for the extension of credit, or to renew an extension of credit, in the form of a personal loan to or for any director or executive officer (or equivalent thereof) of that issuer. An extension of credit maintained by the issuer on July 30, 2002, shall not be subject to the provisions of this subsection, provided that there is no material modification to any term of any such extension of credit or any renewal of any such extension of credit on or after July 30, 2002.

(2) Limitation

Paragraph (1) does not preclude any home improvement and manufactured home loans (as that term is defined in section 1464 of Title 12), consumer credit (as defined in section 1602 of this title), or any extension of credit under an open end credit plan (as defined in section 1602 of this title), or a charge card (as defined in section 1637(c)(4)(e) of this title), or any extension of credit by a broker or dealer registered under section 78o of this title to an employee of that broker or dealer to buy, trade, or carry securities, that is permitted under rules or regulations of the Board of Governors of the Federal Reserve System pursuant to section 78g of this title (other than an extension of credit that would be used to purchase the stock of that issuer), that is—

- (A) made or provided in the ordinary course of the consumer credit business of such issuer;
- (B) of a type that is generally made available by such issuer to the public; and
- (C) made by such issuer on market terms, or terms that are no more favorable than those offered by the issuer to the general public for such extensions of credit.

(3) Rule of construction for certain loans

Paragraph (1) does not apply to any loan made or maintained by an insured depository institution (as defined in section 1813 of Title 12), if the loan is subject to the insider lending restrictions of section 375b of Title 12.

(l) Real time issuer disclosures

Each issuer reporting under subsection (a) of this section or section 78o(d) of this title shall disclose to the public on a rapid and current basis such additional information concerning material changes in the financial condition or operations of the issuer, in plain English, which may

³ This section of the Sarbanes-Oxley Act amended some of the provisions of the 1934 Securities Exchange Act and added the paragraphs reproduced here at 15 U.S.C. Section 78m.

include trend and qualitative information and graphic presentations, as the Commission determines, by rule, is necessary or useful for the protection of investors and in the public interest.

* * * *

EXPLANATORY COMMENTS: *Corporate executives during the Enron era typically received extremely large salaries, significant bonuses, and abundant stock options, even when the companies for which they worked were suffering. Executives were also routinely given personal loans from corporate funds, many of which were never paid back. The average large company during that period loaned almost \$1 million a year to top executives, and some companies, including Tyco International and Adelphia Communications Corporation, loaned hundreds of millions of dollars to their executives every year. Section 402 amended the 1934 Securities Exchange Act to prohibit public companies from making personal loans to executive officers and directors. There are a few exceptions to this prohibition, such as home-improvement loans made in the ordinary course of business. Note also that while loans are forbidden, outright gifts are not. A corporation is free to give gifts to its executives, including cash, provided that these gifts are disclosed on its financial reports. The idea is that corporate directors will be deterred from making substantial gifts to their executives by the disclosure requirement—particularly if the corporation's financial condition is questionable—because making such gifts could be perceived as abusing their authority.*

SECTION 403

Directors, officers, and principal stockholders⁴

(a) Disclosures required

(1) Directors, officers, and principal stockholders required to file

Every person who is directly or indirectly the beneficial owner of more than 10 percent of any class of any equity security (other than an exempted security) which is registered pursuant to section 781 of this title, or who is a director or an officer of the issuer of such security, shall file the statements required by this subsection with the Commission (and, if such security is registered on a national securities exchange, also with the exchange).

(2) Time of filing

The statements required by this subsection shall be filed—

(A) at the time of the registration of such security on a national securities exchange or by the effective date of a registration statement filed pursuant to section 781(g) of this title;

(B) within 10 days after he or she becomes such beneficial owner, director, or officer;

(C) if there has been a change in such ownership, or if such person shall have purchased or sold a security-based swap agreement (as defined in section 206(b) of the Gramm-Leach-Bliley Act (15 U.S.C. 78c note)) involving such equity security, before the end of the second business day following the day on which the subject transaction has been executed, or at such other time as the Commission shall establish, by rule, in any case in which the Commission determines that such 2-day period is not feasible.

(3) Contents of statements

A statement filed—

(A) under subparagraph (A) or (B) of paragraph (2) shall contain a statement of the amount of all equity securities of such issuer of which the filing person is the beneficial owner; and

(B) under subparagraph (C) of such paragraph shall indicate ownership by the filing person at the date of filing, any such changes in such ownership, and such purchases and sales of the security-based swap agreements as have occurred since the most recent such filing under such subparagraph.

(4) Electronic filing and availability

Beginning not later than 1 year after July 30, 2002—

(A) a statement filed under subparagraph (C) of paragraph (2) shall be filed electronically;

(B) the Commission shall provide each such statement on a publicly accessible Internet site not later than the end of the business day following that filing; and

(C) the issuer (if the issuer maintains a corporate website) shall provide that statement on that corporate website, not later than the end of the business day following that filing.

* * * *

EXPLANATORY COMMENTS: *This section dramatically shortens the time period provided in the Securities Exchange Act of 1934 for disclosing transactions by insiders. The prior law stated that most transactions had to be reported within ten days of the beginning of the following month, although certain transactions did not have to be reported until the following fiscal year (within the first forty-five days). Because some of the insider trading that occurred during the Enron fiasco did not have to be disclosed (and was therefore not discovered) until long after the transactions, Congress added this section to reduce the time period for making disclosures. Under Section 403, most transactions by insiders must be electronically filed with the SEC within two business days. Also, any company that maintains a Web site must post these SEC filings on its site by the end of the next business day. Congress enacted this section in the belief that if insiders are required to file reports of their transactions promptly with the SEC, companies will do more to police themselves and prevent insider trading.*

⁴ This section of the Sarbanes-Oxley Act amended the disclosure provisions of the 1934 Securities Exchange Act, at 15 U.S.C. Section 78p.

SECTION 404**Management assessment of internal controls⁵****(a) Rules required**

The Commission shall prescribe rules requiring each annual report required by section 78m(a) or 78o(d) of this title to contain an internal control report, which shall—

- (1) state the responsibility of management for establishing and maintaining an adequate internal control structure and procedures for financial reporting; and
- (2) contain an assessment, as of the end of the most recent fiscal year of the issuer, of the effectiveness of the internal control structure and procedures of the issuer for financial reporting.

(b) Internal control evaluation and reporting

With respect to the internal control assessment required by subsection (a) of this section, each registered public accounting firm that prepares or issues the audit report for the issuer shall attest to, and report on, the assessment made by the management of the issuer. An attestation made under this subsection shall be made in accordance with standards for attestation engagements issued or adopted by the Board. Any such attestation shall not be the subject of a separate engagement.

* * * *

EXPLANATORY COMMENTS: *This section was enacted to prevent corporate executives from claiming they were ignorant of significant errors in their companies' financial reports. For instance, several CEOs testified before Congress that they simply had no idea that the corporations' financial statements were off by billions of dollars. Congress therefore passed Section 404, which requires each annual report to contain a description and assessment of the company's internal control structure and financial reporting procedures. The section also requires that an audit be conducted of the internal control assessment, as well as the financial statements contained in the report. This section goes hand in hand with Section 302 (which, as discussed previously, requires various certifications attesting to the accuracy of the information in financial reports).*

Section 404 has been one of the more controversial and expensive provisions in the Sarbanes-Oxley Act because it requires companies to assess their own internal financial controls to make sure that their financial statements are reliable and accurate. A corporation might need to set up a disclosure committee and a coordinator, establish codes of conduct for accounting and financial personnel, create documentation procedures, provide training, and outline the individuals who are responsible for performing each of the procedures. Companies that were already well managed have not experienced substantial difficulty complying with this section. Other companies, however, have spent millions of dollars setting up, documenting, and evaluating their internal financial control systems. Although initially creating the internal financial control system is a one-time-only expense, the costs of maintaining and evaluating it are ongoing. Some corporations that spent considerable

sums complying with Section 404 have been able to offset these costs by discovering and correcting inefficiencies or frauds within their systems. Nevertheless, it is unlikely that any corporation will find compliance with this section to be inexpensive.

SECTION 802 (a)**Destruction, alteration, or falsification of records in Federal investigations and bankruptcy⁶**

Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.

Destruction of corporate audit records⁷

(a) (1) Any accountant who conducts an audit of an issuer of securities to which section 10A(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78j-1(a)) applies, shall maintain all audit or review workpapers for a period of 5 years from the end of the fiscal period in which the audit or review was concluded.

(2) The Securities and Exchange Commission shall promulgate, within 180 days, after adequate notice and an opportunity for comment, such rules and regulations, as are reasonably necessary, relating to the retention of relevant records such as workpapers, documents that form the basis of an audit or review, memoranda, correspondence, communications, other documents, and records (including electronic records) which are created, sent, or received in connection with an audit or review and contain conclusions, opinions, analyses, or financial data relating to such an audit or review, which is conducted by any accountant who conducts an audit of an issuer of securities to which section 10A(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78j-1(a)) applies. The Commission may, from time to time, amend or supplement the rules and regulations that it is required to promulgate under this section, after adequate notice and an opportunity for comment, in order to ensure that such rules and regulations adequately comport with the purposes of this section.

(b) Whoever knowingly and willfully violates subsection (a)(1), or any rule or regulation promulgated by the Securities and Exchange Commission under subsection (a)(2), shall be fined under this title, imprisoned not more than 10 years, or both.

(c) Nothing in this section shall be deemed to diminish or relieve any person of any other duty or obligation imposed

5. Codified at 15 U.S.C. Section 7262.

6. Codified at 15 U.S.C. Section 1519.

7. Codified at 15 U.S.C. Section 1520.

by Federal or State law or regulation to maintain, or refrain from destroying, any document.

* * * *

EXPLANATORY COMMENTS: Section 802(a) enacted two new statutes that punish those who alter or destroy documents. The first statute is not specifically limited to securities fraud cases. It provides that anyone who alters, destroys, or falsifies records in federal investigations or bankruptcy may be criminally prosecuted and sentenced to a fine or to up to twenty years in prison, or both. The second statute requires auditors of public companies to keep all audit or review working papers for five years but expressly allows the SEC to amend or supplement these requirements as it sees fit. The SEC has, in fact, amended this section by issuing a rule that requires auditors who audit reporting companies to retain working papers for seven years from the conclusion of the review. Section 802(a) further provides that anyone who knowingly and willfully violates this statute is subject to criminal prosecution and can be sentenced to a fine, imprisoned for up to ten years, or both if convicted.

This portion of the Sarbanes-Oxley Act implicitly recognizes that persons who are under investigation often are tempted to respond by destroying or falsifying documents that might prove their complicity in wrongdoing. The severity of the punishment should provide a strong incentive for these individuals to resist the temptation.

SECTION 804

Time limitations on the commencement of civil actions arising under Acts of Congress⁸

(a) Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than 4 years after the cause of action accrues.

(b) Notwithstanding subsection (a), a private right of action that involves a claim of fraud, deceit, manipulation, or contrivance in contravention of a regulatory requirement concerning the securities laws, as defined in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(47)), may be brought not later than the earlier of—

- (1) 2 years after the discovery of the facts constituting the violation; or
- (2) 5 years after such violation.

* * * *

EXPLANATORY COMMENTS: Before the enactment of this section, Section 10(b) of the Securities Exchange Act of 1934 had no express statute of limitations. The courts generally required plaintiffs to have filed suit within one year from the date that they should (using due diligence) have discovered that a fraud had been committed but no later than three years after the fraud occurred. Section 804 extends this period by specifying that plaintiffs must file a lawsuit within two years after they discover (or should have discovered) a fraud but no later than five years after the fraud's occurrence. This provision has

prevented the courts from dismissing numerous securities fraud lawsuits.

SECTION 806

Civil action to protect against retaliation in fraud cases⁹

(a) Whistleblower protection for employees of publicly traded companies.—

No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)), or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee—

(1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by—

- (A) a Federal regulatory or law enforcement agency;
- (B) any Member of Congress or any committee of Congress; or
- (C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct); or

(2) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.

(b) Enforcement action.—

(1) In general.—A person who alleges discharge or other discrimination by any person in violation of subsection (a) may seek relief under subsection (c), by—

- (A) filing a complaint with the Secretary of Labor; or
- (B) if the Secretary has not issued a final decision within 180 days of the filing of the complaint and

8. Codified at 28 U.S.C. Section 1658.

9. Codified at 18 U.S.C. Section 1514A.

there is no showing that such delay is due to the bad faith of the claimant, bringing an action at law or equity for de novo review in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy.

(2) Procedure.—

(A) In general.—An action under paragraph (1)(A) shall be governed under the rules and procedures set forth in section 42121(b) of title 49, United States Code.

(B) Exception.—Notification made under section 42121(b)(1) of title 49, United States Code, shall be made to the person named in the complaint and to the employer.

(C) Burdens of proof.—An action brought under paragraph (1)(B) shall be governed by the legal burdens of proof set forth in section 42121(b) of title 49, United States Code.

(D) Statute of limitations.—An action under paragraph (1) shall be commenced not later than 90 days after the date on which the violation occurs.

(c) Remedies.—

(1) In general.—An employee prevailing in any action under subsection (b)(1) shall be entitled to all relief necessary to make the employee whole.

(2) Compensatory damages.—Relief for any action under paragraph (1) shall include—

(A) reinstatement with the same seniority status that the employee would have had, but for the discrimination;

(B) the amount of back pay, with interest; and

(C) compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees.

(d) Rights retained by employee.—Nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any employee under any Federal or State law, or under any collective bargaining agreement.

EXPLANATORY COMMENTS: *Section 806 is one of several provisions that were included in the Sarbanes-Oxley Act to encourage and protect whistleblowers—that is, employees who report their employer's alleged violations of securities law to the authorities. This section applies to employees, agents, and independent contractors who work for publicly traded companies or testify about such a company during an investigation. It sets up an administrative procedure at the Department of Labor for individuals who claim that their employer retaliated against them (fired or demoted them, for example) for blowing the whistle on the employer's wrongful conduct. It also allows the award of civil damages—including back pay, reinstatement,*

special damages, attorneys' fees, and court costs—to employees who prove that they suffered retaliation. Since this provision was enacted, whistleblowers have filed numerous complaints with the Department of Labor under this section.

SECTION 807

Securities fraud¹⁰

Whoever knowingly executes, or attempts to execute, a scheme or artifice—

(1) to defraud any person in connection with any security of an issuer with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l) or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)); or

(2) to obtain, by means of false or fraudulent pretenses, representations, or promises, any money or property in connection with the purchase or sale of any security of an issuer with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l) or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)); shall be fined under this title, or imprisoned not more than 25 years, or both.

* * * *

EXPLANATORY COMMENTS: *Section 807 adds a new provision to the federal criminal code that addresses securities fraud. Before 2002, federal securities law had already made it a crime—under Section 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5, both of which are discussed in Chapter 29—to intentionally defraud someone in connection with a purchase or sale of securities, but the offense was not listed in the federal criminal code. Also, paragraph 2 of Section 807 goes beyond what is prohibited under securities law by making it a crime to obtain by means of false or fraudulent pretenses any money or property from the purchase or sale of securities. This new provision allows violators to be punished by up to twenty-five years in prison, a fine, or both.*

SECTION 906

Failure of corporate officers to certify financial reports¹¹

(a) Certification of periodic financial reports.—Each periodic report containing financial statements filed by an issuer with the Securities Exchange Commission pursuant to section 13(a) or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m(a) or 78o(d)) shall be accompanied by a written statement by the chief executive officer and chief financial officer (or equivalent thereof) of the issuer.

¹⁰. Codified at 18 U.S.C. Section 1348.

¹¹. Codified at 18 U.S.C. Section 1350.

(b) Content.—The statement required under subsection (a) shall certify that the periodic report containing the financial statements fully complies with the requirements of section 13(a) or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m or 78o(d)) and that information contained in the periodic report fairly presents, in all material respects, the financial condition and results of operations of the issuer.

(c) Criminal penalties.—Whoever—

(1) certifies any statement as set forth in subsections (a) and (b) of this section knowing that the periodic report accompanying the statement does not comport with all the requirements set forth in this section shall be fined not more than \$1,000,000 or imprisoned not more than 10 years, or both; or

(2) willfully certifies any statement as set forth in subsections (a) and (b) of this section knowing that the periodic report accompanying the statement does not comport with all the requirements set forth in

this section shall be fined not more than \$5,000,000, or imprisoned not more than 20 years, or both.

* * * *

EXPLANATORY COMMENTS: *As previously discussed, under Section 302 a corporation's CEO and CFO are required to certify that they believe the quarterly and annual reports their company files with the SEC are accurate and fairly present the company's financial condition. Section 906 adds "teeth" to these requirements by authorizing criminal penalties for those officers who intentionally certify inaccurate SEC filings. Knowing violations of the requirements are punishable by a fine of up to \$1 million, ten years in prison, or both. Willful violators may be fined up to \$5 million, sentenced to up to twenty years in prison, or both. Although the difference between a knowing and a willful violation is not entirely clear, the section is obviously intended to remind corporate officers of the serious consequences of certifying inaccurate reports to the SEC.*

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Glossary



A

Acceptance In contract law, the offeree's notification to the offeror that the offeree agrees to be bound by the terms of the offeror's proposal. Although historically the terms of acceptance had to be the mirror image of the terms of the offer, the Uniform Commercial Code provides that even modified terms of the offer in a definite expression of acceptance constitute a contract.

Accord and satisfaction An agreement for payment (or other performance) between two parties, one of whom has a right of action against the other. After the payment has been accepted or other performance has been made, the "accord and satisfaction" is complete and the obligation is discharged.

Accredited investors In the context of securities offerings, "sophisticated" investors, such as banks, insurance companies, investment companies, the issuer's executive officers and directors, and persons whose income or net worth exceeds certain limits.

Acquittal A certification or declaration following a trial that the individual accused of a crime is innocent, or free from guilt, and is thus absolved of the charges.

Act of state doctrine A doctrine that provides that the judicial branch of one country will not examine the validity of public acts committed by a recognized foreign government within its own territory.

Actionable Capable of serving as the basis of a lawsuit.

Actual authority Authority of an agent that is express or implied.

Actual malice A condition that exists when a person makes a statement with either knowledge of its falsity or a reckless disregard for the truth. In a defamation suit, a statement made about a public figure normally must be made with actual malice for liability to be incurred.

Actus reus (pronounced *ak-tus ray-uhs*) A guilty (prohibited) act. The commission of a prohibited act is one of the two essential elements required for criminal liability, the other element being the intent to commit a crime.

Adequate protection doctrine In bankruptcy law, a doctrine that protects secured creditors from losing their security as a result of an automatic stay on legal proceedings by creditors against the debtor

once the debtor petitions for bankruptcy relief. In certain circumstances, the bankruptcy court may provide adequate protection by requiring the debtor or trustee to pay the creditor or provide additional guaranties to protect the creditor against the losses suffered by the creditor as a result of the stay.

Adhesion contract A "standard-form" contract, such as that between a large retailer and a consumer, in which the stronger party dictates the terms.

Adjudication The process of resolving a dispute by presenting evidence and arguments before a neutral third party decision maker in a court or an administrative law proceeding.

Adjustable-rate mortgage (ARM) A mortgage in which the rate of interest paid by the borrower changes periodically, often with reference to a predetermined government interest rate (the index). Usually, the interest rate for ARMs is initially low and increases over time, but there is a cap on the amount that the rate can increase during any adjustment period.

Administrative agency A federal, state, or local government agency established to perform a specific function. Administrative agencies are authorized by legislative acts to make and enforce rules to administer and enforce the acts.

Administrative law The body of law created by administrative agencies (in the form of rules, regulations, orders, and decisions) in order to carry out their duties and responsibilities.

Administrative law judge (ALJ) One who presides over an administrative agency hearing and who has the power to administer oaths, take testimony, rule on questions of evidence, and make determinations of fact.

Administrative process The procedure used by administrative agencies in the administration of law.

Administrator One who is appointed by a court to handle the probate (disposition) of a person's estate if that person dies intestate (without a valid will) or if the executor named in the will cannot serve.

Adverse possession The acquisition of title to real property by occupying it openly, without the consent of the owner, for a period of time specified by a state statute. The occupation must be actual, open, notorious, exclusive, and in opposition to all others, including the owner.

Affidavit A written or printed voluntary statement of facts, confirmed by the oath or affirmation of the party making it and made before a person having the authority to administer the oath or affirmation.

Affirm To validate; to give legal force to. *See also* Ratification

Affirmative action Job-hiring policies that give special consideration to members of protected classes in an effort to overcome present effects of past discrimination.

Affirmative defense A response to a plaintiff's claim that does not deny the plaintiff's facts but attacks the plaintiff's legal right to bring an action. An example is the running of the statute of limitations.

After-acquired evidence A type of evidence submitted in support of an affirmative defense in employment discrimination cases. Evidence that, prior to the employer's discriminatory act, the employee engaged in misconduct sufficient to warrant dismissal had the employer known of it earlier.

After-acquired property Property of the debtor that is acquired after the execution of a security agreement.

Age of majority The age at which an individual is considered legally capable of conducting himself or herself responsibly. A person of this age is entitled to the full rights of citizenship, including the right to vote. In contract law, the age at which one is no longer an infant and can no longer disaffirm a contract.

Agency A relationship between two parties in which one party (the agent) agrees to represent or act for the other (the principal).

Agency by estoppel An agency that arises when a principal negligently allows an agent to exercise powers not granted to the agent, thus justifying others in believing that the agent possesses the requisite agency authority.

Agent A person who agrees to represent or act for another, called the principal.

Agreement A meeting of two or more minds in regard to the terms of a contract; usually broken down into two events—an offer by one party to form a contract, and an acceptance of the offer by the person to whom the offer is made.

Alien corporation A designation in the United States for a corporation formed in another country but doing business in the United States.

Alienation In real property law, the voluntary transfer of property from one person to another (as opposed to a transfer by operation of law).

Allegation A statement, claim, or assertion.

Allege To state, recite, assert, or charge.

Alternative dispute resolution (ADR) The resolution of disputes in ways other than those involved in the traditional judicial process. Negotiation, mediation, and arbitration are forms of ADR.

Amend To change through a formal procedure.

American Arbitration Association (AAA) The major organization offering arbitration services in the United States.

Analogy In logical reasoning, an assumption that if two things are similar in some respects, they will

be similar in other respects also. Often used in legal reasoning to infer the appropriate application of legal principles in a case being decided by referring to previous cases involving different facts but considered to come within the policy underlying the rule.

Annual percentage rate (APR) The cost of credit on a yearly basis, typically expressed as an annual percentage.

Annuity An insurance policy that pays the insured fixed, periodic payments for life or for a term of years, as stipulated in the policy, after the insured reaches a specified age.

Annul To cancel or to make void.

Answer Procedurally, a defendant's response to the plaintiff's complaint.

Anticipatory repudiation An assertion or action by a party indicating that he or she will not perform an obligation that the party is contractually obligated to perform at a future time.

Antitrust law The body of federal and state laws and statutes protecting trade and commerce from unlawful restraints, price discrimination, price fixing, and monopolies. The principal federal antitrust statutes are the Sherman Act of 1890, the Clayton Act of 1914, and the Federal Trade Commission Act of 1914.

Apparent authority Authority that is only apparent, not real. In agency law, a person may be deemed to have had the power to act as an agent for another party if the other party's manifestations to a third party led the third party to believe that an agency existed when, in fact, it did not.

Appeal Resort to a superior court, such as an appellate court, to review the decision of an inferior court, such as a trial court or an administrative agency.

Appellant The party who takes an appeal from one court to another.

Appellate court A court having appellate jurisdiction.

Appellate jurisdiction Courts having appellate jurisdiction act as reviewing courts, or appellate courts. Generally, cases can be brought before appellate courts only on appeal from an order or a judgment of a trial court or other lower court.

Appellee The party against whom an appeal is taken—that is, the party who opposes setting aside or reversing the judgment.

Appraisal right The right of a dissenting shareholder, if he or she objects to an extraordinary transaction of the corporation (such as a merger or consolidation), to have his or her shares appraised and to be paid the fair value of his or her shares by the corporation.

Appraiser An individual who specializes in determining the value of certain real or personal property.

Appropriation In tort law, the use by one person of another person's name, likeness, or other identifying characteristic without permission and for the benefit of the user.

Arbitrary and capricious test A court reviewing an informal administrative agency action applies this test to determine whether or not that action was in

clear error. The court gives wide discretion to the expertise of the agency and decides if the agency had sufficient factual information on which to base its action. If no clear error was made, then the agency's action stands.

Arbitration The settling of a dispute by submitting it to a disinterested third party (other than a court), who renders a decision. The decision may or may not be legally binding.

Arbitration clause A clause in a contract that provides that, in the event of a dispute, the parties will submit the dispute to arbitration rather than litigate the dispute in court.

Arraignment A procedure in which an accused person is brought before the court to answer criminal charges. The charge is read to the person, and he or she is asked to enter a plea—such as “guilty” or “not guilty.”

Arson The malicious burning of another's dwelling. Some statutes have expanded this to include any real property regardless of ownership and the destruction of property by other means—for example, by explosion.

Articles of incorporation The document filed with the appropriate governmental agency, usually the secretary of state, when a business is incorporated; state statutes usually prescribe what kind of information must be contained in the articles of incorporation.

Articles of organization The document filed with a designated state official by which a limited liability company is formed.

Articles of partnership A written agreement that sets forth each partner's rights and obligations with respect to the partnership.

Artisan's lien A possessory lien given to a person who has made improvements and added value to another person's personal property as security for payment for services performed.

Assault Any word or action intended to make another person fearful of immediate physical harm; a reasonably believable threat.

Assignee The person to whom contract rights are assigned.

Assignment The act of transferring to another all or part of one's rights arising under a contract.

Assignor The person who assigns contract rights.

Assumption of risk A defense against negligence that can be used when the plaintiff was aware of a danger and voluntarily assumed the risk of injury from that danger.

Attachment (1) In the context of secured transactions, the process by which a security interest in the property of another becomes enforceable. (2) In the context of judicial liens, a court-ordered seizure and taking into custody of property prior to the securing of a judgment for a past-due debt.

Attempted monopolization Any actions by a firm to eliminate competition and gain monopoly power.

Authenticate To sign a record, or with the intent to sign a record, to execute or to adopt an electronic sound, symbol, or the like to link with the record. A

record is retrievable information inscribed on a tangible medium or stored in an electronic or other medium.

Authority In agency law, the agent's permission to act on behalf of the principal. An agent's authority may be actual (express or implied) or apparent. *See also* Actual authority; Apparent authority

Authorization card A card signed by an employee that gives a union permission to act on his or her behalf in negotiations with management. Unions typically use authorization cards as evidence of employee support during union organization.

Authorized means In contract law, the means of acceptance authorized by the offeror.

Automatic stay In bankruptcy proceedings, the suspension of virtually all litigation and other action by creditors against the debtor or the debtor's property; the stay is effective the moment the debtor files a petition in bankruptcy.

Award In the context of litigation, the amount of money awarded to a plaintiff in a civil lawsuit as damages. In the context of arbitration, the arbitrator's decision.

B

Bait-and-switch advertising Advertising a product at a very attractive price (the bait) and then informing the consumer, once he or she is in the store, that the advertised product is either not available or is of poor quality; the customer is then urged to purchase (switched to) a more expensive item.

Balloon mortgage A loan that allows the debtor to make small monthly payments for an initial period, such as eight years, but then requires a large balloon payment for the entire remaining balance of the mortgage loan at the end of that period.

Bankruptcy court A federal court of limited jurisdiction that handles only bankruptcy proceedings. Bankruptcy proceedings are governed by federal bankruptcy law.

Bankruptcy trustee A person who is either appointed by the U.S. Department of Justice or by creditors in bankruptcy cases. In all bankruptcies under Chapters 7, 12, or 13, a trustee is appointed by the U.S. Trustee, who is an officer of the Department of Justice. Chapter 11 bankruptcies allow the debtor to continue to manage the property as a “debtor in possession,” but this person can be replaced for cause with a bankruptcy trustee.

Bargain A mutual undertaking, contract, or agreement between two parties; to negotiate over the terms of a purchase or contract.

Basis of the bargain In contract law, the affirmation of fact or promise on which the sale of goods is predicated, creating an express warranty.

Battery The unprivileged, intentional touching of another.

Beneficiary One to whom life insurance proceeds are payable or for whose benefit a trust has been established or property under a will has been transferred.

Beyond a reasonable doubt The standard used to determine the guilt or innocence of a person crim-

inally charged. To be guilty of a crime, one must be proved guilty “beyond and to the exclusion of every reasonable doubt.” A reasonable doubt is one that would cause a prudent person to hesitate before acting in matters important to him or her.

Bilateral contract A type of contract that arises when a promise is given in exchange for a return promise.

Bill of lading A document that serves both as evidence of the receipt of goods for shipment and as documentary evidence of title to the goods.

Bill of Rights The first ten amendments to the U.S. Constitution.

Binding authority Any source of law that a court must follow when deciding a case. Binding authorities include constitutions, statutes, and regulations that govern the issue being decided, as well as court decisions that are controlling precedents within the jurisdiction.

Blue sky laws State laws that regulate the offer and sale of securities.

Bona fide Good faith. A bona fide obligation is one made in good faith—that is, sincerely and honestly.

Bona fide occupational qualification (BFOQ) Identifiable characteristics reasonably necessary to the normal operation of a particular business. These characteristics can include gender, national origin, and religion, but not race.

Bond A certificate that evidences a corporate (or government) debt. It is a security that involves no ownership interest in the issuing entity.

Botnet Short for *robot network*—a group of computers that run an application that is controlled and manipulated only by the software source. Although sometimes a legitimate network, usually this term is reserved for a group of computers that have been infected by malicious robot software. In a botnet, each connected computer becomes a zombie, or drone.

Boycott A concerted refusal to do business with a particular person or entity in order to obtain concessions or to express displeasure with certain acts or practices of that person or business. *See also* Secondary boycott

Breach To violate a law, by an act or an omission, or to break a legal obligation that one owes to another person or to society.

Breach of contract The failure, without legal excuse, of a promisor to perform the obligations of a contract.

Bribery The offering, giving, receiving, or soliciting of anything of value with the aim of influencing an official action or an official's discharge of a legal or public duty or (with respect to commercial bribery) a business decision.

Bridge loan A short-term loan that allows a buyer to make a down payment on a new home before selling her or his current home (the current home is used as collateral).

Brief A formal legal document submitted by the attorney for the appellant—or the appellee (in answer to the appellant's brief)—to an appellate court when a case is appealed. The appellant's brief outlines the facts

and issues of the case, the judge's rulings or jury's findings that should be reversed or modified, the applicable law, and the arguments on the client's behalf.

Browse-wrap terms Terms and conditions of use that are presented to an Internet user at the time certain products, such as software, are being downloaded but that need not be agreed to (by clicking “I agree,” for example) before being able to install or use the product.

Bureaucracy A large organization that is structured hierarchically to carry out specific functions.

Burglary The unlawful entry into a building with the intent to commit a felony. (Some state statutes expand this to include the intent to commit any crime.)

Business ethics Ethics in a business context; a consensus of what constitutes right or wrong behavior in the world of business and the application of moral principles to situations that arise in a business setting.

Business invitees Those people, such as customers or clients, who are invited onto business premises by the owner of those premises for business purposes.

Business judgment rule A rule that immunizes corporate management from liability for actions that result in corporate losses or damages if the actions are undertaken in good faith and are within both the power of the corporation and the authority of management to make.

Business necessity A defense to allegations of employment discrimination in which the employer demonstrates that an employment practice that discriminates against members of a protected class is related to job performance.

Business plan A document describing a company, its products, and its anticipated future performance. Creating a business plan is normally the first step in obtaining loans or venture-capital funds for a new business enterprise.

Business tort Wrongful interference with the business rights of another.

Business trust A voluntary form of business organization in which investors (trust beneficiaries) transfer cash or property to trustees in exchange for trust certificates that represent their investment shares. Management of the business and trust property is handled by the trustees for the use and benefit of the investors. The certificate holders have limited liability (are not responsible for the debts and obligations incurred by the trust) and share in the trust's profits.

Buyout price The amount payable to a partner on his or her dissociation from a partnership, based on the amount distributable to that partner if the firm were wound up on that date, and offset by any damages for wrongful dissociation.

Buy-sell agreement In the context of partnerships, an express agreement made at the time of partnership formation for one or more of the partners to buy out the other or others should the situation warrant—and thus provide for the smooth dissolution of the partnership.

Bylaws A set of governing rules adopted by a corporation or other association.

Bystander A spectator, witness, or person who was standing nearby when an event occurred and who did not engage in the business or act leading to the event.

C

C.I.F. or C.&F. Cost, insurance, and freight—or just cost and freight. A pricing term in a contract for the sale of goods requiring, among other things, that the seller place the goods in the possession of a carrier before risk passes to the buyer.

C.O.D. Cash on delivery. In sales transactions, a term meaning that the buyer will pay for the goods on delivery and before inspecting the goods.

Cancellation The act of nullifying, or making void. *See also* Rescission

Capital Accumulated goods, possessions, and assets used for the production of profits and wealth; the equity of owners in a business.

Carrier An individual or organization engaged in transporting passengers or goods for hire. *See also* Common carrier

Case law The rules of law announced in court decisions. Case law includes the aggregate of reported cases that interpret judicial precedents, statutes, regulations, and constitutional provisions.

Case on point A previous case involving factual circumstances and issues that are similar to those in the case before the court.

Categorical imperative A concept developed by the philosopher Immanuel Kant as an ethical guideline for behavior. In deciding whether an action is right or wrong, or desirable or undesirable, a person should evaluate the action in terms of what would happen if everybody else in the same situation, or category, acted the same way.

Causation in fact An act or omission without (“but for”) which an event would not have occurred.

Cause of action A situation or set of facts sufficient to justify a right to sue.

Cease-and-desist order An administrative or judicial order prohibiting a person or business firm from conducting activities that an agency or court has deemed illegal.

Certificate of deposit (CD) A note of a bank in which a bank acknowledges a receipt of money from a party and promises to repay the money, with interest, to the party on a certain date.

Certificate of limited partnership The basic document filed with a designated state official by which a limited partnership is formed.

Certification mark A mark used by one or more persons, other than the owner, to certify the region, materials, mode of manufacture, quality, or accuracy of the owner’s goods or services. When used by members of a cooperative, association, or other organization, such a mark is referred to as a collective mark. Examples

of certification marks include the “Good Housekeeping Seal of Approval” and “UL Tested.”

Certiorari *See* Writ of *certiorari*

Chain-style business franchise A franchise that operates under a franchisor’s trade name and that is identified as a member of a select group of dealers that engage in the franchisor’s business. The franchisee is generally required to follow standardized or prescribed methods of operation. Examples of this type of franchise are McDonald’s and most other fast-food chains.

Chancellor An adviser to the king at the time of the early king’s courts of England. Individuals petitioned the king for relief when they could not obtain an adequate remedy in a court of law, and these petitions were decided by the chancellor.

Charging order In partnership law, an order granted by a court to a judgment creditor that entitles the creditor to attach profits or assets of a partner on dissolution of the partnership.

Chattel All forms of personal property.

Checks and balances The national government is composed of three separate branches: the executive, the legislative, and the judicial branches. Each branch of the government exercises a check on the actions of the others.

Choice-of-language clause A clause in a contract designating the official language by which the contract will be interpreted in the event of a future disagreement over the contract’s terms.

Choice-of-law clause A clause in a contract designating the law (such as the law of a particular state or nation) that will govern the contract.

Citation A reference to a publication in which a legal authority—such as a statute or a court decision—or other source can be found.

Civil law The branch of law dealing with the definition and enforcement of all private or public rights, as opposed to criminal matters.

Civil law system A system of law derived from that of the Roman Empire and based on a code rather than case law; the predominant system of law in the nations of continental Europe and the nations that were once their colonies. In the United States, Louisiana is the only state that has a civil law system.

Claim As a verb, to assert or demand. As a noun, a right to payment.

Click-on agreement An agreement that arises when a buyer, engaging in a transaction on a computer, indicates his or her assent to be bound by the terms of an offer by clicking on a button that says, for example, “I agree”; sometimes referred to as a click-on license or a click-wrap agreement.

Closed shop A firm that requires union membership by its workers as a condition of employment. The closed shop was made illegal by the Labor-Management Relations Act of 1947.

Closely held corporation A corporation whose shareholders are limited to a small group of persons, often including only family members. The rights of

shareholders of a closely held corporation usually are restricted regarding the transfer of shares to others.

Closing The final step in the sale of real estate—also called settlement or closing escrow. The escrow agent coordinates the closing with the recording of deeds, the obtaining of title insurance, and other concurrent closing activities. A number of costs must be paid, in cash, at the time of closing, and they can range from several hundred to several thousand dollars, depending on the amount of the mortgage loan and other conditions of the sale.

Closing argument An argument made after the plaintiff and defendant have rested their cases. Closing arguments are made prior to the jury charges.

Cloud computing The delivery to users of on-demand services from third-party servers over a network. Cloud computing is a delivery model. The most widely used cloud computing services are Software as a Service (SaaS), which offers companies a cheaper way to buy and use packaged applications that are no longer run on servers in house.

Codicil A written supplement or modification to a will. A codicil must be executed with the same formalities as a will.

Collateral Under Article 9 of the Uniform Commercial Code, the property subject to a security interest.

Collateral promise A secondary promise that is ancillary (subsidiary) to a principal transaction or primary contractual relationship, such as a promise made by one person to pay the debts of another if the latter fails to perform. A collateral promise normally must be in writing to be enforceable.

Collective bargaining The process by which labor and management negotiate the terms and conditions of employment, including working hours and workplace conditions.

Collective mark A mark used by members of a cooperative, association, or other organization to certify the region, materials, mode of manufacture, quality, or accuracy of the specific goods or services. Examples of collective marks include the labor union marks found on tags of certain products and the credits of movies, which indicate the various associations and organizations that participated in the making of the movies.

Comity A deference by which one nation gives effect to the laws and judicial decrees of another nation. This recognition is based primarily on respect.

Comment period A period of time following an administrative agency's publication or a notice of a proposed rule during which private parties may comment in writing on the agency proposal in an effort to influence agency policy. The agency takes any comments received into consideration when drafting the final version of the regulation.

Commerce clause The provision in Article I, Section 8, of the U.S. Constitution that gives Congress the power to regulate interstate commerce.

Commercial impracticability A doctrine under which a seller may be excused from performing a contract when (1) a contingency occurs, (2) the contingency's occurrence makes performance impracticable, and

(3) the nonoccurrence of the contingency was a basic assumption on which the contract was made. Despite the fact that UCC 2-615 expressly frees only sellers under this doctrine, courts have not distinguished between buyers and sellers in applying it.

Commercial use Use of land for business activities only; sometimes called business use.

Commingle To put funds or goods together into one mass so that the funds or goods are so mixed that they no longer have separate identities. In corporate law, if personal and corporate interests are commingled to the extent that the corporation has no separate identity, a court may "pierce the corporate veil" and expose the shareholders to personal liability.

Common carrier A carrier that transfers people or goods for hire to the general public.

Common law That body of law developed from custom or judicial decisions in English and U.S. courts, not attributable to a legislature.

Community property A form of concurrent ownership of property in which each spouse technically owns an undivided one-half interest in property acquired during the marriage. This form of joint ownership occurs in only a minority of states and Puerto Rico.

Comparative negligence A theory in tort law under which the liability for injuries resulting from negligent acts is shared by all parties who were negligent (including the injured party), on the basis of each person's proportionate negligence.

Compensatory damages A money award equivalent to the actual value of injuries or damages sustained by the aggrieved party.

Complaint The pleading made by a plaintiff alleging wrongdoing on the part of the defendant; the document that, when filed with a court, initiates a lawsuit.

Complete performance Performance of a contract strictly in accordance with the contract's terms.

Composition agreement See Creditors' composition agreement

Computer crime Any wrongful act that is directed against computers and computer parties, or wrongful use or abuse of computers or software.

Concentrated industry An industry in which a large percentage of market sales is controlled by either a single firm or a small number of firms.

Concurrent conditions Conditions in a contract that must occur or be performed at the same time; they are mutually dependent. No obligations arise until these conditions are simultaneously performed.

Concurrent jurisdiction Jurisdiction that exists when two different courts have the power to hear a case. For example, some cases can be heard in either a federal or a state court.

Concurrent ownership Joint ownership.

Concurring opinion A written opinion outlining the views of a judge or justice to make or emphasize a point that was not made or emphasized in the majority opinion.

Condemnation The process of taking private property for public use through the government's power of eminent domain.

Condition A possible future event, the occurrence or nonoccurrence of which will trigger the performance of a legal obligation or terminate an existing obligation under a contract.

Condition precedent A condition in a contract that must be met before a party's promise becomes absolute.

Confession of judgment The act of a debtor in permitting a judgment to be entered against him or her by a creditor, for an agreed sum, without the institution of legal proceedings.

Confiscation A government's taking of privately owned business or personal property without a proper public purpose or an award of just compensation.

Conforming goods Goods that conform to contract specifications.

Confusion The mixing together of goods belonging to two or more owners so that the separately owned goods cannot be identified.

Conglomerate merger A merger between firms that do not compete with each other because they are in different markets (as opposed to horizontal and vertical mergers).

Consent Voluntary agreement to a proposition or an act of another. A concurrence of wills.

Consequential damages Special damages that compensate for a loss that is not direct or immediate (for example, lost profits). The special damages must have been reasonably foreseeable at the time the breach or injury occurred in order for the plaintiff to collect them.

Consideration Generally, the value given in return for a promise or a performance. The consideration, which must be present to make the contract legally binding, must be something of legally sufficient value and bargained for.

Consignment A transaction in which an owner of goods (the consignor) delivers the goods to another (the consignee) for the consignee to sell. The consignee pays the consignor for the goods when they are sold by the consignee.

Consolidation A contractual and statutory process in which two or more corporations join to become a completely new corporation. The original corporations cease to exist, and the new corporation acquires all their assets and liabilities.

Constitutional law Law that is based on the U.S. Constitution and the constitutions of the various states.

Construction loan A loan obtained by the borrower to finance the building of a new home. Construction loans are often set up to release funds at particular stages of the project.

Constructive condition A condition in a contract that is neither expressed nor implied by the contract but rather is imposed by law for reasons of justice.

Constructive delivery An act equivalent to the actual, physical delivery of property that cannot be

physically delivered because of difficulty or impossibility; for example, the transfer of a key to a safe constructively delivers the contents of the safe.

Constructive discharge A termination of employment brought about by making an employee's working conditions so intolerable that the employee reasonably feels compelled to leave.

Consumer credit Credit extended primarily for personal or household use.

Consumer-debtor An individual whose debts are primarily consumer debts (debts for purchases made primarily for personal or household use).

Consumer goods Goods that are primarily for personal or household use.

Consumer law The body of statutes, agency rules, and judicial decisions protecting consumers of goods and services from dangerous manufacturing techniques, mislabeling, unfair credit practices, deceptive advertising, and so on. Consumer laws provide remedies and protections that are not ordinarily available to merchants or to businesses.

Contract An agreement that can be enforced in court; formed by two or more parties, each of whom agrees to perform or to refrain from performing some act now or in the future.

Contract implied in law See Quasi contract

Contractual capacity The threshold mental capacity required by the law for a party who enters into a contract to be bound by that contract.

Contribution See Right of contribution

Contributory negligence A theory in tort law under which a complaining party's own negligence contributed to or caused his or her injuries. Contributory negligence is an absolute bar to recovery in a minority of jurisdictions.

Conversion The wrongful taking, using, or retaining possession of personal property that belongs to another.

Conveyance The transfer of a title to land from one person to another by deed; a document (such as a deed) by which an interest in land is transferred from one person to another.

Conviction The outcome of a criminal trial in which the defendant has been found guilty of the crime.

"Cooling-off" laws A set of federal and state laws designed to protect purchasers and leasees of goods or property. For example, the Federal Trade Commission's cooling-off period is three business days for purchases of goods or services from door-to-door salespersons. Cooling off periods vary for loans, mortgages, leases, etc.

Co-ownership Joint ownership.

Copyright The exclusive right of authors to publish, print, or sell an intellectual production for a statutory period of time. A copyright has the same monopolistic nature as a patent or trademark, but it differs in that it applies exclusively to works of art, literature, and other works of authorship, including computer programs.

Corporate governance The relationship between a corporation and its shareholders—specifically, a system that details the distribution of rights and

responsibilities of those within the corporation and spells out the rules and procedures for making corporate decisions.

Corporate social responsibility The concept that corporations can and should act ethically and be accountable to society for their actions.

Corporation A legal entity formed in compliance with statutory requirements. The entity is distinct from its shareholders-owners.

Cosign The act of signing a document (such as a note promising to pay another in return for a loan or other benefit) jointly with another person and thereby assuming liability for performing what was promised in the document.

Cost-benefit analysis A decision-making technique that involves weighing the costs of a given action against the benefits of the action.

Co-surety A joint surety. One who assumes liability jointly with another surety for the payment of an obligation.

Counteradvertising New advertising that is undertaken pursuant to a Federal Trade Commission order for the purpose of correcting earlier false claims that were made about a product.

Counterclaim A claim made by a defendant in a civil lawsuit that in effect sues the plaintiff.

Counteroffer An offeree's response to an offer in which the offeree rejects the original offer and at the same time makes a new offer.

Course of dealing Prior conduct between parties to a contract that establishes a common basis for their understanding.

Course of performance The conduct that occurs under the terms of a particular agreement; such conduct indicates what the parties to an agreement intended it to mean.

Court of equity A court that decides controversies and administers justice according to the rules, principles, and precedents of equity.

Court of law A court in which the only remedies that could be granted were things of value, such as money damages. In the early English king's courts, courts of law were distinct from courts of equity.

Covenant not to compete A contractual promise to refrain from competing with another party for a certain period of time and within a certain geographic area. Although covenants not to compete restrain trade, they are commonly found in partnership agreements, business sale agreements, and employment contracts. If they are ancillary to such agreements, covenants not to compete will normally be enforced by the courts unless the time period or geographic area is deemed unreasonable.

Covenant of quiet enjoyment A promise by a grantor (or landlord) that the grantee (or tenant) will not be evicted or disturbed by the grantor or a person having a lien or superior title.

Covenant running with the land An executory promise made between a grantor and a grantee to which they and subsequent owners of the land are bound.

Cover A buyer or lessee's purchase on the open market of goods to substitute for those promised but never

delivered by the seller. Under the Uniform Commercial Code, if the cost of cover exceeds the cost of the contract goods, the buyer or lessee can recover the difference, plus incidental and consequential damages.

Cram-down provision A provision of the Bankruptcy Code that allows a court to confirm a debtor's Chapter 11 reorganization plan even though only one class of creditors has accepted it. To exercise the court's right under this provision, the court must demonstrate that the plan does not discriminate unfairly against any creditors and is fair and equitable.

Creditor A person to whom a debt is owed by another person (the debtor).

Creditors' composition agreement An agreement formed between a debtor and his or her creditors in which the creditors agree to accept a lesser sum than that owed by the debtor in full satisfaction of the debt.

Crime A wrong against society proclaimed in a statute and punishable by society through fines and/or imprisonment—or, in some cases, death.

Criminal act See *Actus reus*

Criminal intent See *Mens rea*

Criminal law Law that defines and governs actions that constitute crimes. Generally, criminal law has to do with wrongful actions committed against society for which society demands redress.

Cross-border pollution Pollution across national boundaries; air and water degradation in one nation resulting from pollution-causing activities in a neighboring country.

Cross-examination The questioning of an opposing witness during a trial.

Cumulative voting A method of shareholder voting designed to allow minority shareholders to be represented on the board of directors. With cumulative voting, the number of members of the board to be elected is multiplied by the total number of voting shares held. The result equals the number of votes a shareholder has, and this total can be cast for one or more nominees for director.

Cure Under the Uniform Commercial Code, the right of a party who tenders nonconforming performance to correct his or her performance within the contract period.

Cyber crime A crime that occurs online, in the virtual community of the Internet, as opposed to the physical world.

Cyber fraud Fraud that involves the online theft of credit card information, banking details, and other information for criminal use.

Cyber mark A trademark in cyberspace.

Cyber tort A tort committed via the Internet.

Cyberlaw An informal term used to refer to all laws governing electronic communications and transactions, particularly those conducted via the Internet.

Cybernotary A legally recognized authority that can certify the validity of digital signatures.

Cybersquatting The act of registering a domain name that is the same as, or confusingly similar to, the trademark of another and then offering to sell that domain name back to the trademark owner.

Cyberterrorist A hacker whose purpose is to exploit a target computer for a serious impact, such as the corruption of a program to sabotage a business.

D

Damages Money sought as a remedy for a breach of contract or for a tortious act.

Debtor Under Article 9 of the Uniform Commercial Code, any party who owes payment or performance of a secured obligation.

Debtor in possession (DIP) In Chapter 11 bankruptcy proceedings, a debtor who is allowed to continue in possession of the estate in property (the business) and to continue business operations.

Deceptive advertising Advertising that misleads consumers, either by making unjustified claims concerning a product's performance or by omitting a material fact concerning the product's composition or performance.

Declaratory judgment A court's judgment on a justiciable controversy when the plaintiff is in doubt as to his or her legal rights; a binding adjudication of the rights and status of litigants even though no consequential relief is awarded.

Decree The judgment of a court of equity.

Deed A document by which title to property (usually real property) is passed.

Deed in lieu of foreclosure An alternative to foreclosure in which the mortgagor, rather than fighting to retain possession, voluntarily conveys the property to the lender in satisfaction of the mortgage.

Defalcation The misuse of funds.

Defamation Any published or publicly spoken false statement that causes injury to another's good name, reputation, or character.

Default judgment A judgment entered by a court against a defendant who has failed to appear in court to answer or defend against the plaintiff's claim.

Defendant One against whom a lawsuit is brought; the accused person in a criminal proceeding.

Defense Reasons that a defendant offers in an action or suit as to why the plaintiff should not obtain what he or she is seeking.

Deficiency judgment A judgment against a debtor for the amount of a debt remaining unpaid after collateral has been repossessed and sold.

Delegatee One to whom contract duties are delegated by another, called the delegator.

Delegation The transfer of a contractual duty to a third party. The party delegating the duty (the delegator) to the third party (the delegatee) is still obliged to perform on the contract should the delegatee fail to perform.

Delegation doctrine A doctrine based on Article I, Section 8, of the U.S. Constitution, which has been construed to allow Congress to delegate some of its power to make and implement laws to administrative agencies. The delegation is considered to be proper as long as Congress sets standards outlining the scope of the agency's authority.

Delegator One who delegates his or her duties under a contract to another, called the delegatee.

Delivery In contract law, one party's act of placing the subject matter of the contract within the other party's possession or control.

De novo Anew; afresh; a second time. In a hearing *de novo*, an appellate court hears the case as a court of original jurisdiction—that is, as if the case had not previously been tried and a decision rendered.

Deposition The testimony of a party to a lawsuit or a witness taken under oath before a trial.

Destination contract A contract in which the seller is required to ship the goods by carrier and deliver them at a particular destination. The seller assumes liability for any losses or damage to the goods until they are tendered at the destination specified in the contract.

Dilution With respect to trademarks, a doctrine under which distinctive or famous trademarks are protected from certain unauthorized uses of the marks regardless of a showing of competition or a likelihood of confusion. Congress created a federal cause of action for dilution in 1995 with the passage of the Federal Trademark Dilution Act.

Direct examination The examination of a witness by the attorney who calls the witness to the stand to testify on behalf of the attorney's client.

Directed verdict See Motion for a directed verdict

Disaffirmance The legal avoidance, or setting aside, of a contractual obligation.

Discharge The termination of an obligation. (1) In contract law, discharge occurs when the parties have fully performed their contractual obligations or when events, conduct of the parties, or operation of the law releases the parties from performance. (2) In bankruptcy proceedings, the extinction of the debtor's dischargeable debts.

Discharge in bankruptcy The release of a debtor from all debts that are provable, except those specifically excepted from discharge by statute.

Disclosed principal A principal whose identity is known to a third party at the time the agent makes a contract with the third party.

Discovery A phase in the litigation process during which the opposing parties may obtain information from each other and from third parties prior to trial.

Dishonor To refuse to accept or pay a draft or a promissory note when it is properly presented. An instrument is dishonored when presentment is properly made and acceptance or payment is refused or cannot be obtained within the prescribed time.

Disparagement of property An economically injurious false statement made about another's product or property. A general term for torts that are more specifically referred to as slander of quality or slander of title.

Disparate-impact discrimination A form of employment discrimination that results from certain employer practices or procedures that, although not discriminatory on their face, have a discriminatory effect.

Disparate-treatment discrimination A form of employment discrimination that results when an employer intentionally discriminates against employees who are members of protected classes.

G-10 GLOSSARY

Dissenting opinion A written opinion by a judge or justice who disagrees with the majority opinion.

Dissociation The severance of the relationship between a partner and a partnership when the partner ceases to be associated with the carrying on of the partnership business.

Dissolution The formal disbanding of a partnership or a corporation. It can take place by (1) acts of the partners or, in a corporation, of the shareholders and board of directors; (2) the death of a partner; (3) the expiration of a time period stated in a partnership agreement or a certificate of incorporation; or (4) judicial decree.

Distributed network A network that can be used by persons located (distributed) around the country or the globe to share computer files.

Distribution agreement A contract between a seller and a distributor of the seller's products setting out the terms and conditions of the distributorship.

Distributorship A business arrangement that is established when a manufacturer licenses a dealer to sell its product. An example of a distributorship is an automobile dealership.

Diversity of citizenship Under Article III, Section 2, of the Constitution, a basis for federal court jurisdiction over a lawsuit between (1) citizens of different states, (2) a foreign country and citizens of a state or of different states, or (3) citizens of a state and citizens or subjects of a foreign country. The amount in controversy must be more than \$75,000 before a federal court can take jurisdiction in such cases.

Divestiture The act of selling one or more of a company's parts, such as a subsidiary or plant; often mandated by the courts in merger or monopolization cases.

Dividend A distribution to corporate shareholders of corporate profits or income, disbursed in proportion to the number of shares held.

Docket The list of cases entered on a court's calendar and thus scheduled to be heard by the court.

Document of title Paper exchanged in the regular course of business that evidences the right to possession of goods (for example, a bill of lading or a warehouse receipt).

Domain name The series of letters and symbols used to identify site operators on the Internet; Internet "addresses."

Domestic corporation In a given state, a corporation that does business in, and is organized under the laws of, that state.

Domestic relations court A court that deals with domestic (household) relationships, such as adoption, divorce, support payments, child custody, and the like.

Double jeopardy A situation occurring when a person is tried twice for the same criminal offense; prohibited by the Fifth Amendment to the Constitution.

Double taxation A feature (and disadvantage) of the corporate form of business. Because a corporation is a separate legal entity, corporate profits are taxed by

state and federal governments. Dividends are again taxable as ordinary income to the shareholders receiving them.

Down payment The part of the purchase price of real property that is paid in cash up front, reducing the amount of the loan or mortgage.

Draft Any instrument (such as a check) drawn on a drawee (such as a bank) that orders the drawee to pay a certain sum of money, usually to a third party (the payee), on demand or at a definite future time.

Dram shop act A state statute that imposes liability on the owners of bars and taverns, as well as those who serve alcoholic drinks to the public, for injuries resulting from accidents caused by intoxicated persons when the sellers or servers of alcoholic drinks contributed to the intoxication.

Due diligence A required standard of care that certain professionals, such as accountants, must meet to avoid liability for securities violations. Under securities law, an accountant will be deemed to have exercised due diligence if he or she followed generally accepted accounting principles and generally accepted auditing standards and had, "after reasonable investigation, reasonable grounds to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were true and that there was no omission of a material fact required to be stated therein or necessary to make the statements therein not misleading."

Due process clause The provisions of the Fifth and Fourteenth Amendments to the Constitution that guarantee that no person shall be deprived of life, liberty, or property without due process of law. Similar clauses are found in most state constitutions.

Dumping The selling of goods in a foreign country at a price below the price charged for the same goods in the domestic market.

Duress Unlawful pressure brought to bear on a person, causing the person to perform an act that he or she would not otherwise perform.

Duty of care The duty of all persons, as established by tort law, to exercise a reasonable amount of care in their dealings with others. Failure to exercise due care, which is normally determined by the "reasonable person standard," constitutes the tort of negligence.

E

E-agent A computer program, electronic, or other automated means used to perform specific tasks without review by an individual.

E-commerce Business transacted in cyberspace.

E-contract A contract that is entered into in cyberspace and is evidenced only by electronic impulses (such as those that make up a computer's memory), rather than, for example, a typewritten form.

E-evidence A type of evidence that consists of computer-generated or electronically recorded information, including e-mail, voice mail, spreadsheets, word-processing documents, and other data.

E-signature As defined by the Uniform Electronic Transactions Act, “an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record.”

Early neutral case evaluation A form of alternative dispute resolution in which a neutral third party evaluates the strengths and weakness of the disputing parties’ positions; the evaluator’s opinion forms the basis for negotiating a settlement.

Easement A nonpossessory right to use another’s property in a manner established by either express or implied agreement.

Emancipation In regard to minors, the act of being freed from parental control; occurs when a child’s parent or legal guardian relinquishes the legal right to exercise control over the child. Normally, a minor who leaves home to support himself or herself is considered emancipated.

Embezzlement The fraudulent appropriation of money or other property by a person to whom the money or property has been entrusted.

Eminent domain The power of a government to take land for public use from private citizens for just compensation.

Employee A person who works for an employer for a salary or for wages.

Employer An individual or business entity that hires employees, pays them salaries or wages, and exercises control over their work.

Employment at will A common law doctrine under which either party may terminate an employment relationship at any time for any reason, unless a contract specifies otherwise.

Employment discrimination Treating employees or job applicants unequally on the basis of race, color, national origin, religion, gender, age, or disability; prohibited by federal statutes.

Enabling legislation A statute enacted by Congress that authorizes the creation of an administrative agency and specifies the name, composition, purpose, and powers of the agency being created.

Encryption The process by which a message (plaintext) is transformed into something (ciphertext) that the sender and receiver intend third parties not to understand.

Entrapment In criminal law, a defense in which the defendant claims that he or she was induced by a public official—usually an undercover agent or police officer—to commit a crime that he or she would otherwise not have committed.

Entrepreneur One who initiates and assumes the financial risks of a new enterprise and who undertakes to provide or control its management.

Entrustment The transfer of goods to a merchant who deals in goods of that kind and who may transfer those goods and all rights to them to a buyer in the ordinary course of business [UCC 2-403(2)].

Environmental impact statement (EIS) A statement required by the National Environmental Policy Act for any major federal action that will significantly

affect the quality of the environment. The statement must analyze the action’s impact on the environment and explore alternative actions that might be taken.

Environmental law The body of statutory, regulatory, and common law relating to the protection of the environment.

Equal dignity rule In most states, a rule stating that express authority given to an agent must be in writing if the contract to be made on behalf of the principal is required to be in writing.

Equal protection clause The provision in the Fourteenth Amendment to the Constitution that guarantees that no state will “deny to any person within its jurisdiction the equal protection of the laws.” This clause mandates that state governments treat similarly situated individuals in a similar manner.

Equitable maxims General propositions or principles of law that have to do with fairness (equity).

Equitable right of redemption The right of a mortgagor who has breached the mortgage agreement to redeem or purchase the property prior to foreclosure proceedings.

Equity of redemption The right of a mortgagor who has breached the mortgage agreement to redeem or purchase the property prior to foreclosure proceedings.

Equity participation loan A loan that allows the lender to participate in some percentage of the increase in the equity value of a business or property; any loan that gives the lender the right to obtain an ownership interest in the project being financed.

Escrow account An account that is generally held in the name of the depositor and escrow agent; the funds in the account are paid to a third person only on fulfillment of the escrow condition.

Establishment clause The provision in the First Amendment to the U.S. Constitution that prohibits Congress from creating any law “respecting an establishment of religion.”

Estop To bar, impede, or preclude.

Estoppel The principle that a party’s own acts prevent him or her from claiming a right to the detriment of another who was entitled to and did rely on those acts. *See also* Agency by estoppel; Promissory estoppel

Ethical reasoning A reasoning process in which an individual links his or her moral convictions or ethical standards to the particular situation at hand.

Ethics Moral principles and values applied to social behavior.

Eviction A landlord’s act of depriving a tenant of possession of the leased premises.

Evidence Proof offered at trial—in the form of testimony, documents, records, exhibits, objects, and so on—for the purpose of convincing the court or jury of the truth of a contention.

Exclusionary rule In criminal procedure, a rule under which any evidence that is obtained in violation of the accused’s constitutional rights guaranteed by the Fourth, Fifth, and Sixth Amendments, as well as any

evidence derived from illegally obtained evidence, will not be admissible in court.

Exclusive distributorship A distributorship in which the seller and the distributor of the seller's products agree that the distributor has the exclusive right to distribute the seller's products in a certain geographic area.

Exclusive jurisdiction Jurisdiction that exists when a case can be heard only in a particular court or type of court, such as a federal court or a state court.

Exclusive-dealing contract An agreement under which a seller forbids a buyer to purchase products from the seller's competitors.

Exculpatory clause A clause that releases a contractual party from liability in the event of monetary or physical injury, no matter who is at fault.

Executed contract A contract that has been completely performed by both parties.

Execution An action to carry into effect the directions in a court decree or judgment.

Executive agency An administrative agency within the executive branch of government. At the federal level, executive agencies are those within the cabinet departments.

Executory contract A contract that has not as yet been fully performed.

Export To sell products to buyers located in other countries.

Express authority Authority expressly given by one party to another. In agency law, an agent has express authority to act for a principal if both parties agree, orally or in writing, that an agency relationship exists in which the agent had the power (authority) to act in the place of, and on behalf of, the principal.

Express contract A contract in which the terms of the agreement are fully and explicitly stated in words, oral or written.

Express warranty A seller's or lessor's oral or written promise, ancillary to an underlying sales or lease agreement, as to the quality, description, or performance of the goods being sold or leased.

Expropriation The seizure by a government of privately owned business or personal property for a proper public purpose and with just compensation.

Extension clause A clause in a time instrument that allows the instrument's date of maturity to be extended into the future.

F

F.A.S. Free alongside. A contract term that requires the seller, at his or her own expense and risk, to deliver the goods alongside the ship before risk passes to the buyer.

F.O.B. Free on board. A contract term that indicates that the selling price of the goods includes transportation costs (and that the seller carries the risk of loss) to the specific F.O.B. place named in the contract. The place can be either the place of initial shipment (for example, the seller's city or place of business) or the

place of destination (for example, the buyer's city or place of business).

Family limited liability partnership (FLLP) A limited liability partnership (LLP) in which the majority of the partners are persons related to each other, essentially as spouses, parents, grandparents, siblings, cousins, nephews, or nieces. A person acting in a fiduciary capacity for persons so related could also be a partner. All of the partners must be natural persons or persons acting in a fiduciary capacity for the benefit of natural persons.

Federal form of government A system of government in which the states form a union and the sovereign power is divided between a central government and the member states.

Federal question A question that pertains to the U.S. Constitution, acts of Congress, or treaties. A federal question provides a basis for federal jurisdiction.

Federal Rules of Civil Procedure (FRCP) The rules controlling procedural matters in civil trials brought before the federal district courts.

Fee simple An absolute form of property ownership entitling the property owner to use, possess, or dispose of the property as he or she chooses during his or her lifetime. On death, the interest in the property passes to the owner's heirs; a fee simple absolute.

Fee simple absolute An ownership interest in land in which the owner has the greatest possible aggregation of rights, privileges, and power. Ownership in fee simple absolute is limited absolutely to a person and his or her heirs.

Felony A crime—such as arson, murder, rape, or robbery—that carries the most severe sanctions, usually ranging from one year in a state or federal prison to the forfeiture of one's life.

Fiduciary As a noun, a person having a duty created by his or her undertaking to act primarily for another's benefit in matters connected with the undertaking. As an adjective, a relationship founded on trust and confidence.

Fiduciary duty The duty, imposed on a fiduciary by virtue of his or her position, to act primarily for another's benefit.

Filtering software A computer program that includes a pattern through which data are passed. When designed to block access to certain Web sites, the pattern blocks the retrieval of a site whose URL or key words are on a list within the program.

Final order The final decision of an administrative agency on an issue. If no appeal is taken, or if the case is not reviewed or considered anew by the agency commission, the administrative law judge's initial order becomes the final order of the agency.

Firm offer An offer (by a merchant) that is irrevocable without consideration for a period of time (not longer than three months). A firm offer by a merchant must be in writing and must be signed by the offeror.

Fitness for a particular purpose See Implied warranty of fitness for a particular purpose

Fixed-rate mortgage A standard mortgage with a fixed, or unchanging, rate of interest. The loan payments

on these mortgages remain the same for the duration of the loan, which ranges between fifteen and forty years.

Fixed-term tenancy A type of tenancy under which property is leased for a specified period of time, such as a month, a year, or a period of years; also called a *tenancy for years*.

Fixture A thing that was once personal property but that has become attached to real property in such a way that it takes on the characteristics of real property and becomes part of that real property.

Forbearance An agreement between the lender and the borrower in which the lender agrees to temporarily cease requiring mortgage payments, to delay foreclosure, or to accept smaller payments than previously scheduled.

Force majeure clause A provision in a contract stipulating that certain unforeseen events—such as war, political upheavals, acts of God, or other events—will excuse a party from liability for nonperformance of contractual obligations.

Foreclosure A proceeding in which a mortgagee either takes title to or forces the sale of the mortgagor's property in satisfaction of a debt.

Foreign corporation In a given state, a corporation that does business in the state without being incorporated therein.

Foreseeable risk In negligence law, the risk of harm or injury to another that a person of ordinary intelligence and prudence should have reasonably anticipated or foreseen when undertaking an action or refraining from undertaking an action.

Forgery The fraudulent making or altering of any writing in a way that changes the legal rights and liabilities of another.

Formal contract A contract that by law requires a specific form, such as being executed under seal, to be valid.

Forum A jurisdiction, court, or place in which disputes are litigated and legal remedies are sought.

Forum-selection clause A provision in a contract designating the court, jurisdiction, or tribunal that will decide any disputes arising under the contract.

Franchise Any arrangement in which the owner of a trademark, trade name, or copyright licenses another to use that trademark, trade name, or copyright, under specified conditions or limitations, in the selling of goods and services.

Franchise tax A state or local government tax on the right and privilege of carrying on a business in the form of a corporation.

Franchisee One receiving a license to use another's (the franchisor's) trademark, trade name, or copyright in the sale of goods and services.

Franchisor One licensing another (the franchisee) to use his or her trademark, trade name, or copyright in the sale of goods or services.

Fraud Any misrepresentation, either by misstatement or omission of a material fact, knowingly made with the intention of deceiving another and on which a reasonable person would and does rely to his or her detriment.

Fraudulent misrepresentation (fraud) Any misrepresentation, either by misstatement or omission of a material fact, knowingly made with the intention of deceiving another and on which a reasonable person would and does rely to his or her detriment.

Free exercise clause The provision in the First Amendment to the U.S. Constitution that prohibits Congress from making any law "prohibiting the free exercise" of religion.

Free writing prospectus A free writing prospectus is any type of written, electronic, or graphic offer that describes the issuing corporation or its securities and includes a legend indicating that the investor may obtain the prospectus at the SEC's Web site.

Frustration of purpose A court-created doctrine under which a party to a contract will be relieved of his or her duty to perform when the objective purpose for performance no longer exists (due to reasons beyond that party's control).

Full faith and credit clause A clause in Article IV, Section 1, of the U.S. Constitution that provides that "Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State." The clause ensures that rights established under deeds, wills, contracts, and the like in one state will be honored by the other states and that any judicial decision with respect to such property rights will be honored and enforced in all states.

Full warranty A warranty as to full performance covering generally both labor and materials.

Fungible goods Goods that are alike by physical nature, by agreement, or by trade usage. Examples of fungible goods are wheat, oil, and wine that are identical in type and quality.

G

Garnishment A legal process used by a creditor to collect a debt by seizing property of the debtor (such as wages) that is being held by a third party (such as the debtor's employer).

General jurisdiction Exists when a court's subject-matter jurisdiction is not restricted. A court of general jurisdiction normally can hear any type of case.

General partner In a limited partnership, a partner who assumes responsibility for the management of the partnership and liability for all partnership debts.

General partnership See Partnership

Generally accepted accounting principles (GAAP) The conventions, rules, and procedures that define accepted accounting practices at a particular time. The source of the principles is the Financial Accounting Standards Board.

Generally accepted auditing standards (GAAS) Standards concerning an auditor's professional qualities and the judgment exercised by him or her in the performance of an examination and report. The source of the standards is the American Institute of Certified Public Accountants.

Genuineness of assent Knowing and voluntary assent to the terms of a contract. If a contract is formed

as a result of a mistake, misrepresentation, undue influence, or duress, genuineness of assent is lacking, and the contract will be voidable.

Good faith Under the Uniform Commercial Code, good faith means honesty in fact; with regard to merchants, good faith means honesty in fact *and* the observance of reasonable commercial standards of fair dealing in the trade.

Good faith purchaser A purchaser who buys without notice of any circumstance that would put a person of ordinary prudence on inquiry as to whether the seller has valid title to the goods being sold.

Good Samaritan statute A state statute that provides that persons who rescue or provide emergency services to others in peril—unless they do so recklessly, thus causing further harm—cannot be sued for negligence.

Goodwill In the business context, the valuable reputation of a business viewed as an intangible asset.

Grand jury A group of citizens called to decide, after hearing the state's evidence, whether a reasonable basis (probable cause) exists for believing that a crime has been committed and whether a trial ought to be held.

Grant deed A deed that simply recites words of consideration and conveyance. Under statute, a grant deed may impliedly warrant that at least the grantor has not conveyed the property's title to someone else.

Grantee One to whom a grant (of land or property, for example) is made.

Grantor A person who makes a grant, such as a transferor of property or the creator of a trust.

Group boycott The refusal to deal with a particular person or firm by a group of competitors; prohibited by the Sherman Act.

Guarantor A person who agrees to satisfy the debt of another (the debtor) only after the principal debtor defaults; a guarantor's liability is thus secondary.

H

Habitability See Implied warranty of habitability

Hacker A person who uses one computer to break into another. Professional computer programmers refer to such persons as “crackers.”

Hearsay An oral or written statement made out of court that is later offered in court by a witness (not the person who made the statement) to prove the truth of the matter asserted in the statement. Hearsay is generally inadmissible as evidence.

Herfindahl-Hirschman Index (HHI) An index measuring market concentration for purposes of anti-trust enforcement; calculated by summing the squares of the percentage market shares held by the respective firms.

Historical school A school of legal thought that emphasizes the evolutionary process of law and that looks to the past to discover what the principles of contemporary law should be.

Holding company A company whose business activity is holding shares in another company.

Home equity loan A loan in which the lender accepts a person's home equity (the portion of the home's value that is paid off) as collateral, which can be seized if the loan is not repaid on time. Borrowers often take out home equity loans to finance the renovation of the property or to pay off debt that carries a higher interest rate, such as credit-card debt.

Homeowners' insurance Insurance that protects a homeowner's property against damage from storms, fire, and other hazards. Lenders may require that a borrower carry homeowners' insurance on mortgaged property.

Homestead exemption A law permitting a debtor to retain the family home, either in its entirety or up to a specified dollar amount, free from the claims of unsecured creditors or trustees in bankruptcy.

Horizontal merger A merger between two firms that are competing in the same market.

Horizontal restraint Any agreement that in some way restrains competition between rival firms competing in the same market.

Hot-cargo agreement An agreement in which employers voluntarily agree with unions not to handle, use, or deal in nonunion-produced goods of other employers; a type of secondary boycott explicitly prohibited by the Labor-Management Reporting and Disclosure Act of 1959.

Hybrid (two-step) mortgage A mortgage that starts as a fixed-rate mortgage and then converts to an adjustable-rate mortgage.

I-551 Alien Registration Receipt Proof that a noncitizen has obtained permanent residency in the United States; the so-called green card.

I-9 verification A form from the Department of Homeland Security, U.S. Citizenship and Immigration Services, used for employment eligibility verification; a form that documents that each new employee is authorized to work in the United States

Identification In a sale of goods, the express designation of the specific goods provided for in the contract.

Identity theft The act of stealing another's identifying information—such as a name, date of birth, or Social Security number—and using that information to access the victim's financial resources.

Immunity A status of being exempt, or free, from certain duties or requirements. In criminal law, the state may grant an accused person immunity from prosecution—or agree to prosecute for a lesser offense—if the accused person agrees to give the state information that would assist the state in prosecuting other individuals for crimes. In tort law, freedom from liability for defamatory speech. *See also* Privilege

Implied authority Authority that is created not by an explicit oral or written agreement but by implication. In agency law, implied authority (of the agent) can be conferred by custom, inferred from the position the agent occupies, or implied by virtue of being reasonably necessary to carry out express authority.

Implied contract A contract formed in whole or in part from the conduct of the parties (as opposed to an express contract). Also known as implied-in-fact contract.

Implied warranty A warranty that the law derives by implication or inference from the nature of the transaction or the relative situation or circumstances of the parties.

Implied warranty of fitness for a particular purpose A warranty that goods sold or leased are fit for a particular purpose. The warranty arises when any seller or lessor knows the particular purpose for which a buyer or lessee will use the goods and knows that the buyer or lessee is relying on the skill and judgment of the seller or lessor to select suitable goods.

Implied warranty of habitability An implied promise by a landlord that rented residential premises are fit for human habitation—that is, in a condition that is safe and suitable for people to live in.

Implied warranty of merchantability A warranty that goods being sold or leased are reasonably fit for the ordinary purpose for which they are sold or leased, are properly packaged and labeled, and are of fair quality. The warranty automatically arises in every sale or lease of goods made by a merchant who deals in goods of the kind sold or leased.

Impossibility of performance A doctrine under which a party to a contract is relieved of his or her duty to perform when performance becomes impossible or totally impracticable (through no fault of either party).

Imposter One who, by use of the mail, telephone, or personal appearance, induces a maker or drawer to issue an instrument in the name of an impersonated payee. Indorsements by imposters are not treated as unauthorized under Article 3 of the Uniform Commercial Code.

In personam jurisdiction Court jurisdiction over the “person” involved in a legal action; personal jurisdiction.

In rem jurisdiction Court jurisdiction over a defendant’s property.

Incidental beneficiary A third party who incidentally benefits from a contract but whose benefit was not the reason the contract was formed; an incidental beneficiary has no rights in a contract and cannot sue to have the contract enforced.

Indemnify To compensate or reimburse another for losses or expenses incurred.

Independent contractor One who works for, and receives payment from, an employer but whose working conditions and methods are not controlled by the employer. An independent contractor is not an employee but may be an agent.

Independent regulatory agency An administrative agency that is not considered part of the government’s executive branch and is not subject to the authority of the president. Independent agency officials cannot be removed without cause.

Indictment (pronounced in-*dyte*-ment) A charge by a grand jury that a reasonable basis (probable cause) exists

for believing that a crime has been committed and that a trial should be held.

Industrial use Land use for light or heavy manufacturing, shipping, or heavy transportation.

Informal contract A contract that does not require a specified form or formality in order to be valid.

Information A formal accusation or complaint (without an indictment) issued in certain types of actions (usually criminal actions involving lesser crimes) by a law officer, such as a magistrate.

Information return A tax return submitted by a partnership that only reports the income earned by the business. The partnership as an entity does not pay taxes on the income received by the partnership. A partner’s profit from the partnership (whether distributed or not) is taxed as individual income to the individual partner.

Infringement A violation of another’s legally recognized right. The term is commonly used with reference to the invasion by one party of another party’s rights in a patent, trademark, or copyright.

Initial order In the context of administrative law, an agency’s disposition in a matter other than a rule-making. An administrative law judge’s initial order becomes final unless it is appealed.

Injunction A court decree ordering a person to do or refrain from doing a certain act or activity.

Innkeeper An owner of an inn, hotel, motel, or other lodging.

Innocent misrepresentation A false statement of fact or an act made in good faith that deceives and causes harm or injury to another.

Inside director A person on the board of directors who is also an officer of the corporation.

Insider A corporate director or officer, or other employee or agent, with access to confidential information and a duty not to disclose that information in violation of insider-trading laws.

Insider trading The purchase or sale of securities on the basis of “inside information” (information that has not been made available to the public) in violation of a duty owed to the company whose stock is being traded.

Insolvent Under the Uniform Commercial Code, a term describing a person who ceases to pay “his debts in the ordinary course of business or cannot pay his debts as they become due or is insolvent within the meaning of federal bankruptcy law” [UCC 1–201(23)].

Installment contract Under the Uniform Commercial Code, a contract that requires or authorizes delivery in two or more separate lots to be accepted and paid for separately.

Insurable interest An interest either in a person’s life or well-being or in property that is sufficiently substantial that insuring against injury to (or the death of) the person or against damage to the property does not amount to a mere wagering (betting) contract.

Insurance A contract in which, for a stipulated consideration, one party agrees to compensate the other for loss on a specific subject by a specified peril.

Intangible property Property that is incapable of being apprehended by the senses (such as by sight or

touch); intellectual property is an example of intangible property.

Integrated contract A written contract that constitutes the final expression of the parties' agreement. If a contract is integrated, evidence extraneous to the contract that contradicts or alters the meaning of the contract in any way is inadmissible.

Intellectual property Property resulting from intellectual, creative processes. Patents, trademarks, and copyrights are examples of intellectual property.

Intended beneficiary A third party for whose benefit a contract is formed; an intended beneficiary can sue the promisor if such a contract is breached.

Intentional tort A wrongful act knowingly committed.

Interest-only (IO) mortgage A mortgage that gives the borrower the option of paying only the interest portion of the monthly payment and forgoing the payment of principal for a specified period of time, such as five years. After the interest-only payment option is exhausted, the borrower's payment will increase to include payments on the principal.

Intermediary bank Any bank to which an item is transferred in the course of collection, except the depository or payor bank.

International Financial Reporting Standards (IFRS) A set of accounting standards created by the International Accounting Standards Board (IASB). Today, more than 120 nations and reporting jurisdictions either permit or require IFRS for domestically listed companies. The Securities and Exchange Commission is working towards a convergence between the IASB and U.S. accounting standards.

International law The law that governs relations among nations. International customs and treaties are generally considered to be two of the more important sources of international law.

International organization In international law, a term that generally refers to an organization composed mainly of nations and usually established by treaty. The United States is a member of more than one hundred multilateral and bilateral organizations, including at least twenty through the United Nations.

Interpretive rule An administrative agency rule that simply declares a policy or explains the agency's position and does not establish any legal rights or obligations.

Interrogatories A series of written questions for which written answers are prepared and then signed under oath by a party to a lawsuit, usually with the assistance of the party's attorney.

Inverse condemnation The taking of private property by the government without payment of just compensation as required by the U.S. Constitution. The owner must sue the government to recover just compensation.

Investment company A company that acts on behalf of many smaller shareholder-owners by buying a large portfolio of securities and professionally managing that portfolio.

Investment contract In securities law, a transaction in which a person invests in a common enterprise reasonably expecting profits that are derived primarily from the efforts of others.

Invitee A person who, either expressly or impliedly, is privileged to enter onto another's land. The inviter owes the invitee (for example, a customer in a store) the duty to exercise reasonable care to protect the invitee from harm.

Irrevocable offer An offer that cannot be revoked or recalled by the offeror without liability. A merchant's firm offer is an example of an irrevocable offer.

J

Joint and several liability In partnership law, a doctrine under which a plaintiff may sue, and collect a judgment from, one or more of the partners separately (severally, or individually) or all of the partners together (jointly). This is true even if one of the partners sued did not participate in, ratify, or know about whatever gave rise to the cause of action.

Joint liability Shared liability. In partnership law, partners incur joint liability for partnership obligations and debts. For example, if a third party sues a partner on a partnership debt, the partner has the right to insist that the other partners be sued with him or her.

Joint tenancy The joint ownership of property by two or more co-owners in which each co-owner owns an undivided portion of the property. On the death of one of the joint tenants, his or her interest automatically passes to the surviving joint tenants.

Joint venture A joint undertaking of a specific commercial enterprise by an association of persons. A joint venture is normally not a legal entity and is treated like a partnership for federal income tax purposes.

Judgment The final order or decision resulting from a legal action.

Judgment *n.o.v.* See Motion for judgment *n.o.v.*

Judgment rate of interest A rate of interest fixed by statute that is applied to a monetary judgment from the moment the judgment is awarded by a court until the judgment is paid or terminated.

Judicial foreclosure A court-supervised foreclosure proceeding in which the court determines the validity of the debt and, if the borrower is in default, issues a judgment for the lender.

Judicial lien A lien on property created by a court order.

Judicial process The procedures relating to, or connected with, the administration of justice through the judicial system.

Judicial review The process by which courts decide on the constitutionality of legislative enactments and actions of the executive branch.

Jurisdiction The authority of a court to hear and decide a specific action.

Jurisprudence The science or philosophy of law.

Justiciable controversy A controversy that is not hypothetical or academic but real and substantial. A

requirement that must be satisfied before a court will hear a case.

K

King's court A medieval English court. The king's courts, or *curiae regis*, were established by the Norman conquerors of England. The body of law that developed in these courts was common to the entire English realm and thus became known as the common law.

L

Laches The equitable doctrine that bars a party's right to legal action if the party has neglected for an unreasonable length of time to act on his or her rights.

Landlord An owner of land or rental property who leases it to another person, called the tenant.

Larceny The wrongful taking and carrying away of another person's personal property with the intent to permanently deprive the owner of the property. Some states classify larceny as either grand or petit, depending on the property's value.

Law A body of enforceable rules governing relationships among individuals and between individuals and their society.

Lawsuit The litigation process. *See* Litigation

Lease In real property law, a contract by which the owner of real property (the landlord, or lessor) grants to a person (the tenant, or lessee) an exclusive right to use and possess the property, usually for a specified period of time, in return for rent or some other form of payment.

Lease agreement In regard to the lease of goods, an agreement in which one person (the lessor) agrees to transfer the right to the possession and use of property to another person (the lessee) in exchange for rental payments.

Leasehold estate An estate in realty held by a tenant under a lease. In every leasehold estate, the tenant has a qualified right to possess and/or use the land.

Legal positivists Adherents to the positivist school of legal thought. This school holds that there can be no higher law than a nation's positive law—law created by a particular society at a particular point in time. In contrast to the natural law school, the positivist school maintains that there are no “natural” rights; rights come into existence only when there is a sovereign power (government) to confer and enforce those rights.

Legal rate of interest A rate of interest fixed by statute as either the maximum rate of interest allowed by law or a rate of interest applied when the parties to a contract intend, but do not fix, an interest rate in the contract. In the latter case, the rate is frequently the same as the statutory maximum rate permitted.

Legal realism A school of legal thought that was popular in the 1920s and 1930s and that challenged many existing jurisprudential assumptions, particularly the assumption that subjective elements play no

part in judicial reasoning. Legal realists generally advocated a less abstract and more pragmatic approach to the law, an approach that would take into account customary practices and the circumstances in which transactions take place. The school left a lasting imprint on American jurisprudence.

Legal reasoning The process of reasoning by which a judge harmonizes his or her decision with the judicial decisions of previous cases.

Legislative rule An administrative agency rule that affects substantive legal rights and carries the same weight as a congressionally enacted statute.

Letter of credit A written instrument, usually issued by a bank on behalf of a customer or other person, in which the issuer promises to honor drafts or other demands for payment by third persons in accordance with the terms of the instrument.

Levy The obtaining of money by legal process through the seizure and sale of property, usually done after a writ of execution has been issued.

Liability Any actual or potential legal obligation, duty, debt, or responsibility.

Libel Defamation in writing or other form (such as in a videotape) having the quality of permanence.

License A revocable right or privilege of a person to come on another person's land.

Licensee One who receives a license to use, or enter onto, another's property.

Lien (pronounced *leen*) A claim against specific property to satisfy a debt.

Lien creditor One whose claim is secured by a lien on particular property, as distinguished from a general creditor, who has no such security.

Life estate An interest in land that exists only for the duration of the life of some person, usually the holder of the estate.

Limited jurisdiction Exists when a court's subject-matter jurisdiction is limited. Bankruptcy courts and probate courts are examples of courts with limited jurisdiction.

Limited liability Exists when the liability of the owners of a business is limited to the amount of their investments in the firm.

Limited liability company (LLC) A hybrid form of business enterprise that offers the limited liability of the corporation but the tax advantages of a partnership.

Limited liability limited partnership (LLLP) A type of limited partnership. The difference between a limited partnership and an LLLP is that the liability of the general partner in an LLLP is the same as the liability of the limited partner. That is, the liability of all partners is limited to the amount of their investments in the firm.

Limited liability partnership (LLP) A form of partnership that allows professionals to enjoy the tax benefits of a partnership while limiting their personal liability for the malpractice of other partners.

Limited partner In a limited partnership, a partner who contributes capital to the partnership but has no right to participate in the management and operation

of the business. The limited partner assumes no liability for partnership debts beyond the capital contributed.

Limited partnership (LP) A partnership consisting of one or more general partners (who manage the business and are liable to the full extent of their personal assets for debts of the partnership) and one or more limited partners (who contribute only assets and are liable only to the extent of their contributions).

Limited warranty A written warranty that fails to meet one or more of the minimum standards for a full warranty.

Liquidated damages An amount, stipulated in the contract, that the parties to a contract believe to be a reasonable estimation of the damages that will occur in the event of a breach.

Liquidated debt A debt that is due and certain in amount.

Liquidation (1) In regard to bankruptcy, the sale of all of the nonexempt assets of a debtor and the distribution of the proceeds to the debtor's creditors. Chapter 7 of the Bankruptcy Code provides for liquidation bankruptcy proceedings. (2) In regard to corporations, the process by which corporate assets are converted into cash and distributed among creditors and shareholders according to specific rules of preference.

Litigant A party to a lawsuit.

Litigation The process of resolving a dispute through the court system.

Long arm statute A state statute that permits a state to obtain personal jurisdiction over nonresident defendants. A defendant must have "minimum contacts" with that state for the statute to apply.

M

Magistrate's court A court of limited jurisdiction that is presided over by a public official (magistrate) with certain judicial authority, such as the power to set bail.

Mailbox rule A rule providing that an acceptance of an offer becomes effective on dispatch (on being placed in a mailbox), if mail is, expressly or impliedly, an authorized means of communication of acceptance to the offeror.

Main purpose rule A rule of contract law under which an exception to the Statute of Frauds is made if the main purpose in accepting secondary liability under a contract is to secure a personal benefit. If this situation exists, the contract need not be in writing to be enforceable.

Majority See Age of majority

Majority opinion A court's written opinion, outlining the views of the majority of the judges or justices deciding the case.

Malpractice Professional misconduct or the failure to exercise the requisite degree of skill as a professional. Negligence—the failure to exercise due care—on the part of a professional, such as a physician or an attorney, is commonly referred to as malpractice.

Manufacturing or processing-plant franchise A franchise that is created when the franchisor transmits

to the franchisee the essential ingredients or formula to make a particular product. The franchisee then markets the product either at wholesale or at retail in accordance with the franchisor's standards. Examples of this type of franchise are Coca-Cola and other soft-drink bottling companies.

Mark See Trademark

Market concentration A situation that exists when a small number of firms share the market for a particular good or service. For example, if the four largest grocery stores in Chicago accounted for 80 percent of all retail food sales, the market clearly would be concentrated in those four firms.

Market power The power of a firm to control the market price of its product. A monopoly has the greatest degree of market power.

Marketable title Title to real estate that is reasonably free from encumbrances, defects in the chain of title, and other matters that affect title, such as adverse possession.

Market-share liability A method of sharing liability among several firms that manufactured or marketed a particular product that may have caused a plaintiff's injury. Each firm's liability is proportionate to its respective share of the relevant market for the product. Market-share liability applies only if the injuring product is fungible, the true manufacturer is unidentifiable, and the unknown character of the manufacturer is not the plaintiff's fault.

Market-share test The primary measure of monopoly power. A firm's market share is the percentage of a market that the firm controls.

Material alteration See Alteration

Material fact A fact to which a reasonable person would attach importance in determining his or her course of action.

Mechanic's lien A statutory lien on the real property of another, created to ensure payment for work performed and materials furnished in the repair or improvement of real property, such as a building.

Mediation A method of settling disputes outside of court by using the services of a neutral third party, called a mediator. The mediator acts as a communicating agent between the parties and suggests ways in which the parties can resolve their dispute.

Member The term used to designate a person who has an ownership interest in a limited liability company.

Mens rea (pronounced *mehns ray-uh*) Mental state, or intent. A wrongful mental state is as necessary as a wrongful act to establish criminal liability. What constitutes a mental state varies according to the wrongful action. Thus, for murder, the *mens rea* is the intent to take a life. For theft, the *mens rea* must involve both the knowledge that the property belongs to another and the intent to deprive the owner of it.

Merchant A person who is engaged in the purchase and sale of goods. Under the Uniform Commercial Code, a person who deals in goods of the kind involved in the sales contract; for further definitions, see UCC 2-104.

Merger A contractual and statutory process in which one corporation (the surviving corporation) acquires all

of the assets and liabilities of another corporation (the merged corporation). The shareholders of the merged corporation receive either payment for their shares or shares in the surviving corporation.

Meta tags Words inserted into a Web site's keywords field to increase the site's appearance in search engine results.

Minimum-contacts requirement The requirement that before a state court can exercise jurisdiction over a foreign corporation, the foreign corporation must have sufficient contacts with the state. A foreign corporation that has its home office in the state or that has manufacturing plants in the state meets this requirement.

Minimum wage The lowest wage, either by government regulation or union contract, that an employer may pay an hourly worker.

Mini-trial A private proceeding in which each party to a dispute argues its position before the other side and vice versa. A neutral third party may be present and act as an adviser if the parties fail to reach an agreement.

Mirror image rule A common law rule that requires, for a valid contractual agreement, that the terms of the offeree's acceptance adhere exactly to the terms of the offeror's offer.

Misdemeanor A lesser crime than a felony, punishable by a fine or imprisonment for up to one year in other than a state or federal penitentiary.

Misrepresentation A false statement of fact or an action that deceives and causes harm or injury to another. *See also* Fraudulent misrepresentation (fraud); Innocent misrepresentation

Mitigation of damages A rule requiring a plaintiff to have done whatever was reasonable to minimize the damages caused by the defendant.

Money laundering Falsely reporting income that has been obtained through criminal activity as income obtained through a legitimate business enterprise—in effect, “laundering” the “dirty money.”

Monopolization The possession of monopoly power in the relevant market and the willful acquisition or maintenance of that power, as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

Monopoly A term generally used to describe a market in which there is a single seller or a limited number of sellers.

Monopoly power The ability of a monopoly to dictate what takes place in a given market.

Moral minimum The minimum degree of ethical behavior expected of a business firm, which is usually defined as compliance with the law.

Mortgage A written instrument that gives a creditor (the mortgagee) an interest in, or lien on, the debtor's (mortgagor's) real property as security for a debt. If the debt is not paid, the property can be sold by the creditor and the proceeds used to pay the debt.

Mortgage assignee An entity that purchases a mortgage from the current mortgage holder and assumes all rights and liabilities of that mortgage, including the right to collect and foreclose.

Mortgage bond A bond that pledges specific property. If the corporation defaults on the bond, the bondholder can take the property.

Motion A procedural request or application presented by an attorney to the court on behalf of a client.

Motion for a directed verdict In a state court, a party's request that the judge enter a judgment in her or his favor before the case is submitted to a jury because the other party has not presented sufficient evidence to support the claim. The federal courts refer to this request as a *motion for judgment as a matter of law*.

Motion for a new trial A motion asserting that the trial was so fundamentally flawed (because of error, newly discovered evidence, prejudice, or other reason) that a new trial is necessary to prevent a miscarriage of justice.

Motion for judgment as a matter of law In a federal court, a party's request that the judge enter a judgment in her or his favor before the case is submitted to a jury because the other party has not presented sufficient evidence to support the claim. The state courts refer to this request as a *motion for a directed verdict*.

Motion for judgment *n.o.v.* A motion requesting the court to grant judgment in favor of the party making the motion on the ground that the jury verdict against him or her was unreasonable and erroneous.

Motion for judgment on the pleadings A motion by either party to a lawsuit at the close of the pleadings requesting the court to decide the issue solely on the pleadings without proceeding to trial. The motion will be granted only if no facts are in dispute.

Motion for summary judgment A motion requesting the court to enter a judgment without proceeding to trial. The motion can be based on evidence outside the pleadings and will be granted only if no facts are in dispute.

Motion to dismiss A pleading in which a defendant asserts that the plaintiff's claim fails to state a cause of action (that is, has no basis in law) or that there are other grounds on which a suit should be dismissed.

Multiple product order An order issued by the Federal Trade Commission to a firm that has engaged in deceptive advertising by which the firm is required to cease and desist from false advertising not only in regard to the product that was the subject of the action but also in regard to all the firm's other products.

Municipal court A city or community court with criminal jurisdiction over traffic violations and, less frequently, with civil jurisdiction over other minor matters.

Mutual assent The element of voluntary consent in the formation of a contract. The manifestation of contract parties' mutual assent to the same bargain is required to establish a contract.

Mutual fund A specific type of investment company that continually buys or sells to investors shares of ownership in a portfolio.

Mutual rescission An agreement between the parties to cancel their contract, releasing the parties from further obligations under the contract. The object of

the agreement is to restore the parties to the positions they would have occupied had no contract ever been formed. *See also* Rescission

N

National law Law that pertains to a particular nation (as opposed to international law).

Natural law The belief that government and the legal system should reflect universal moral and ethical principles that are inherent in human nature. The natural law school is the oldest and one of the most significant schools of legal thought.

Necessity In criminal law, a defense against liability; under Section 3.02 of the Model Penal Code, this defense is justifiable if “the harm or evil sought to be avoided” by a given action “is greater than that sought to be prevented by the law defining the offense charged.”

Negative amortization Occurs when the payment made by the borrower is less than the interest due on the loan and the difference is added to the principal. The result of negative amortization is that the balance owed on the loan increases rather than decreases over time.

Negligence The failure to exercise the standard of care that a reasonable person would exercise in similar circumstances.

Negligence *per se* An act (or failure to act) in violation of a statutory requirement.

Negligent misrepresentation Any manifestation through words or conduct that amounts to an untrue statement of fact made in circumstances in which a reasonable and prudent person would not have done (or failed to do) that which led to the misrepresentation. A representation made with an honest belief in its truth may still be negligent due to (1) a lack of reasonable care in ascertaining the facts, (2) the manner of expression, or (3) the absence of the skill or competence required by a particular business or profession.

Nominal damages A small monetary award (often one dollar) granted to a plaintiff when no actual damage was suffered or when the plaintiff is unable to show such loss with sufficient certainty.

Nonconforming goods Goods that do not conform to contract specifications.

Normal trade relations (NTR) status A status granted through an international treaty by which each member nation must treat other members at least as well as it treats the country that receives its most favorable treatment. This status was formerly known as most-favored-nation status.

Notary public A public official authorized to attest to the authenticity of signatures.

Notice-and-comment rulemaking An administrative rulemaking procedure that involves the publication of a notice of a proposed rulemaking in the *Federal Register*, a comment period for interested parties to express their views on the proposed rule, and the publication of the agency's final rule in the *Federal Register*.

Notice of default A formal notice to a borrower who is behind in making mortgage payments that the

borrower is in default and may face foreclosure if the payments are not brought up to date. The notice is filed by the lender in the county where the property is located.

Notice of Proposed Rulemaking A notice published (in the *Federal Register*) by an administrative agency describing a proposed rule. The notice must include information on when and where agency proceedings on the proposed rule will be held, a description of the nature of the proceedings, the legal authority for the proceedings (which usually is the agency's enabling legislation), and the terms or the subject matter of the proposed rule.

Notice of sale A formal notice to a borrower who is in default on a mortgage that the mortgaged property will be sold in a foreclosure proceeding. The notice is sent to the borrower by the lender and is also typically recorded with the county, posted on the property, and published in a newspaper.

Novation The substitution, by agreement, of a new contract for an old one, with the rights under the old one being terminated. Typically, there is a substitution of a new person who is responsible for the contract and the removal of an original party's rights and duties under the contract.

Nuisance A common law doctrine under which persons may be held liable for using their property in a manner that unreasonably interferes with others' rights to use or enjoy their own property.

O

Objective theory of contracts A theory under which the intent to form a contract will be judged by outward, objective facts (what the party said when entering into the contract, how the party acted or appeared, and the circumstances surrounding the transaction) as interpreted by a reasonable person, rather than by the party's own secret, subjective intentions.

Offer A promise or commitment to perform or refrain from performing some specified act in the future.

Offeree A person to whom an offer is made.

Offeror A person who makes an offer.

Online Dispute Resolution (ODR) The resolution of disputes with the assistance of organizations that offer dispute-resolution services via the Internet.

Opening statement A statement made to the jury at the beginning of a trial by a party's attorney, prior to the presentation of evidence. The attorney briefly outlines the evidence that will be offered and the legal theory that will be pursued.

Operating agreement In a limited liability company, an agreement in which the members set forth the details of how the business will be managed and operated.

Opinion A statement by the court expressing the reasons for its decision in a case.

Option contract A contract under which the offeror cannot revoke his or her offer for a stipulated time period and the offeree can accept or reject the offer during this period without fear that the offer will be made to another person. The offeree must give consideration for the option (the irrevocable offer) to be enforceable.

Order for relief A court's grant of assistance to a complainant. In bankruptcy proceedings, the order relieves the debtor of the immediate obligation to pay the debts listed in the bankruptcy petition.

Ordinance A law passed by a local governing unit, such as a municipality or a county.

Original jurisdiction Courts having original jurisdiction are courts of the first instance, or trial courts—that is, courts in which lawsuits begin, trials take place, and evidence is presented.

Output contract An agreement in which a seller agrees to sell and a buyer agrees to buy all or up to a stated amount of what the seller produces.

Outside director A person on the board of directors who does not hold a management position at the corporation.

P

Parol evidence A term that originally meant “oral evidence,” but that has come to refer to any negotiations or agreements made prior to a contract or any contemporaneous oral agreements made by the parties.

Parol evidence rule A substantive rule of contracts under which a court will not receive into evidence the parties' prior negotiations, prior agreements, or contemporaneous oral agreements if that evidence contradicts the terms of the parties' written contract.

Participation loan A loan that gives the lender some equity rights in the property, such as the right to receive a percentage of revenue, rental income, or resale income. Also called an equity participation loan.

Partner A co-owner of a partnership.

Partnering agreement An agreement between a seller and a buyer who frequently do business with each other on the terms and conditions that will apply to all subsequently formed electronic contracts.

Partnership An agreement by two or more persons to carry on, as co-owners, a business for profit.

Partnership by estoppel A judicially created partnership that may, at the court's discretion, be imposed for purposes of fairness. The court can prevent those who present themselves as partners (but who are not) from escaping liability if a third person relies on an alleged partnership in good faith and is harmed as a result.

Pass-through entity Any entity that does not have its income taxed at the level of that entity; examples are partnerships, S corporations, and limited liability companies.

Past consideration Something given or some act done in the past, which cannot ordinarily be consideration for a later bargain.

Patent A government grant that gives an inventor the exclusive right or privilege to make, use, or sell his or her invention for a limited time period. The word *patent* usually refers to some invention and designates either the instrument by which patent rights are evidenced or the patent itself.

Peer-to-peer (P2P) networking The sharing of resources (such as files, hard drives, and processing

styles) among multiple computers without necessarily requiring a central network server.

Penalty A sum inserted into a contract, not as a measure of compensation for its breach but rather as punishment for a default. The agreement as to the amount will not be enforced, and recovery will be limited to actual damages.

Per curiam By the whole court; a court opinion written by the court as a whole instead of being authored by a judge or justice.

Per se A Latin term meaning “in itself” or “by itself.”

Per se violation A type of anticompetitive agreement—such as a horizontal price-fixing agreement—that is considered to be so injurious to the public that there is no need to determine whether it actually injures market competition; rather, it is in itself (*per se*) a violation of the Sherman Act.

Perfect tender rule A common law rule under which a seller was required to deliver to the buyer goods that conformed perfectly to the requirements stipulated in the sales contract. A tender of nonconforming goods would automatically constitute a breach of contract. Under the Uniform Commercial Code, the rule has been greatly modified.

Perfection The legal process by which secured parties protect themselves against the claims of third parties who may wish to have their debts satisfied out of the same collateral; usually accomplished by the filing of a financing statement with the appropriate government official.

Performance In contract law, the fulfillment of one's duties arising under a contract with another; the normal way of discharging one's contractual obligations.

Periodic tenancy A lease interest in land for an indefinite period involving payment of rent at fixed intervals, such as week to week, month to month, or year to year.

Personal jurisdiction See *In personam* jurisdiction.

Personal property Property that is movable; any property that is not real property.

Petition in bankruptcy The document that is filed with a bankruptcy court to initiate bankruptcy proceedings. The official forms required for a petition in bankruptcy must be completed accurately, sworn to under oath, and signed by the debtor.

Petitioner In equity practice, a party that initiates a lawsuit.

Petty offense In criminal law, the least serious kind of criminal offense, such as a traffic or building-code violation.

Phishing An online fraud action that allows criminals to pretend to be legitimate companies either by using e-mails or malicious Web sites that trick individuals and companies into providing useful information, such as bank account numbers, Social Security numbers, or credit card numbers.

Pierce the corporate veil To disregard the corporate entity, which limits the liability of shareholders, and hold the shareholders personally liable for a corporate obligation.

Plaintiff One who initiates a lawsuit.

Plea In criminal law, a defendant's allegation, in response to the charges brought against him or her, of guilt or innocence.

Plea bargaining The process by which a criminal defendant and the prosecutor in a criminal case work out a mutually satisfactory disposition of the case, subject to court approval; usually involves the defendant's pleading guilty to a lesser offense in return for a lighter sentence.

Pleadings Statements made by the plaintiff and the defendant in a lawsuit that detail the facts, charges, and defenses involved in the litigation; the complaint and answer are part of the pleadings.

Police powers Powers possessed by states as part of their inherent sovereignty. These powers may be exercised to protect or promote the public order, health, safety, morals, and general welfare.

Policy In insurance law, a contract between the insurer and the insured in which, for a stipulated consideration, the insurer agrees to compensate the insured for loss on a specific subject by a specified peril.

Positive law The body of conventional, or written, law of a particular society at a particular point in time.

Positivist school A school of legal thought whose adherents believe that there can be no higher law than a nation's positive law—the body of conventional, or written, law of a particular society at a particular time.

Possessory lien A lien that allows one person to retain possession of another's property as security for a debt or obligation owed by the owner of the property to the lienholder. An example of a possessory lien is an artisan's lien.

Potentially responsible party (PRP) A potentially liable party under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). Any person who generated the hazardous waste, transported the hazardous waste, owned or operated a waste site at the time of disposal, or currently owns or operates a site may be responsible for some or all of the cleanup costs involved in removing the hazardous chemicals.

Power of attorney A written document, which is usually notarized, authorizing another to act as one's agent; can be special (permitting the agent to do specified acts only) or general (permitting the agent to transact all business for the principal).

Power of sale foreclosure A foreclosure procedure that is not court supervised; available only in some states.

Preauthorized transfer A transaction authorized in advance to recur at substantially regular intervals. The terms and procedures for preauthorized electronic fund transfers through certain financial institutions are subject to the Electronic Fund Transfer Act.

Precedent A court decision that furnishes an example or authority for deciding subsequent cases involving identical or similar facts.

Predatory pricing The pricing of a product below cost with the intent to drive competitors out of the market.

Predominant-factor test A test courts use to determine whether a contract is primarily for the sale of goods or for the sale of services.

Preemption A doctrine under which certain federal laws preempt, or take precedence over, conflicting state or local laws.

Preemptive rights Rights held by shareholders that entitle them to purchase newly issued shares of a corporation's stock, equal in percentage to shares presently held, before the stock is offered to any outside buyers. Preemptive rights enable shareholders to maintain their proportionate ownership and voice in the corporation.

Preference In bankruptcy proceedings, property transfers or payments made by the debtor that favor (give preference to) one creditor over others. The bankruptcy trustee is allowed to recover payments made both voluntarily and involuntarily to one creditor in preference over another.

Preferred creditor One who has received a preferential transfer from a debtor.

Prejudgment interest Interest that accrues on the amount of a court judgment from the time of the filing of a lawsuit to the court's issuance of a judgment.

Preliminary hearing An initial hearing used in many felony cases to establish whether it is proper to detain the defendant. A magistrate reviews the evidence and decides if there is probable cause to believe that the defendant committed the crime with which he or she has been charged.

Preponderance of the evidence A standard in civil law cases under which the plaintiff must convince the court that, based on the evidence presented by both parties, it is more likely than not that the plaintiff's allegation is true.

Pretrial conference A conference, scheduled before the trial begins, between the judge and the attorneys litigating the suit. The parties may settle the dispute, clarify the issues, schedule discovery, and so on during the conference.

Pretrial motion A written or oral application to a court for a ruling or order, made before trial.

Price discrimination Setting prices in such a way that two competing buyers pay two different prices for an identical product or service.

Price-fixing agreement An agreement between competitors in which the competitors agree to fix the prices of products or services at a certain level; prohibited by the Sherman Act.

Prima facie case A case in which the plaintiff has produced sufficient evidence of his or her conclusion that the case can go to a jury; a case in which the evidence compels the plaintiff's conclusion if the defendant produces no evidence to disprove it.

Prime offer rate An interest rate that banks historically charged their most reliable customers. Today, it serves as a basis for pricing other commercial and residential loans.

Principal In agency law, a person who agrees to have another, called the agent, act on his or her behalf.

Principle of rights The principle that human beings have certain fundamental rights (to life, freedom, and

the pursuit of happiness, for example). Those who adhere to this “rights theory” believe that a key factor in determining whether a business decision is ethical is how that decision affects the rights of others. These others include the firm’s owners, its employees, the consumers of its products or services, its suppliers, the community in which it does business, and society as a whole.

Privatization The replacement of government-provided products and services by private firms.

Privilege In tort law, the ability to act contrary to another person’s right without that person’s having legal redress for such acts. Privilege may be raised as a defense to defamation.

Privileges and immunities clause Special rights and exceptions provided by law. Article IV, Section 2, of the Constitution requires states not to discriminate against one another’s citizens. A resident of one state cannot be treated as an alien when in another state; he or she may not be denied such privileges and immunities as legal protection, access to courts, travel rights, and property rights.

Privity of contract The relationship that exists between the promisor and the promisee of a contract.

Pro rata Proportionately; in proportion.

Probable cause Reasonable grounds to believe the existence of facts warranting certain actions, such as the search or arrest of a person.

Probate The process of proving and validating a will and the settling of all matters pertaining to administration, guardianship, and the like.

Probate court A state court of limited jurisdiction that conducts proceedings relating to the settlement of a deceased person’s estate.

Procedural due process The requirement that any government decision to take life, liberty, or property must be made fairly. For example, fair procedures must be used in determining whether a person will be subjected to punishment or have some burden imposed on him or her.

Procedural law Rules that define the manner in which the rights and duties of individuals may be enforced.

Procedural unconscionability Occurs when, due to one contractual party’s vastly superior bargaining power, the other party lacks knowledge or understanding of the contract terms due to inconspicuous print or the lack of an opportunity to read the contract or to ask questions about its meaning. Procedural unconscionability often involves an *adhesion contract*, which is a contract drafted by the dominant party and then presented to the other—the adhering party—on a take-it-or-leave-it basis.

Product liability The legal liability of manufacturers, sellers, and lessors of goods to consumers, users, and bystanders for injuries or damages that are caused by the goods.

Product misuse A defense against product liability that may be raised when the plaintiff used a product in a manner not intended by the manufacturer. If the misuse is reasonably foreseeable, the seller will not escape liability unless measures were taken to guard against the harm that could result from the misuse.

Professional corporation A corporation formed by professional persons, such as physicians, lawyers, dentists, or accountants, to gain tax benefits. Subject to certain exceptions (when a court may treat a professional corporation as a partnership for liability purposes), the shareholders of a professional corporation have the limited liability characteristic of the corporate form of business.

Profit In real property law, the right to enter onto and remove things from the property of another (for example, the right to enter onto a person’s land and remove sand and gravel therefrom).

Promise A person’s assurance that he or she will or will not do something.

Promisee A person to whom a promise is made.

Promisor A person who makes a promise.

Promissory estoppel A doctrine that applies when a promisor makes a clear and definite promise on which the promisee justifiably relies; such a promise is binding if justice will be better served by the enforcement of the promise. *See also* Estoppel

Promissory note A written promise made by one person (the maker) to pay a fixed sum of money to another person (the payee or a subsequent holder) on demand or on a specified date.

Promoter A person who takes the preliminary steps in organizing a corporation, including (usually) issuing a prospectus, procuring stock subscriptions, making contract purchases, securing a corporate charter, and the like.

Property Legally protected rights and interests in anything with an ascertainable value that is subject to ownership.

Prospectus A document required by federal or state securities laws that describes the financial operations of the corporation, thus allowing investors to make informed decisions.

Protected class A class of persons with identifiable characteristics who historically have been victimized by discriminatory treatment for certain purposes. Depending on the context, these characteristics include age, color, gender, national origin, race, and religion.

Proximate cause Legal cause; exists when the connection between an act and an injury is strong enough to justify imposing liability.

Proxy In corporation law, a written agreement between a stockholder and another under which the stockholder authorizes the other to vote the stockholder’s shares in a certain manner.

Proxy fight A conflict between an individual, group, or firm attempting to take control of a corporation and the corporation’s management for the votes of the shareholders.

Public corporation A corporation owned by a federal, state, or municipal government—not to be confused with a publicly held corporation.

Public figures Individuals who are thrust into the public limelight. Public figures include government officials and politicians, movie stars, well-known businesspersons, and generally anybody who becomes known to the public because of his or her position or activities.

Public policy A government policy based on widely held societal values and (usually) expressed or implied in laws or regulations.

Publicly held corporation A corporation for which shares of stock have been sold to the public.

Puffery A salesperson's exaggerated claims concerning the quality of goods offered for sale. Such claims involve opinions rather than facts and are not considered to be legally binding promises or warranties.

Punitive damages Money damages that may be awarded to a plaintiff to punish the defendant and deter future similar conduct.

Purchase-money security interest (PMSI) A security interest that arises when a seller or lender extends credit for part or all of the purchase price of goods purchased by a buyer.

Q

Quantum meruit (pronounced *kwahn-tuhm mehr-oo-wuht*) Literally, "as much as he deserves"—an expression describing the extent of liability on a contract implied in law (quasi contract). An equitable doctrine based on the concept that one who benefits from another's labor and materials should not be unjustly enriched thereby but should be required to pay a reasonable amount for the benefits received, even absent a contract.

Quasi contract A fictional contract imposed on parties by a court in the interests of fairness and justice; usually, quasi contracts are imposed to avoid the unjust enrichment of one party at the expense of another.

Question of fact In a lawsuit, an issue involving a factual dispute that can only be decided by a judge (or, in a jury trial, a jury).

Question of law In a lawsuit, an issue involving the application or interpretation of a law; therefore, the judge, and not the jury, decides the issue.

Quiet enjoyment See Covenant of quiet enjoyment

Quitclaim deed A deed intended to pass any title, interest, or claim that the grantor may have in the property but not warranting that such title is valid. A quitclaim deed offers the least amount of protection against defects in the title.

Quorum The number of members of a decision-making body that must be present before business may be transacted.

Quota An assigned import limit on goods.

R

Ratification The act of accepting and giving legal force to an obligation that previously was not enforceable.

Reaffirmation agreement An agreement between a debtor and a creditor in which the debtor reaffirms, or promises to pay, a debt dischargeable in bankruptcy. To be enforceable, the agreement must be made prior to the discharge of the debt by the bankruptcy court.

Real property Land and everything attached to it, such as foliage and buildings.

Reamortize Restart the amortization schedule (a table of the periodic payments the borrower makes to pay off a debt), changing the way the payments are configured.

Reasonable care The degree of care that a person of ordinary prudence would exercise in the same or similar circumstances.

Reasonable doubt See Beyond a reasonable doubt

Reasonable person standard The standard of behavior expected of a hypothetical "reasonable person." The standard against which negligence is measured and that must be observed to avoid liability for negligence.

Rebuttal The refutation of evidence introduced by an adverse party's attorney.

Receiver In a corporate dissolution, a court-appointed person who winds up corporate affairs and liquidates corporate assets.

Record According to the Uniform Electronic Transactions Act, information that is either inscribed on a tangible medium or stored in an electronic or other medium and that is retrievable. The Uniform Computer Information Transactions Act uses the term *record* instead of *writing*.

Recording statutes Statutes that allow deeds, mortgages, and other real property transactions to be recorded so as to provide notice to future purchasers or creditors of an existing claim on the property.

Red herring prospectus A preliminary prospectus that can be distributed to potential investors after the registration statement (for a securities offering) has been filed with the Securities and Exchange Commission. The name derives from the red legend printed across the prospectus stating that the registration has been filed but has not become effective.

Redemption A repurchase, or buying back. In secured transactions law, a debtor's repurchase of collateral securing a debt after a creditor has taken title to the collateral due to the debtor's default but before the secured party disposes of the collateral.

Reformation A court-ordered correction of a written contract so that it reflects the true intentions of the parties.

Regulation Z A set of rules promulgated by the Federal Reserve Board to implement the provisions of the Truth-in-Lending Act.

Rejection In contract law, an offeree's express or implied manifestation not to accept an offer. In the law governing contracts for the sale of goods, a buyer's manifest refusal to accept goods on the ground that they do not conform to contract specifications.

Rejoinder The defendant's answer to the plaintiff's rebuttal.

Release A contract in which one party forfeits the right to pursue a legal claim against the other party.

Relevant evidence Evidence tending to make a fact at issue in the case more or less probable than it would be without the evidence. Only relevant evidence is admissible in court.

Remainder A future interest in property held by a person other than the original owner.

Remanded Sent back. If an appellate court disagrees with a lower court's judgment, the case may be remanded to the lower court for further proceedings in which the lower court's decision should be consistent with the appellate court's opinion on the matter.

Remedy The relief given to an innocent party to enforce a right or compensate for the violation of a right.

Remedy at law A remedy available in a court of law. Money damages are awarded as a remedy at law.

Remedy in equity A remedy allowed by courts in situations where remedies at law are not appropriate. Remedies in equity are based on settled rules of fairness, justice, and honesty, and include injunction, specific performance, rescission and restitution, and reformation.

Replevin (pronounced *rih-pleh-vin*) An action to recover specific goods in the hands of a party who is wrongfully withholding them from the other party.

Reply Procedurally, a plaintiff's response to a defendant's answer.

Reporter A publication in which court cases are published, or reported.

Repudiation The renunciation of a right or duty; the act of a buyer or seller in rejecting a contract either partially or totally. *See also* Anticipatory repudiation

Requirements contract An agreement in which a buyer agrees to purchase and the seller agrees to sell all or up to a stated amount of what the buyer needs or requires.

Res ipsa loquitur (pronounced *reh-s eh-p-suh low-quuh-tuhr*) A doctrine under which negligence may be inferred simply because an event occurred, if it is the type of event that would not occur in the absence of negligence. Literally, the term means "the facts speak for themselves."

Resale price maintenance agreement An agreement between a manufacturer and a retailer in which the manufacturer specifies the minimum retail price of its products. Resale price maintenance agreements are illegal *per se* under the Sherman Act.

Rescind (pronounced *rih-sihnd*) To cancel. *See also* Rescission

Rescission (pronounced *rih-sih-zhen*) A remedy whereby a contract is canceled and the parties are returned to the positions they occupied before the contract was made; may be effected through the mutual consent of the parties, by their conduct, or by court decree.

Residential use Use of land for construction of buildings for human habitation only.

Respondent superior (pronounced *ree-spahn-dee-uht soo-peer-ee-your*) In Latin, "Let the master respond." A doctrine under which a principal or an employer is held liable for the wrongful acts committed by agents or employees while acting within the course and scope of their agency or employment.

Respondent In equity practice, the party who answers a bill or other proceeding.

Restitution An equitable remedy under which a person is restored to his or her original position prior

to loss or injury, or placed in the position he or she would have been in had the breach not occurred.

Restraint of trade Any contract or combination that tends to eliminate or reduce competition, effect a monopoly, artificially maintain prices, or otherwise hamper the course of trade and commerce as it would be carried on if left to the control of natural economic forces.

Restrictive covenant A private restriction on the use of land that is binding on the party that purchases the property originally as well as on subsequent purchasers. If its benefit or obligation passes with the land's ownership, it is said to "run with the land."

Retained earnings The portion of a corporation's profits that has not been paid out as dividends to shareholders.

Retainer An advance payment made by a client to a law firm to cover part of the legal fees and/or costs that will be incurred on that client's behalf.

Reverse To reject or overrule a court's judgment. An appellate court, for example, might reverse a lower court's judgment on an issue if it feels that the lower court committed an error during the trial or that the jury was improperly instructed.

Reverse discrimination Discrimination against majority groups, such as white males, that results from affirmative action programs, in which preferences are given to minority members and women.

Reverse mortgage A loan product typically provided to older homeowners that allows them to extract cash (in either a lump sum or multiple payments) for the equity in their home. The mortgage does not need to be repaid until the home is sold or the owner leaves or dies.

Reversible error An error by a lower court that is sufficiently substantial to justify an appellate court's reversal of the lower court's decision.

Revocation In contract law, the withdrawal of an offer by an offeror. Unless an offer is irrevocable, it can be revoked at any time prior to acceptance without liability.

Right of contribution The right of a co-surety who pays more than his or her proportionate share on a debtor's default to recover the excess paid from other co-sureties.

Right of first refusal The right to purchase personal or real property—such as corporate shares or real estate—before the property is offered for sale to others.

Right of reimbursement The legal right of a person to be restored, repaid, or indemnified for costs, expenses, or losses incurred or expended on behalf of another.

Right of subrogation The right of a person to stand in the place of (be substituted for) another, giving the substituted party the same legal rights that the original party had.

Right-to-work law A state law providing that employees are not to be required to join a union as a condition of obtaining or retaining employment.

Robbery The act of forcefully and unlawfully taking personal property of any value from another; force or

intimidation is usually necessary for an act of theft to be considered a robbery.

Rule of four A rule of the United States Supreme Court under which the Court will not issue a writ of *certiorari* unless at least four justices approve of the decision to issue the writ.

Rule of reason A test by which a court balances the positive effects (such as economic efficiency) of an agreement against its potentially anticompetitive effects. In antitrust litigation, many practices are analyzed under the rule of reason.

Rule 10b-5 See SEC Rule 10b-5

Rulemaking The process undertaken by an administrative agency when formally adopting a new regulation or amending an old one. Rulemaking involves notifying the public of a proposed rule or change and receiving and considering the public's comments.

Rules of evidence Rules governing the admissibility of evidence in trial courts.

S

S corporation A close business corporation that has met certain requirements as set out by the Internal Revenue Code and thus qualifies for special income tax treatment. Essentially, an S corporation is taxed the same as a partnership, but its owners enjoy the privilege of limited liability.

Sale The passing of title (evidence of ownership rights) from the seller to the buyer for a price.

Sales contract A contract for the sale of goods under which the ownership of goods is transferred from a seller to a buyer for a price.

Satisfaction See Accord and satisfaction

Scienter (pronounced sy-en-ter) Knowledge by the misrepresenting party that material facts have been falsely represented or omitted with an intent to deceive.

Search warrant An order granted by a public authority, such as a judge, that authorizes law enforcement personnel to search particular premises or property.

Seasonably Within a specified time period, or, if no period is specified, within a reasonable time.

SEC Rule 10b-5 A rule of the Securities and Exchange Commission that makes it unlawful, in connection with the purchase or sale of any security, to make any untrue statement of a material fact or to omit a material fact if such omission causes the statement to be misleading.

Secondary boycott A union's refusal to work for, purchase from, or handle the products of a secondary employer, with whom the union has no dispute, for the purpose of forcing that employer to stop doing business with the primary employer, with whom the union has a labor dispute.

Secured party A lender, seller, or any other person in whose favor there is a security interest, including a person to whom accounts or chattel paper has been sold.

Secured transaction Any transaction in which the payment of a debt is guaranteed, or secured, by personal property owned by the debtor or in which the debtor has a legal interest.

Securities Generally, corporate stocks and bonds. A security may also be a note, debenture, stock warrant, or any document given as evidence of an ownership interest in a corporation or as a promise of repayment by a corporation.

Security agreement An agreement that creates or provides for a security interest between the debtor and a secured party.

Security interest Any interest "in personal property or fixtures which secures payment or performance of an obligation" [UCC 1-201(37)].

Self-defense The legally recognized privilege to protect one's self or property against injury by another. The privilege of self-defense protects only acts that are reasonably necessary to protect one's self or property.

Seniority system In regard to employment relationships, a system in which those who have worked longest for the company are first in line for promotions, salary increases, and other benefits; they are also the last to be laid off if the workforce must be reduced.

Service mark A mark used in the sale or the advertising of services, such as to distinguish the services of one person from the services of others. Titles, character names, and other distinctive features of radio and television programs may be registered as service marks.

Service of process The delivery of the complaint and summons to a defendant.

Severance pay A payment by an employer to an employee that exceeds the employee's wages due on termination.

Sexual harassment In the employment context, the granting of job promotions or other benefits in return for sexual favors or language or conduct that is so sexually offensive that it creates a hostile working environment.

Share A unit of stock. See also Stock

Share exchange In a share exchange, some or all of the shares of one corporation are exchanged for some or all of the shares of another corporation, but both corporations continue to exist. Share exchanges are often used to create *holding companies* (companies that own part or all of other companies' stock).

Shareholder One who purchases shares of a corporation's stock, thus acquiring an equity interest in the corporation.

Shareholder's derivative suit A suit brought by a shareholder to enforce a corporate cause of action against a third person.

Sharia Civil law principles of some Middle Eastern countries that are based on the Islamic directives that follow the teachings of the prophet Muhammad.

Sheriff's deed The deed given to the purchaser of property at a sheriff's sale as part of the foreclosure process against the owner of the property.

Shipment contract A contract in which the seller is required to ship the goods by carrier. The buyer assumes liability for any losses or damage to the goods after they are delivered to the carrier. Generally, all contracts are assumed to be shipment contracts if nothing to the contrary is stated in the contract.

Short sale A sale of real property for an amount that is less than the balance owed on the mortgage loan, usually due to financial hardship. Both the lender and the borrower must consent to a short sale. Following a short sale, the borrower still owes the balance of the mortgage debt (after the sale proceeds are applied) to the lender unless the lender agrees to forgive the remaining debt.

Short-swing profits Profits made by officers, directors, and certain large stockholders resulting from the use of nonpublic (inside) information about their companies; prohibited by Section 12 of the 1934 Securities Exchange Act.

Shrink-wrap agreement An agreement whose terms are expressed in a document located inside a box in which goods (usually software) are packaged; sometimes called a *shrink-wrap license*.

Signature Under the Uniform Commercial Code, "any symbol executed or adopted by a party with a present intention to authenticate a writing."

Slander Defamation in oral form.

Slander of quality The publication of false information about another's product, alleging that it is not what its seller claims.

Slander of title The publication of a statement that denies or casts doubt on another's legal ownership of any property, causing financial loss to that property's owner. Also called trade libel.

Small claims courts Special courts in which parties may litigate small claims (usually, claims involving \$2,500 or less). Attorneys are not required in small claims courts, and in many states attorneys are not allowed to represent the parties.

Sociological school A school of legal thought that views the law as a tool for promoting justice in society.

Sole proprietorship The simplest form of business, in which the owner is the business; the owner reports business income on his or her personal income tax return and is legally responsible for all debts and obligations incurred by the business.

Sovereign immunity A doctrine that immunizes foreign nations from the jurisdiction of U.S. courts when certain conditions are satisfied.

Spam Bulk, unsolicited (junk) e-mail.

Special-use permit A permit that allows for a specific exemption to zoning regulations for a particular piece of land in a location that has a particular zoning characteristic. Local zoning authorities grant special-use permits.

Special warranty deed A deed in which the grantor only covenants to warrant and defend the title against claims and demands of the grantor and all persons claiming by, through, and under the grantor.

Specific performance An equitable remedy requiring the breaching party to perform as promised under the contract; usually granted only when money damages would be an inadequate remedy and the subject matter of the contract is unique (for example, real property).

Spot zoning A zoning classification granted to a parcel of land that is different than the classification given to other land in the immediate area.

Standing to sue The requirement that an individual must have a sufficient stake in a controversy before he or she can bring a lawsuit. The plaintiff must demonstrate that he or she either has been injured or threatened with injury.

Stare decisis (pronounced *ster-ay dih-si-ses*) A common law doctrine under which judges are obligated to follow the precedents established in prior decisions.

Statute of Frauds A state statute under which certain types of contracts must be in writing to be enforceable.

Statute of limitations A federal or state statute setting the maximum time period during which a certain action can be brought or certain rights enforced.

Statute of repose Basically, a statute of limitations that is not dependent on the happening of a cause of action. Statutes of repose generally begin to run at an earlier date and run for a longer period of time than statutes of limitations.

Statutory law The body of law enacted by legislative bodies (as opposed to constitutional law, administrative law, or case law).

Statutory lien A lien created by statute.

Statutory period of redemption A time period (usually set by state statute) during which the property subject to a defaulted mortgage, land contract, or other contract can be redeemed by the debtor after foreclosure or judicial sale.

Statutory right of redemption A right provided by statute in some states under which mortgagors can redeem or purchase their property back after a judicial foreclosure for a limited period of time, such as one year.

Stock An equity (ownership) interest in a corporation, measured in units of shares.

Stock buyback Sometimes, publicly held companies use funds from their own treasuries to repurchase their own stock, with the result being that the price of the stock usually goes up.

Stock certificate A certificate issued by a corporation evidencing the ownership of a specified number of shares in the corporation.

Stock option See Stock warrant

Stock warrant A certificate that grants the owner the option to buy a given number of shares of stock, usually within a set time period.

Stockholder See Shareholder

Strict liability Liability regardless of fault. In tort law, strict liability may be imposed on defendants in cases involving abnormally dangerous activities, dangerous animals, or defective products.

Strike An extreme action undertaken by unionized workers when collective bargaining fails; the workers leave their jobs, refuse to work, and (typically) picket the employer's workplace.

Subject-matter jurisdiction Jurisdiction over the subject matter of a lawsuit.

Sublease A lease executed by the lessee of real estate to a third person, conveying the same interest that the lessee enjoys but for a shorter term than that held by the lessee.

Subpoena A document commanding a person to appear at a certain time and place or give testimony concerning a certain matter.

Subprime mortgage A high-risk loan made to a borrower who does not qualify for a standard mortgage because of his or her poor credit rating or high debt-to-income ratio. Lenders typically charge a higher interest rate on subprime mortgages.

Substantial performance Performance that does not vary greatly from the performance promised in a contract; the performance must create substantially the same benefits as those promised in the contract.

Substantive due process A requirement that focuses on the content, or substance, of legislation. If a law or other governmental action limits a fundamental right, such as the right to travel or to vote, it will be held to violate substantive due process unless it promotes a compelling or overriding state interest.

Substantive law Law that defines the rights and duties of individuals with respect to each other, as opposed to procedural law, which defines the manner in which these rights and duties may be enforced.

Substantive unconscionability Results from contracts, or portions of contracts, that are oppressive or overly harsh. Courts generally focus on provisions that deprive one party of the benefits of the agreement or leave that party without remedy for nonperformance by the other. An example of substantive unconscionability is the agreement by a welfare recipient with a fourth-grade education to purchase a refrigerator for \$2,000 under an installment contract.

Suit See Lawsuit; Litigation

Summary judgment See Motion for summary judgment

Summary jury trial (SJT) A method of settling disputes in which a trial is held, but the jury's verdict is not binding. The verdict acts only as a guide to both sides in reaching an agreement during the mandatory negotiations that immediately follow the summary jury trial.

Summons A document informing a defendant that a legal action has been commenced against him or her and that the defendant must appear in court on a certain date to answer the plaintiff's complaint. The document is delivered by a sheriff or any other person so authorized.

Superseding cause An intervening force or event that breaks the connection between a wrongful act and an injury to another; in negligence law, a defense to liability.

Supremacy clause The provision in Article VI of the Constitution that provides that the Constitution, laws, and treaties of the United States are "the supreme Law of the Land." Under this clause, state and local laws that directly conflict with federal law will be rendered invalid.

Surety A person, such as a cosigner on a note, who agrees to be primarily responsible for the debt of another.

Suretyship An express contract in which a third party to a debtor-creditor relationship (the surety)

promises to be primarily responsible for the debtor's obligation.

Syllogism A form of deductive reasoning consisting of a major premise, a minor premise, and a conclusion.

Symbolic speech Nonverbal conduct that expresses opinions or thoughts about a subject. Symbolic speech is protected under the First Amendment's guarantee of freedom of speech.

T

Tag In the context of the World Wide Web, a code in an HTML document. See Meta tags.

Takeover The acquisition of control over a corporation through the purchase of a substantial number of the voting shares of the corporation.

Taking The taking of private property by the government for public use. Under the Fifth Amendment to the Constitution, the government may not take private property for public use without "just compensation."

Tangible employment action A significant change in employment status, such as firing or failing to promote an employee, reassigning the employee to a position with significantly different responsibilities, or effecting a significant change in employment benefits.

Tangible property Property that has physical existence and can be distinguished by the senses of touch, sight, and so on. A car is tangible property; a patent right is intangible property.

Tariff A tax on imported goods.

Technology licensing Allowing another to use and profit from intellectual property (patents, copyrights, trademarks, innovative products or processes, and so on) for consideration. In the context of international business transactions, technology licensing is sometimes an attractive alternative to the establishment of foreign production facilities.

Tenancy at sufferance A type of tenancy under which one who, after rightfully being in possession of leased premises, continues (wrongfully) to occupy the property after the lease has been terminated. The tenant has no rights to possess the property and occupies it only because the person entitled to evict the tenant has not done so.

Tenancy at will A type of tenancy under which either party can terminate the tenancy without notice; usually arises when a tenant who has been under a tenancy for years retains possession, with the landlord's consent, after the tenancy for years has terminated.

Tenancy by the entirety The joint ownership of property by a husband and wife. Neither party can transfer his or her interest in the property without the consent of the other.

Tenancy in common Co-ownership of property in which each party owns an undivided interest that passes to his or her heirs at death.

Tenant One who has the temporary use and occupation of real property owned by another person, called the landlord; the duration and terms of the tenancy are usually established by a lease.

Tender An unconditional offer to perform an obligation by a person who is ready, willing, and able to do so.

Tender of delivery Under the Uniform Commercial Code, a seller's or lessor's act of placing conforming goods at the disposal of the buyer or lessee and giving the buyer or lessee whatever notification is reasonably necessary to enable the buyer or lessee to take delivery.

Tender offer An offer to purchase made by one company directly to the shareholders of another (target) company; often referred to as a "takeover bid."

Third party beneficiary One for whose benefit a promise is made in a contract but who is not a party to the contract.

Time draft A draft that is payable at a definite future time.

Tippee A person who receives inside information.

Title insurance Insurance commonly purchased by a purchaser of real property to protect against loss in the event that the title to the property is not free from liens or superior ownership claims.

Tombstone ad An advertisement, historically in a format resembling a tombstone, of a securities offering. The ad informs potential investors of where and how they may obtain a prospectus.

Tort A civil wrong not arising from a breach of contract. A breach of a legal duty that proximately causes harm or injury to another.

Tortfeasor One who commits a tort.

Toxic tort A personal injury caused by exposure to a toxic substance, such as asbestos or hazardous waste. Victims can sue for medical expenses, lost wages, and pain and suffering.

Trade dress The image and overall appearance of a product—for example, the distinctive decor, menu, layout, and style of service of a particular restaurant. Basically, trade dress is subject to the same protection as trademarks.

Trade libel The publication of false information about another's product, alleging it is not what its seller claims; also referred to as slander of quality.

Trade name A term that is used to indicate part or all of a business's name and that is directly related to the business's reputation and goodwill. Trade names are protected under the common law (and under trademark law, if the name is the same as the firm's trademark).

Trade secret Information or a process that gives a business an advantage over competitors who do not know the information or process.

Trademark A distinctive mark, motto, device, or implement that a manufacturer stamps, prints, or otherwise affixes to the goods it produces so that they may be identified on the market and their origins made known. Once a trademark is established (under the common law or through registration), the owner is entitled to its exclusive use.

Treasury securities Government debt issued by the U.S. Department of the Treasury. The interest rate on Treasury securities is often used as a baseline for measuring the rate on loan products with higher interest rates.

Treasury shares Corporate shares that are authorized by the corporation but that have not been issued.

Treaty An agreement formed between two or more independent nations.

Treble damages Damages consisting of three times the amount of damages determined by a jury in certain cases as required by statute.

Trespass to land The entry onto, above, or below the surface of land owned by another without the owner's permission or legal authorization.

Trespass to personal property The unlawful taking or harming of another's personal property; interference with another's right to the exclusive possession of his or her personal property.

Trespasser One who commits the tort of trespass in one of its forms.

Trial court A court in which trials are held and testimony taken.

Trust An arrangement in which title to property is held by one person (a trustee) for the benefit of another (a beneficiary).

Trust indorsement An indorsement for the benefit of the indorser or a third person; also known as an agency indorsement. The indorsement results in legal title vesting in the original indorsee.

Two-step mortgage A mortgage that starts as a fixed-rate mortgage and then converts to an adjustable-rate mortgage (ARM).

Tying arrangement An agreement between a buyer and a seller in which the buyer of a specific product or service becomes obligated to purchase additional products or services from the seller.

U

U.S. trustee A government official who performs certain administrative tasks that a bankruptcy judge would otherwise have to perform.

Ultra vires (pronounced *uhl-trah vye-reez*) A Latin term meaning "beyond the powers"; in corporate law, acts of a corporation that are beyond its express and implied powers to undertake.

Unanimous opinion A court opinion in which all of the judges or justices of the court agree to the court's decision.

Unconscionable (pronounced *un-kon-shun-uh-bul*) **contract or clause** A contract or clause that is void on the basis of public policy because one party, as a result of his or her disproportionate bargaining power, is forced to accept terms that are unfairly burdensome and that unfairly benefit the dominating party. *See also* Procedural unconscionability; Substantive unconscionability

Undisclosed principal A principal whose identity is unknown by a third person, and the third person has no knowledge that the agent is acting for a principal at the time the agent and the third person form a contract.

Unenforceable contract A valid contract rendered unenforceable by some statute or law.

Unidentified principal A principal whose identity is unknown by a third person, but the third person

knows that the agent is or may be acting for a principal at the time the agent and the third person form a contract.

Uniform law A model law created by the National Conference of Commissioners on Uniform State Laws and/or the American Law Institute for the states to consider adopting. If the state adopts the law, it becomes statutory law in that state. Each state has the option of adopting or rejecting all or part of a uniform law.

Unilateral contract A contract that results when an offer can only be accepted by the offeree's performance.

Union shop A place of employment in which all workers, once employed, must become union members within a specified period of time as a condition of their continued employment.

Unliquidated debt A debt that is uncertain in amount.

Unreasonably dangerous product In product liability, a product that is defective to the point of threatening a consumer's health and safety. A product will be considered unreasonably dangerous if it is dangerous beyond the expectation of the ordinary consumer or if a less dangerous alternative was economically feasible for the manufacturer, but the manufacturer failed to produce it.

Usage of trade Any practice or method of dealing having such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to the transaction in question.

Usury Charging an illegal rate of interest.

Utilitarianism An approach to ethical reasoning in which ethically correct behavior is not related to any absolute ethical or moral values but to an evaluation of the consequences of a given action on those who will be affected by it. In utilitarian reasoning, a "good" decision is one that results in the greatest good for the greatest number of people affected by the decision.

V

Valid contract A contract that results when elements necessary for contract formation (agreement, consideration, legal purpose, and contractual capacity) are present.

Validation notice An initial notice to a debtor from a collection agency informing the debtor that he or she has thirty days to challenge the debt and request verification.

Variance A form of a relief from zoning and other laws that is granted to a property owner; used to make up for any deficiency in real property so that it could prevent the property from complying with zoning regulations.

Venue (pronounced *ven-yoo*) The geographical district in which an action is tried and from which the jury is selected.

Verdict A formal decision made by a jury.

Vertical merger The acquisition by a company at one stage of production of a company at a higher

or lower stage of production (such as its supplier or retailer).

Vertical restraint Any restraint on trade created by agreements between firms at different levels in the manufacturing and distribution process.

Vertically integrated firm A firm that carries out two or more functional phases—such as manufacture, distribution, retailing—of a product.

Vesting Under the Employee Retirement Income Security Act of 1974, a pension plan becomes vested when an employee has a legal right to the benefits purchased with the employer's contributions, even if the employee is no longer working for this employer.

Vicarious liability Legal responsibility placed on one person for the acts of another.

Virtual courtroom A courtroom that is conceptual and not physical. In the context of cyberspace, a virtual courtroom could be a location on the Internet at which judicial proceedings take place.

Virtual property Property that, in the context of cyberspace, is conceptual, as opposed to physical. Intellectual property that exists on the Internet is virtual property.

Virus Any program transmitted between computers via the Internet generally without the knowledge or consent of the recipient. Viruses attempt to do deliberate damage to systems and data.

Vishing The voice counterpart of phishing; vishers use an e-mail or a notice on a Web site that encourage persons to make a phone call which then triggers a voice response system that asks for valuable personal information such as credit card numbers.

Void contract A contract having no legal force or binding effect.

Voidable contract A contract that may be legally avoided (canceled, or annulled) at the option of one of the parties.

Voidable preference In bankruptcy law, a preference that may be avoided, or set aside, by the trustee.

Voir dire (pronounced *vwahr deehr*) A French phrase meaning, literally, "to see, to speak." In jury trials, the phrase refers to the process in which the attorneys question prospective jurors to determine whether they are biased or have any connection with a party to the action or with a prospective witness.

Voting trust An agreement (trust contract) under which legal title to shares of corporate stock is transferred to a trustee who is authorized by the shareholders to vote the shares on their behalf.

W

Waiver An intentional, knowing relinquishment of a legal right.

Warranty A promise that certain facts are truly as they are represented to be.

Warranty deed A deed in which the grantor guarantees to the grantee that the grantor has title to the property conveyed in the deed, that there are no encumbrances on the property other than what the grantor has represented, and that the grantee will

enjoy quiet possession of the property; a deed that provides the greatest amount of protection for the grantee.

Warranty disclaimer A seller's or lessor's negation or qualification of a warranty.

Warranty of fitness See Implied warranty of fitness for a particular purpose.

Warranty of merchantability See Implied warranty of merchantability.

Warranty of title An implied warranty made by a seller that the seller has good and valid title to the goods sold and that the transfer of the title is rightful.

Waste The abuse or destructive use of real property by one who is in rightful possession of the property but who does not have title to it. Waste does not include ordinary depreciation due to age and normal use.

Watered stock Shares of stock issued by a corporation for which the corporation receives, as payment, less than the fair market value of the shares.

Whistleblowing An employee's disclosure to government, the press, or upper-management authorities that the employer is engaged in unsafe or illegal activities.

White-collar crime Nonviolent crime committed by individuals or corporations to obtain a personal or business advantage.

Willful Intentional.

Winding up The second of two stages involved in the termination of a partnership or corporation. Once the firm is dissolved, it continues to exist legally until the process of winding up all business affairs (collecting and distributing the firm's assets) is complete.

Workers' compensation laws State statutes establishing an administrative procedure for compensating workers' injuries that arise out of—or in the course of—their employment, regardless of fault.

Workout agreement A formal contract between a debtor and his or her creditors in which the parties

agree to negotiate a payment plan for the amount due on the loan instead of proceeding to foreclosure.

Worm A type of virus that is designed to copy itself from one computer to another without human interaction. Unlike the typical virus, a computer worm can copy itself automatically and can replicate in great volume and with great speed. Worms, for example, can send out copies of themselves to every contact in your e-mail address book.

Writ of attachment A court's order, prior to a trial to collect a debt, directing the sheriff or other officer to seize nonexempt property of the debtor; if the creditor prevails at trial, the seized property can be sold to satisfy the judgment.

Writ of certiorari (pronounced sur-shee-uh-rah-ree) A writ from a higher court asking the lower court for the record of a case.

Writ of execution A court's order, after a judgment has been entered against the debtor, directing the sheriff to seize (levy) and sell any of the debtor's nonexempt real or personal property. The proceeds of the sale are used to pay off the judgment, accrued interest, and costs of the sale; any surplus is paid to the debtor.

Wrongful discharge An employer's termination of an employee's employment in violation of an employment contract or laws that protect employees.

Zoning The division of a city by legislative regulation into districts and the application in each district of regulations having to do with structural and architectural designs of buildings and prescribing the use to which buildings within designated districts may be put.

Zoning laws The rules and regulations that collectively manage the development and use of land.

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