CHAPTER 570

H.B. No. 1113

AN ACT

relating to certain commercial transactions.

Be it enacted by the Legislature of the State of Texas:

SECTION 1. Title 1, Business & Commerce Code, is amended by adding Chapter 2A to read as follows:

CHAPTER 2A. LEASES

SUBCHAPTER A. GENERAL PROVISIONS

Sec. 2A.101. SHORT TITLE. This chapter shall be known and may be cited as the Uniform Commercial Code—Leases.

Sec. 2A.102. SCOPE. This chapter applies to any transaction, regardless of form, that creates a lease of goods. This chapter does not apply to a transaction that creates an interest in or lease of real estate, except to the extent that provision is made for leases of fixtures by Section 2A.309.

Sec. 2A.103. DEFINITIONS AND INDEX OF DEFINITIONS. (a) In this chapter unless the context otherwise requires:

(1) "Buyer in the 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 the 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 preexisting 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.

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

(3) "Commercial unit" means 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.

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

(5) "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 $25,000.

(6) "Fault" means a wrongful act, omission, breach, or default.

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

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

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

(C) one of the following occurs:

(i) 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;

(ii) 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;

(iii) 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

(iv) 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 chapter to the 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.

(8) "Goods" means all things that are moveable 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.

(9) "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 the clause "each delivery is a separate lease" or its equivalent.

(10) "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.

(11) "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 by this chapter. Unless the context clearly indicates otherwise, the term includes a sublease agreement.

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

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

(14) "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.

(15) "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 preexisting lease contract but does not include a transfer in bulk or as security for or in total or partial satisfaction of a money debt.

(16) "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.

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

(18) "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.

(19) "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.

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

(21) "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.

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

(23) "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.

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

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

(26) "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.

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

"Accessions". Section 2A.310(a).

"Construction mortgage". Section 2A.309(a)(4).

"Encumbrance". Section 2A.309(a)(5).

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

"Fixture filing". Section 2A.309(a)(2).

"Purchase money lease". Section 2A.309(a)(3).

(c) The following definitions in other chapters apply to this chapter:

"Account". Section 9.106.

"Between merchants". Section 2.104(c).

"Buyer". Section 2.103(a)(1).

"Chattel paper". Section 9.105(a)(2).

"Consumer goods". Section 9.109(1).

"Document". Section 9.105(a)(6).

"Entrusting". Section 2.403(c).

"General intangibles". Section 9.106.

"Good faith". Section 2.103(a)(2).

"Instrument". Section 9.105(a)(9).

"Merchant". Section 2.104(a).

"Mortgage". Section 9.105(a)(10).

"Pursuant to commitment". Section 9.105(a)(11).

"Receipt". Section 2.103(a)(3).

"Sale". Section 2.106(a).

"Sale on approval". Section 2.326.

"Sale or return". Section 2.326.

"Seller". Section 2.103(a)(4).

(d) In addition Chapter 1 contains general definitions and principles of construction and interpretation applicable throughout this chapter.

Sec. 2A.104. LEASES SUBJECT TO OTHER LAWS. (a) A lease, although subject to this chapter, is also subject to any applicable:

(1) certificate of title statute of this state, including the provisions of the Certificate of Title Act (Article 6687–1, Vernon's Texas Civil Statutes), Chapter 31, Parks and Wildlife

Code, and Section 19, Texas Manufactured Housing Standards Act (Article 5221f, Vernon's Texas Civil Statutes);

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

(3) consumer law of this state, both decisional and statutory, including, to the extent that they apply to a lease transaction, the provisions of Chapters 17 and 35, Business & Commerce Code, and the Texas Manufactured Housing Standards Act (Article 5221f, Vernon's Texas Civil Statutes).

(b) In case of conflict between this chapter, other than Sections 2A.105, 2A.304(c) and 2A.305(c), and any statute or law referred to in Subsection (a), the statute or law controls.

(c) Failure to comply with any applicable statute has only the effect specified therein.

Sec. 2A.105. TERRITORIAL APPLICATION OF CHAPTER TO GOODS COVERED BY CERTIFICATE OF TITLE. Subject to the provisions of Sections 2A.304(c) and 2A.305(c), 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:

(1) surrender of the certificate; or

(2) four months after the goods are removed from that jurisdiction and thereafter until a new certificate of title is issued by another jurisdiction.

Sec. 2A.106. LIMITATION ON POWER OF PARTIES TO CONSUMER LEASE TO CHOOSE APPLICABLE LAW AND JUDICIAL FORUM. (a) 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.

(b) If the judicial forum chosen by the parties to a consumer lease is a forum located in a jurisdiction other than the jurisdiction in which the lessee in fact signed the lease agreement, resides at the commencement of the action, or resided at the time the lease contract became enforceable or in which the goods are in fact used by the lessee, the choice is not enforceable.

Sec. 2A.107. WAIVER OR RENUNCIATION OF CLAIM OR RIGHT AFTER DEFAULT. A 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.

Sec. 2A.108. UNCONSCIONABILITY. (a) 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.

(b) 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.

(c) Before making a finding of unconscionability under Subsection (a) or (b), 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.

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

(1) if the court finds unconscionability under Subsection (a) or (b), the court shall award reasonable attorney's fees to the lessee;

(2) 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; and

(3) in determining attorney's fees, the amount of the recovery on behalf of the claimant under Subsections (a) and (b) is not controlling.

Sec. 2A.109. OPTION TO ACCELERATE AT WILL. (a) A term providing that one party or the party's successor in interest may accelerate payment or performance or require collateral or additional collateral "at will" or "when the party deems himself or herself insecure" or in words of similar import must be construed to mean that the party has power to do so only if the party in good faith believes that the prospect of payment or performance is impaired.

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

SUBCHAPTER B. FORMATION AND CONSTRUCTION OF LEASE CONTRACT

Sec. 2A.201. STATUTE OF FRAUDS. (a) A lease contract is not enforceable by way of action or defense unless:

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

(2) 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.

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

(c) A writing is not insufficient because it omits or incorrectly states a term agreed upon, but the lease contract is not enforceable under Subsection (a)(2) beyond the lease term and the quantity of goods shown in the writing.

(d) A lease contract that does not satisfy the requirements of Subsection (a), but which is valid in other respects, is enforceable:

(1) 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;

(2) 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;

(3) with respect to goods that have been received and accepted by the lessee; or

(4) if the lease contract would otherwise be enforceable under general principles of equitable estoppel, detrimental reliance or unjust enrichment.

(e) The lease term under a lease contract referred to in Subsection (d) is:

(1) 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;

(2) 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

(3) a reasonable lease term.

Sec. 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 a prior agreement or of a contemporaneous oral agreement but may be explained or supplemented:

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

(2) 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.

Sec. 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.

Sec. 2A.204. FORMATION IN GENERAL. (a) 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.

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

(c) 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.

Sec. 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 three months. Any such term of assurance on a form supplied by the offeree must be separately signed by the offeror.

Sec. 2A.206. OFFER AND ACCEPTANCE IN FORMATION OF LEASE CONTRACT. (a) 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.

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

Sec. 2A.207. COURSE OF PERFORMANCE OR PRACTICAL CONSTRUCTION. (a) 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, a course of performance accepted or acquiesced in without objection is relevant to determine the meaning of the lease agreement.

(b) 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.

(c) Subject to the provisions of Section 2A.208 on modification and waiver, course of performance is relevant to show a waiver or modification of a term inconsistent with the course of performance.

Sec. 2A.208. MODIFICATION, RESCISSION AND WAIVER. (a) An agreement modifying a lease contract needs no consideration to be binding.

(b) 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.

(c) Although an attempt at modification or rescission does not satisfy the requirements of Subsection (b), it may operate as a waiver.

(d) 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 a retraction would be unjust in view of a material change of position in reliance on the waiver.

Sec. 2A.209. LESSEE UNDER FINANCE LEASE AS BENEFICIARY OF SUPPLY CONTRACT. (a) The benefit of a 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 of the warranty and of the supply contract and all defenses or claims arising therefrom.

(b) The extension of the benefit of a supplier's promises and of warranties to the lessee (Section 2A.209(a)) does not:

(1) modify the rights and obligations of the parties to the supply contract, whether arising therefrom or otherwise; or

(2) impose any duty or liability under the supply contract on the lessee.

(c) 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.

(d) In addition to the extension of the benefit of the supplier's promises and of warranties to the lessee under Subsection (a), 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.

Sec. 2A.210. EXPRESS WARRANTIES. (a) Express warranties by the lessor are created as follows:

(1) Any affirmation of fact or promise made by the lessor to the lessee that 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.

(2) 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.

(3) 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.

(b) 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.

Sec. 2A.211. WARRANTIES AGAINST INTERFERENCE AND AGAINST INFRINGEMENT; LESSEE'S OBLIGATION AGAINST INFRINGEMENT. (a) 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.

(b) 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.

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

Sec. 2A.212. IMPLIED WARRANTY OF MERCHANTABILITY. (a) 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.

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

(1) pass without objection in the trade under the description in the lease agreement;

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

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

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

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

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

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

Sec. 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.

Sec. 2A.214. EXCLUSION OR MODIFICATION OF WARRANTIES. (a) 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 whenever 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.

(b) Subject to Subsection (c), 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 (c), to exclude or modify an 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."

(c) Notwithstanding Subsection (b), but subject to Subsection (d):

(1) 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;

(2) 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

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

(d) 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.

Sec. 2A.215. ACCUMULATION 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:

(1) exact or technical specifications displace an inconsistent sample or model or general language of description;

(2) a sample from an existing bulk displaces inconsistent general language of description; and

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

Sec. 2A.216. THIRD-PARTY BENEFICIARIES OF EXPRESS AND IMPLIED WARRANTIES. This chapter does not provide whether anyone other than a lessee may take advantage of an express or implied warranty of quality made to the lessee or whether the lessee or anyone entitled to take advantage of a warranty made to the lessee may sue a third party other than the immediate lessor, or the supplier in a finance lease, for deficiencies in the quality of the goods. These matters are left to the courts for their determination.

Sec. 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:

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

(2) 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

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

Sec. 2A.218. INSURANCE AND PROCEEDS. (a) 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.

(b) 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.

(c) Notwithstanding a lessee's insurable interest under Subsections (a) and (b), the lessor retains an insurable interest during the existence of the lease contract.

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

(e) 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.

Sec. 2A.219. RISK OF LOSS. (a) 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.

(b) Subject to the provisions of this chapter 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:

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

(A) 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

(B) 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.

(2) If the goods are held by a bailee to be delivered without being moved, the risk of loss passes to the lessee on acknowledgement by the bailee of the lessee's right to possession of the goods.

(3) In any case not within Subdivision (1) or (2), the risk of loss passes to the lessee on tender of delivery if the lessee is a merchant; otherwise the risk of loss passes to the lessee on the lessee's receipt of the goods.

Sec. 2A.220. EFFECT OF DEFAULT ON RISK OF LOSS. (a) Where risk of loss is to pass to the lessee and the time of passage is not stated:

(1) 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; or

(2) if the lessee rightfully revokes acceptance, the lessee, to the extent of any deficiency in the lessee's effective insurance coverage, may treat the risk of loss as having remained with the lessor from the beginning.

(b) 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 the lessor's or the supplier's effective insurance coverage may treat the risk of loss as resting on the lessee for a commercially reasonable time.

Sec. 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 under the lease agreement or Section 2A.219:

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

(2) 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 the lessee's 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.

SUBCHAPTER C. EFFECT OF LEASE CONTRACT

Sec. 2A.301. ENFORCEABILITY OF LEASE CONTRACT. Except as otherwise provided in this title, 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.

Sec. 2A.302. TITLE TO AND POSSESSION OF GOODS. Except as otherwise provided in this title, each provision of this chapter 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.

Sec. 2A.303. ALIENABILITY OF PARTY'S INTEREST UNDER LEASE CONTRACT OR OF LESSOR'S RESIDUAL INTEREST IN GOODS; DELEGATION OF PERFORMANCE; TRANSFER OF RIGHTS. (a) As used in this section, "creation of a security interest" includes the sale of a lease contract that is subject to Chapter 9 of this code, Secured Transactions, by reason of Section 9.102(a)(2).

(b) Except as provided in Subsections (c) and (d), a provision in a lease agreement which (1) 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 (2) makes such a transfer an event of default, gives rise to the rights and remedies provided in Subsection (e) of this section, but a transfer that is prohibited or is an event of default under the lease agreement is otherwise effective.

(c) A provision in a lease agreement which (1) prohibits the creation or enforcement of a security interest in an interest of a party under the lease contract or in the lessor's residual interest in the goods, or (2) makes such a transfer an event of default, is not enforceable unless, and then only to the extent that, there is an actual transfer by the lessee of the lessee's right of possession or use of the goods in violation of the provision or an actual delegation of a material performance of either party to the lease contract in violation of the provision. Neither the granting nor the enforcement of a security interest in (1) the lessor's interest in the lease contract or (2) the lessor's residual interest in the goods is a transfer that materially impairs the prospect of obtaining return performance by, materially changes the duty of, or materially increases the burden of risk imposed on, the lessee within the purview of Subsection (e) unless, and then only to the extent that, there is an actual delegation of a material performance of the lessor.

(d) A provision in a lease agreement which (1) 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 (2) 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 (e).

(e) Subject to Subsections (c) and (d):

(1) 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(b); and

(2) if Subdivision (1) is not applicable and if a transfer is made that (A) is prohibited under a lease agreement or (B) materially impairs the prospect of obtaining return performance by, materially changes the duty of, or materially increases the burden of 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.

(f) 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. This promise is enforceable by either the transferor or the other party to the lease contract.

(g) 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.

(h) 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.

Sec. 2A.304. SUBSEQUENT LEASE OF GOODS BY LESSOR. (a) Subject to Section 2A.303 of this chapter, 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 by Subsection (b) or Section 2A.527(d) 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:

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

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

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

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

(b) 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.

(c) 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.

Sec. 2A.305. SALE OR SUBLEASE OF GOODS BY LESSEE. (a) 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 by Subsection (b) and Section 2A.511, 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:

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

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

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

(b) 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.

(c) 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.

Sec. 2A.306. PRIORITY OF CERTAIN LIENS ARISING BY OPERATION OF LAW. If a person in the ordinary course of the person's 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 chapter 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.

Sec. 2A.307. PRIORITY OF LIENS ARISING BY ATTACHMENT OR LEVY ON, SECURITY INTERESTS IN, AND OTHER CLAIMS TO GOODS. (a) Except as otherwise provided in Section 2A.306, a creditor of a lessee takes subject to the lease contract.

(b) Except as otherwise provided in Subsections (c) and (d) and Sections 2A.306 and 2A.308, a creditor of a lessor takes subject to the lease contract unless:

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

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

(3) the creditor holds a security interest in the goods which was perfected (Section 9.303) before the lease contract became enforceable.

(c) A lessee in the ordinary course of business takes the leasehold interest free of a security interest in the goods created by the lessor even though the security interest is perfected (Section 9.303) and the lessee knows of its existence.

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

Sec. 2A.308. SPECIAL RIGHTS OF CREDITORS. (a) 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 or voids the lease contract 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 and does not void the lease contract.

(b) Nothing in this chapter impairs the rights of creditors of a lessor if the lease contract is made under circumstances which under any statute or rule of law apart from this chapter would constitute the transaction a fraudulent transfer or voidable preference.

(c) 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.

Sec. 2A.309. LESSOR'S AND LESSEE'S RIGHTS WHEN GOODS BECOME FIXTURES. (a) In this section:

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

(2) 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 9.402(e);

(3) 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;

(4) 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

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

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

(c) This chapter does not prevent the creation of a lease of fixtures pursuant to real estate law.

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

(1) the lease is a purchase money lease, the conflicting interest of the encumbrancer or owner arises before the goods become fixtures, a fixture filing covering the fixtures is filed or recorded before the goods become fixtures or within 10 days thereafter, and the lessee has an interest of record in the real estate or is in possession of the real estate; or

(2) 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.

(e) 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:

(1) 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

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

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

(4) 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.

(f) Notwithstanding Subsection (d)(1) but otherwise subject to Subsections (d) and (e), 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.

(g) 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.

(h) 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 (1) on default, expiration, termination, or cancellation of the lease agreement but subject to the lease agreement and this chapter, or (2) if necessary to enforce other rights and remedies of the lessor or lessee under this chapter, 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.

(i) 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 Chapter 9.

Sec. 2A.310. LESSOR'S AND LESSEE'S RIGHTS WHEN GOODS BECOME ACCESSIONS. (a) Goods are "accessions" when they are installed in or affixed to other goods.

(b) The lessor's residual interest in the accessions and the interest of a lessor or a lessee under a lease contract entered into before the goods became accessions are superior to all interests in the whole except as stated in Subsection (d).

(c) The lessor's residual interest in the accessions and the interest of a lessor or a lessee under a lease contract entered into at the time or after the goods became accessions are superior to all subsequently acquired interests in the whole except as stated in Subsection (d) but are 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.

(d) The lessor's residual interest in the accessions and the interest of a lessor or a lessee under a lease contract described by Subsection (b) or (c) are subordinate to the interest of:

(1) 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

(2) 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.

(e) When under Subsections (b) or (c) and (d) 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 (1) 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 chapter, or (2) if necessary to enforce the lessor's or lessee's other rights and remedies under this chapter, remove the goods from the whole, free and clear of all interests in the whole, but the party 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.

SUBCHAPTER D. PERFORMANCE OF LEASE CONTRACT:

REPUDIATED, SUBSTITUTED AND EXCUSED

Sec. 2A.401. INSECURITY: ADEQUATE ASSURANCE OF PERFORMANCE. (a) A lease contract imposes an obligation on each party that the other's expectation of receiving due performance will not be impaired.

(b) 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 the party has not already received the agreed return.

(c) 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.

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

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

Sec. 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:

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

(2) make demand pursuant to Section 2A.401 and await assurance of future performance adequate under the circumstances of the particular case; or

(3) resort to any right or remedy on default under the lease contract or this chapter, 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 chapter on the lessor's right to identify goods to the lease contract notwithstanding default or to salvage unfinished goods (Section 2A.524).

Sec. 2A.403. RETRACTION OF ANTICIPATORY REPUDIATION. (a) Until the repudiating party's next performance is due, the repudiating party can retract the repudiation unless, since the repudiation, the aggrieved party has canceled the lease contract or materially changed the aggrieved party's position or otherwise indicated that the aggrieved party considers the repudiation final.

(b) 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.

(c) 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.

Sec. 2A.404. SUBSTITUTED PERFORMANCE. (a) 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.

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

(1) 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

(2) 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.

Sec. 2A.405. EXCUSED PERFORMANCE. Subject to Section 2A.404 on substituted performance, the following rules apply:

(1) Delay in delivery or nondelivery in whole or in part by a lessor or a supplier who complies with Subdivisions (2) and (3) is not a default under the lease contract if performance as agreed has been made impracticable by the occurrence of a contingency the

nonoccurrence of which was a basic assumption on which the lease contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order, whether or not the regulation or order later proves to be invalid.

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

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

Sec. 2A.406. PROCEDURE ON EXCUSED PERFORMANCE. (a) 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):

(1) terminate the lease contract (Section 2A.505(b)); or

(2) 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.

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

Sec. 2A.407. IRREVOCABLE PROMISES: FINANCE LEASES. (a) In the case of a finance lease that is not a consumer lease, a term in the lease agreement that provides that the lessee's promises under the lease contract become irrevocable and independent upon the lessee's acceptance of the goods is enforceable.

(b) A promise that has become irrevocable and independent under Subsection (a):

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

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

SUBCHAPTER E. DEFAULT

Sec. 2A.501. DEFAULT: PROCEDURE. (a) Whether the lessor or the lessee is in default under a lease contract is determined by the lease agreement and this chapter.

(b) 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 chapter and, except as limited by this chapter, as provided in the lease agreement.

(c) 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 chapter.

(d) Except as otherwise provided by Section 1.106(a) or this chapter or the lease agreement, the rights and remedies referred to in Subsections (b) and (c) are cumulative.

(e) If the lease agreement covers both real property and goods, the party seeking enforcement may proceed under this subchapter 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 subchapter does not apply.

Sec. 2A.502. NOTICE AFTER DEFAULT. Except as provided by this chapter 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.

Sec. 2A.503. MODIFICATION OR IMPAIRMENT OF RIGHTS AND REMEDIES. (a) Except as otherwise provided in this chapter, the lease agreement may include rights and remedies for default in addition to or in substitution for those provided by this chapter and may limit or alter the measure of damages recoverable under this chapter.

(b) Resort to a remedy provided under this chapter 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 its essential purpose, or provision for an exclusive remedy is unconscionable, remedy may be had as provided by this chapter.

(c) Consequential damages may be liquidated under Section 2A.504 or otherwise be limited, altered, or excluded unless the limitation, alteration, or exclusion is unconscionable. Liquidation, limitation, alteration, or exclusion of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable, but liquidation, limitation, alteration, or exclusion of damages where the loss is commercial is not prima facie unconscionable.

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

Sec. 2A.504. LIQUIDATION OF DAMAGES. (a) 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. In a consumer lease, a term fixing liquidated damages that are unreasonably large in light of the actual harm is unenforceable as a penalty.

(b) If the lease agreement provides for liquidation of damages, and such provision does not comply with Subsection (a) 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 chapter.

(c) 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 the lessee's payments exceeds:

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

(2) 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.

(d) A lessee's right to restitution under Subsection (c) is subject to offset to the extent the lessor establishes:

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

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

Sec. 2A.505. CANCELLATION AND TERMINATION AND EFFECT OF CANCELLATION, TERMINATION, RESCISSION, OR FRAUD ON RIGHTS AND REMEDIES. (a) 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 canceling party also retains any remedy for default of the whole lease contract or any unperformed balance.

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

(c) 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.

(d) Rights and remedies for material misrepresentation or fraud include all rights and remedies available under this chapter for default.

(e) 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.

Sec. 2A.506. STATUTE OF LIMITATIONS. (a) An action for default under a lease contract, including breach of warranty or indemnity, must be commenced within four years after the cause of action accrued. By the original lease contract the parties may not expand such period of limitation but, except in the case of a consumer lease, may reduce the period of limitation to not less than one year.

(b) 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. A cause of action for indemnity accrues:

(1) in the case of an indemnity against liability, when the act or omission on which the claim for indemnity is based is or should have been discovered by the indemnified party; or

(2) in the case of an indemnity against loss or damage, when the person indemnified makes payment thereof.

(c) If an action commenced within the time limited by Subsection (a) 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 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.

(d) 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 chapter becomes effective.

Sec. 2A.507. PROOF OF MARKET RENT. (a) 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.

(b) 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 chapter 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.

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

(d) 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.

Sec. 2A.508. LESSEE'S REMEDIES. (a) 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 and 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:

(1) cancel the lease contract (Section 2A.505(a));

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

(3) 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); or

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

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

(1) if the goods have been identified, recover them (Section 2A.522); or

(2) in a proper case, obtain specific performance, replevin, detinue, sequestration, claim and delivery, or the like for the goods (Section 2A.521).

(c) 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(c).

(d) If a lessor has breached a warranty, whether express or implied, the lessee may recover damages (Section 2A.519(d)).

(e) On rightful rejection or justifiable revocation or 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(e).

(f) 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 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.

Sec. 2A.509. LESSEE'S RIGHTS ON IMPROPER DELIVERY; RIGHTFUL REJECTION. (a) 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.

(b) 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.

Sec. 2A.510. INSTALLMENT LEASE CONTRACTS: REJECTION AND DEFAULT. (a) 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 (b) and the lessor or the supplier gives adequate assurance of its cure, the lessee must accept the delivery.

(b) 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.

Sec. 2A.511. MERCHANT LESSEE'S DUTIES AS TO RIGHTFULLY REJECTED GOODS. Subject to any security interest of a lessee (Section 2A.508(e)), 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 the lessee's 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.

Sec. 2A.512. LESSEE'S DUTIES AS TO RIGHTFULLY REJECTED GOODS. (a) 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(e)):

(1) 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;

(2) 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 by Subsection (d); but

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

(b) Action by the lessee pursuant to Subsection (a) is not acceptance or conversion.

(c) If a merchant lessee (Section 2A.511) or any other lessee disposes of goods, the lessee 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.

(d) In complying with this section or Section 2A.511, 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.

(e) A purchaser who purchases in good faith from a lessee pursuant to this section or Section 2A.511 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 chapter.

Sec. 2A.513. CURE BY LESSOR OF IMPROPER TENDER OR DELIVERY; REPLACEMENT. (a) If any tender or delivery by the lessor or the supplier is rejected because nonconforming and the time for performance 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 by the lease contract.

(b) 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 the lessor or supplier seasonably notifies the lessee.

Sec. 2A.514. WAIVER OF LESSEE'S OBJECTIONS. (a) 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:

(1) if, stated seasonably, the lessor or the supplier could have cured it (Section 2A.513); or

(2) 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.

(b) 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.

Sec. 2A.515. ACCEPTANCE OF GOODS. (a) Acceptance of goods occurs after the lessee has had a reasonable opportunity to inspect the goods and:

(1) 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

(2) the lessee fails to make an effective rejection of the goods (Section 2A.509(b)).

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

Sec. 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. (a) 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.

(b) A lessee's acceptance of goods precludes rejection of the goods accepted. In the case of a finance lease that is not a consumer 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 chapter or the lease agreement for nonconformity.

(c) If a tender has been accepted:

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

(2) 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

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

(d) 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:

(1) 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 both litigations, then unless the person notified after seasonable receipt of the notice does come in and defend that person is so bound.

(2) 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.

(e) Subsections (c) and (d) apply to any obligation of a lessee to hold the lessor or the supplier harmless against infringement or the like (Section 2A.211).

(f) Subsection (c) shall not apply to a consumer lease.

Sec. 2A.517. REVOCATION OF ACCEPTANCE OF GOODS. (a) 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:

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

(2) 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 that is not a consumer lease, by the difficulty of discovery before acceptance.

(b) 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.

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

(d) 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.

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

Sec. 2A.518. COVER; SUBSTITUTE GOODS. (a) After default by a lessor under the lease contract of the type described by Section 2A.508(a), 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.

(b) 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(c) and 2A.503), if a lessee's cover is by a 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 (1) 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 (2) any incidental or consequential damages, less expenses saved as a consequence of the lessor's default.

(c) If the lessee's cover is by lease agreement that for any reason does not qualify for treatment under Subsection (b) 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.

Sec. 2A.519. LESSEE'S DAMAGES FOR NONDELIVERY, REPUDIATION, DEFAULT, AND BREACH OF WARRANTY IN REGARD TO ACCEPTED GOODS. (a) 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(c) 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(b) or is by purchase or otherwise, the measure of damages for nondelivery 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.

(b) 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.

(c) Except as otherwise agreed, if the lessee has accepted goods and given notification (Section 2A.516(c)), the measure of damages for nonconforming 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.

(d) 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.

Sec. 2A.520. LESSEE'S INCIDENTAL AND CONSEQUENTIAL DAMAGES. (a) 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.

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

(1) 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

(2) injury to person or property proximately resulting from any breach of warranty.

Sec. 2A.521. LESSEE'S RIGHT TO SPECIFIC PERFORMANCE, REPLEVIN, AND OTHER REMEDIES. (a) Specific performance may be decreed if the goods are unique or in other proper circumstances.

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

(c) 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.

Sec. 2A.522. LESSEE'S RIGHT TO GOODS ON LESSOR'S INSOLVENCY. (a) Subject to Subsection (b) 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.

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

Sec. 2A.523. LESSOR'S REMEDIES. (a) 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:

(1) cancel the lease contract (Section 2A.505(a));

(2) proceed respecting goods not identified to the lease contract (Section 2A.524);

(3) withhold delivery of the goods and take possession of goods previously delivered (Section 2A.525);

(4) stop delivery of the goods by any bailee (Section 2A.526);

(5) 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); or

(6) exercise any other rights or pursue any other remedies provided in the lease contract.

(b) If a lessor does not fully exercise a right or obtain a remedy to which the lessor is entitled under Subsection (a), 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.

(c) 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:

(1) 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 by Subsection (a) or (b); or

(2) if the default does not substantially impair the value of the lease contract to the lessor, the lessor may recover as provided by Subsection (b).

Sec. 2A.524. LESSOR'S RIGHT TO IDENTIFY GOODS TO LEASE CONTRACT. (a) A lessor aggrieved under Section 2A.523(a) may:

(1) 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

(2) dispose of goods (Section 2A.527(a)) that demonstrably have been intended for the particular lease contract even though those goods are unfinished.

(b) 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.

Sec. 2A.525. LESSOR'S RIGHT TO POSSESSION OF GOODS. (a) If a lessor discovers the lessee to be insolvent, the lessor may refuse to deliver the goods.

(b) After a default by the lessee under the lease contract of the type described by Section 2A.523(a) or (c)(1) 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).

(c) The lessor may proceed under Subsection (b) without judicial process if that can be done without breach of the peace or the lessor may proceed by action.

Sec. 2A.526. LESSOR'S STOPPAGE OF DELIVERY IN TRANSIT OR OTHERWISE. (a) 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.

(b) In pursuing its remedies under Subsection (a), the lessor may stop delivery until:

(1) receipt of the goods by the lessee;

(2) acknowledgement to the lessee by any bailee of the goods, except a carrier, that the bailee holds the goods for the lessee; or

(3) such an acknowledgement to the lessee by a carrier via reshipment or as warehouseman.

(c)(1) To stop delivery, a lessor shall so notify as to enable the bailee by reasonable diligence to prevent delivery of the goods.

(2) 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.

(3) A carrier who has issued a nonnegotiable bill of lading is not obligated to obey a notification to stop received from a person other than the consignor.

Sec. 2A.527. LESSOR'S RIGHTS TO DISPOSE OF GOODS. (a) After a default by a lessee under the lease contract of the type described in Section 2A.523(a) or (c)(1) 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.

(b) 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(c) 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 (1) accrued and unpaid rent as of the date of the commencement of the term of the new lease agreement, (2) 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 (3) any incidental damages allowed under Section 2A.530, less expenses saved in consequence of the lessee's default.

(c) If the lessor's disposition is by lease agreement that for any reason does not qualify for treatment under Subsection (b), 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.

(d) 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 chapter.

(e) 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(e)).

Sec. 2A.528. LESSOR'S DAMAGES FOR NONACCEPTANCE, FAILURE TO PAY, REPUDIATION, OR OTHER DEFAULT. (a) 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(c) 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(b) 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(a) or (c)(1), or, if agreed, for other default of the lessee, (i) accrued and unpaid rent as of the date of 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 at 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.

(b) If the measure of damages provided in Subsection (a) 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.

Sec. 2A.529. LESSOR'S ACTION FOR THE RENT. (a) After default by the lessee under the lease contract of the type described in Section 2A.523(a) or (c)(1), or, if agreed, after other default by the lessee, if the lessor complies with Subsection (b), the lessor may recover from the lessee as damages:

(1) 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

(2) 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.

(b) Except as provided by Subsection (c) of this section, 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.

(c) The lessor may dispose of the goods at any time before collection of the judgment for damages obtained pursuant to Subsection (a). 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 2A.528, and the lessor will cause an appropriate credit to be provided against any judgment for damages to the extent that the amount of the judgment exceeds the recovery available pursuant to Section 2A.527 or 2A.528.

(d) Payment of the judgment for damages obtained pursuant to Subsection (a) 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.

(e) After a lessee has wrongfully rejected or revoked acceptance of goods, has failed to pay rent then due, or has repudiated (Section 2A.402), a lessor who is held not entitled to rent under this section must nevertheless be awarded damages for nonacceptance under Section 2A.527 or 2A.528.

Sec. 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.

Sec. 2A.531. STANDING TO SUE THIRD PARTIES FOR INJURY TO GOODS. (a) 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:

(1) the lessor has a right of action against the third party; and

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

(A) has a security interest in the goods;

(B) has an insurable interest in the goods;

(C) 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.

(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 lease contract and there is no arrangement between them for disposition of the recovery, the party's suit or settlement, subject to the party's own interest, is as a fiduciary for the other party to the lease contract.

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

Sec. 2A.532. LESSOR'S RIGHTS TO RESIDUAL INTEREST. In addition to any other recovery permitted by this chapter 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.

SECTION 2. Section 1.105, Business & Commerce Code, is amended by amending Subsection (b) and adding Subsection (c) to read as follows:

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

Rights of creditors against sold goods. Section 2.402.

Applicability of the chapter on Leases. Sections 2A.105 and 2A.106.

Applicability of the chapter on Bank Deposits and Collections. Section 4.102.

Governing law in the chapter on Funds Transfers. Section 4A.507.

~~[Bulk transfers subject to the chapter on Bulk Transfers. Section 6.102.]~~

Applicability of the chapter on Investment Securities. Section 8.106.

Perfection provisions of the chapter on Secured Transactions. Section 9.103.

(c) If a transaction that is subject to this title is a "qualified transaction," as defined in Section 35.51 of this code, then except as provided in Subsection (b) of this section, Section 35.51 governs the effect of an agreement by the parties that the law of a particular jurisdiction governs an issue relating to the transaction or that the law of a particular jurisdiction governs the interpretation or construction of an agreement relating to the transaction or a provision of the agreement.

SECTION 3. Section 2.403(d), Business & Commerce Code, is amended to read as follows:

(d) The rights of other purchasers of goods and of lien creditors are governed by the chapters on Secured Transactions (Chapter 9)[~~, Bulk Transfers (Chapter 6)~~] and Documents of Title (Chapter 7).

SECTION 4. Section 9.113, Business & Commerce Code, is amended to read as follows:

Sec. 9.113. SECURITY INTERESTS ARISING UNDER CHAPTER ON SALES *OR UNDER CHAPTER ON LEASES*. A security interest arising solely under the chapter on Sales (Chapter 2) *or the chapter on Leases (Chapter 2A)* is subject to the provisions of this

chapter except that to the extent that and so long as the debtor does not have or does not lawfully obtain possession of the goods

(1) no security agreement is necessary to make the security interest enforceable; and

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

(3) the rights of the secured party on default by the debtor are governed by the chapter on Sales (Chapter 2) *or by the chapter on Leases (Chapter 2A) in the case of a security interest arising solely under such chapter.*

SECTION 5. Section 9.410(b), Business & Commerce Code, is amended to read as follows:

(b) A secured party may change the name or mailing address of the secured party in more than one financing statement by filing a written statement of master *amendment* [~~assignment~~] signed by the secured party of record in each financing statement and setting forth the name of the secured party of record and file number of each financing statement and the new name or mailing address of the secured party. The secured party must also provide filing information in computer-readable form prescribed by the secretary of state.

SECTION 6. Section 17.46(b), Business & Commerce Code, is amended to read as follows:

(b) Except as provided in Subsection (d) of this section, the term "false, misleading, or deceptive acts or practices" includes, but is not limited to, the following acts:

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

(2) causing confusion or misunderstanding as to the source, sponsorship, approval, or certification of goods or services;

(3) causing confusion or misunderstanding as to affiliation, connection, or association with, or certification by, another;

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

(5) representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have or that a person has a sponsorship, approval, status, affiliation, or connection which he does not;

(6) representing that goods are original or new if they are deteriorated, reconditioned, reclaimed, used, or secondhand;

(7) representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another;

(8) disparaging the goods, services, or business of another by false or misleading representation of facts;

(9) advertising goods or services with intent not to sell them as advertised;

(10) advertising goods or services with intent not to supply a reasonable expectable public demand, unless the advertisements disclosed a limitation of quantity;

(11) making false or misleading statements of fact concerning the reasons for, existence of, or amount of price reductions;

(12) representing that an agreement confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law;

(13) knowingly making false or misleading statements of fact concerning the need for parts, replacement, or repair service;

(14) misrepresenting the authority of a salesman, representative or agent to negotiate the final terms of a consumer transaction;

(15) basing a charge for the repair of any item in whole or in part on a guaranty or warranty instead of on the value of the actual repairs made or work to be performed on the item without stating separately the charges for the work and the charge for the warranty or guaranty, if any;

(16) disconnecting, turning back, or resetting the odometer of any motor vehicle so as to reduce the number of miles indicated on the odometer gauge;

(17) advertising of any sale by fraudulently representing that a person is going out of business;

(18) using or employing a chain referral sales plan in connection with the sale or offer to sell of goods, merchandise, or anything of value, which uses the sales technique, plan, arrangement, or agreement in which the buyer or prospective buyer is offered the opportunity to purchase merchandise or goods and in connection with the purchase receives the seller's promise or representation that the buyer shall have the right to receive compensation or consideration in any form for furnishing to the seller the names of other prospective buyers if receipt of the compensation or consideration is contingent upon the occurrence of an event subsequent to the time the buyer purchases the merchandise or goods;

(19) representing that a guarantee or warranty confers or involves rights or remedies which it does not have or involve, provided, however, that nothing in this subchapter shall be construed to expand the implied warranty of merchantability as defined in Sections 2.314 through 2.318 *and Sections 2A.212 through 2A.216* of the Business & Commerce Code to involve obligations in excess of those which are appropriate to the goods;

(20) selling or offering to sell, either directly or associated with the sale of goods or services, a right of participation in a multi-level distributorship. As used herein, "multi-level distributorship" means a sales plan for the distribution of goods or services in which promises of rebate or payment are made to individuals, conditioned upon those individuals recommending or securing additional individuals to assume positions in the sales operation, and where the rebate or payment is not exclusively conditioned on or in relation to proceeds from the retail sales of goods;

(21) representing that work or services have been performed on, or parts replaced in, goods when the work or services were not performed or the parts replaced;

(22) filing suit founded upon a written contractual obligation of and signed by the defendant to pay money arising out of or based on a consumer transaction for goods, services, loans, or extensions of credit intended primarily for personal, family, household, or agricultural use in any county other than in the county in which the defendant resides at the time of the commencement of the action or in the county in which the defendant in fact signed the contract; provided, however, that a violation of this subsection shall not occur where it is shown by the person filing such suit he neither knew or had reason to know that the county in which such suit was filed was neither the county in which the defendant resides at the commencement of the suit nor the county in which the defendant in fact signed the contract;

(23) the failure to disclose information concerning goods or services which was known at the time of the transaction if such failure to disclose such information was intended to induce the consumer into a transaction into which the consumer would not have entered had the information been disclosed; or

(24) using the term "corporation," "incorporated," or an abbreviation of either of those terms in the name of a business entity that is not incorporated under the laws of this state or another jurisdiction.

SECTION 7. Title 1, Business & Commerce Code, is amended by adding Chapter 4A to read as follows:

CHAPTER 4A. FUNDS TRANSFERS

SUBCHAPTER A. SUBJECT MATTER AND DEFINITIONS

Sec. 4A.101. SHORT TITLE. This chapter may be cited as Uniform Commercial Code—Funds Transfers.

Sec. 4A.102. SUBJECT MATTER. Except as otherwise provided in Section 4A.108, this chapter applies to funds transfers defined in Section 4A.104.

Sec. 4A.103. PAYMENT ORDER–DEFINITIONS. (a) In this chapter:

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

(A) the instruction does not state a condition of payment to the beneficiary other than the time of payment;

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

(C) the instruction is transmitted by the sender directly to the receiving bank or to an agent, funds transfer system, or communication system for transmittal to the receiving bank.

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

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

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

(5) "Sender" means the person giving the instruction to the receiving bank.

(b) If an instruction complying with Subsection (a)(1) is to make more than one payment to a beneficiary, the instruction is a separate payment order with respect to each payment.

(c) A payment order is issued when it is sent to the receiving bank.

Sec. 4A.104. FUNDS TRANSFER-DEFINITIONS. In this chapter:

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

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

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

(4) "Originator's bank" means:

(A) the receiving bank to which the payment order of the originator is issued if the originator is not a bank; or

(B) the originator if the originator is a bank.

Sec. 4A.105. OTHER DEFINITIONS. (a) In this chapter:

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

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

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

(4) "Funds transfer business day" of a receiving bank means the part of a day during which the receiving bank is open for the receipt, processing, and transmittal of payment orders and cancellations and amendments of payment orders.

(5) "Funds transfer system" means a wire transfer network, automated clearinghouse, or other communication system of a clearinghouse or other association of banks through which a payment order by a bank may be transmitted to the bank to which the order is addressed.

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

(7) "Prove" with respect to a fact means to meet the burden of establishing the fact (Section 1.201(8)).

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

(1) "Acceptance." Section 4A.209.

(2) "Beneficiary." Section 4A.103.

(3) "Beneficiary's bank." Section 4A.103.

(4) "Executed." Section 4A.301.

(5) "Execution date." Section 4A.301.

(6) "Funds transfer." Section 4A.104.

(7) "Funds transfer system rule." Section 4A.501.

(8) "Intermediary bank." Section 4A.104.

(9) "Originator." Section 4A.104.

(10) "Originator's bank." Section 4A.104.

(11) "Payment by beneficiary's bank to beneficiary." Section 4A.405.

(12) "Payment by originator to beneficiary." Section 4A.406.

(13) "Payment by sender to receiving bank." Section 4A.403.

(14) "Payment date." Section 4A.401.

(15) "Payment order." Section 4A.103.

(16) "Receiving bank." Section 4A.103.

(17) "Security procedure." Section 4A.201.

(18) "Sender." Section 4A.103.

(c) The following definitions in Chapter 4 apply to this chapter:

(1) "Clearinghouse." Section 4.104.

(2) "Item." Section 4.104.

(3) "Suspends payments." Section 4.104.

(d) In addition, Chapter 1 contains general definitions and principles of construction and interpretation applicable throughout this chapter.

Sec. 4A.106. TIME PAYMENT ORDER IS RECEIVED. (a) The time of receipt of a payment order or communication cancelling or amending a payment order is determined by the rules applicable to receipt of a notice stated in Section 1.201. A receiving bank may fix a cutoff time or times on a funds transfer business day for the receipt and processing of payment orders and communications cancelling or amending payment orders. Different cutoff times may apply to payment orders, cancellations, or amendments, or to different categories of payment orders, cancellations, or amendments. A cutoff time may apply to senders generally or different cutoff times may apply to different senders or categories of payment orders. If a payment order or communication cancelling or amending a payment order is received after the close of a funds transfer business day or after the appropriate cutoff time on a funds transfer business day, the receiving bank may treat the payment order or communication as received at the opening of the next funds transfer business day.

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

Sec. 4A.107. FEDERAL RESERVE REGULATIONS AND OPERATING CIRCULARS. Regulations of the Board of Governors of the Federal Reserve System and operating circulars of the Federal Reserve Banks supersede any inconsistent provision of this chapter to the extent of the inconsistency.

Sec. 4A.108. EXCLUSION OF CONSUMER TRANSACTIONS GOVERNED BY FEDERAL LAW. This chapter does not apply to a funds transfer any part of which is governed by the Electronic Fund Transfer Act, 15 U.S.C. Sec. 1693 et seq., as amended from time to time.

[Sections 4A.109-4A.200 reserved for expansion]

SUBCHAPTER B. ISSUE AND ACCEPTANCE OF PAYMENT ORDER

Sec. 4A.201. SECURITY PROCEDURE. "Security procedure" means a procedure established by an agreement between a customer and a receiving bank for the purpose of (i) verifying that a payment order or communication amending or cancelling a payment order is that of the customer, or (ii) detecting error in the transmission or the content of the payment order or communication. A security procedure may require the use of algorithms or other codes, identifying words or numbers, encryption, callback procedures, or similar security devices. Comparison of a signature on a payment order or communication with an authorized specimen signature of the customer is not by itself a security procedure.

Sec. 4A.202. AUTHORIZED AND VERIFIED PAYMENT ORDERS. (a) A payment order received by the receiving bank is the authorized order of the person identified as sender if that person authorized the order or is otherwise bound by it under the law of agency.

(b) If a bank and its customer have agreed that the authenticity of payment orders issued to the bank in the name of the customer as sender will be verified pursuant to a security procedure, a payment order received by the receiving bank is effective as the order of the customer, whether or not authorized, if (i) the security procedure is a commercially reasonable method of providing security against unauthorized payment orders, and (ii) the bank proves that it accepted the payment order in good faith and in compliance with the security procedure and any written agreement or instruction of the customer restricting acceptance of payment orders issued in the name of the customer. The bank is not required to follow an instruction that violates a written agreement with the customer or notice of which is not received at a time and in a manner affording the bank a reasonable opportunity to act on it before the payment order is accepted.

(c) Commercial reasonableness of a security procedure is a question of law to be determined by considering the wishes of the customer expressed to the bank, the circumstances of the customer known to the bank, including the size, type, and frequency of payment orders normally issued by the customer to the bank, alternative security procedures offered to the customer, and security procedures in general use by customers and receiving banks similarly situated. A security procedure is deemed to be commercially reasonable if:

(1) the security procedure was chosen by the customer after the bank offered, and the customer refused, a security procedure that was commercially reasonable for the customer; and

(2) the customer expressly agreed in writing to be bound by any payment order, whether or not authorized, issued in its name and accepted by the bank in compliance with the security procedure chosen by the customer.

(d) The term "sender" in this chapter includes the customer in whose name a payment order is issued if the order is the authorized order of the customer under Subsection (a) or it is effective as the order of the customer under Subsection (b).

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

(f) Except as provided in this section and in Section 4A.203(a)(1), the rights and obligations arising under this section or Section 4A.203 may not be varied by agreement.

Sec. 4A.203. UNENFORCEABILITY OF CERTAIN VERIFIED PAYMENT ORDERS. (a) If an accepted payment order is not, under Section 4A.202(a), an authorized order of a customer identified as sender, but is effective as an order of the customer pursuant to Section 4A.202(b), the following rules apply:

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

(2) The receiving bank is not entitled to enforce or retain payment of the payment order if the customer proves that the order was not caused, directly or indirectly, by a person:

(A) entrusted at any time with duties to act for the customer with respect to payment orders or the security procedure; or

(B) who obtained access to transmitting facilities of the customer or who obtained, from a source controlled by the customer and without authority of the receiving bank, information facilitating breach of the security procedure, regardless of how the information was obtained or whether the customer was at fault. Information includes any access device, computer software, or the like.

(b) This section applies to amendments of payment orders to the same extent it applies to payment orders.

Sec. 4A.204. REFUND OF PAYMENT AND DUTY OF CUSTOMER TO REPORT WITH RESPECT TO UNAUTHORIZED PAYMENT ORDER. (a) If a receiving bank accepts a payment order issued in the name of its customer as sender which is (i) not authorized and not effective as the order of the customer under Section 4A.202, or (ii) not enforceable, in whole or in part, against the customer under Section 4A.203, the bank shall refund any payment of the payment order received from the customer to the extent the bank is not entitled to enforce payment and shall pay interest on the refundable amount calculated from the date the bank received payment to the date of the refund. However, the customer is not entitled to interest from the bank on the amount to be refunded if the customer fails to exercise ordinary care to determine that the order was not authorized by the customer and to notify the bank of the relevant facts within a reasonable time not exceeding 90 days after the date the customer received notification from the bank that the order was accepted or that the customer's account was debited with respect to the order. The bank is not entitled to any recovery from the customer on account of a failure by the customer to give notification as stated in this section.

(b) Reasonable time under Subsection (a) may be fixed by agreement as stated in Section 1.204, but the obligation of a receiving bank to refund payment as stated in Subsection (a) may not otherwise be varied by agreement.

Sec. 4A.205. ERRONEOUS PAYMENT ORDERS. (a) If an accepted payment order was transmitted pursuant to a security procedure for the detection of error and the payment order (i) erroneously instructed payment to a beneficiary not intended by the sender, (ii) erroneously instructed payment in an amount greater than the amount intended by the sender, or (iii) was an erroneously transmitted duplicate of a payment order previously sent by the sender, the following rules apply:

(1) If the sender proves that the sender or a person acting on behalf of the sender pursuant to Section 4A.206 complied with the security procedure and that the error would have been detected if the receiving bank had also complied, the sender is not obliged to pay the order to the extent stated in Subdivisions (2) and (3).

(2) If the funds transfer is completed on the basis of an erroneous payment order described in clause (i) or (iii) of Subsection (a), the sender is not obliged to pay the order and the receiving bank is entitled to recover from the beneficiary any amount paid to the beneficiary to the extent allowed by the law governing mistake and restitution.

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

(b) If (i) the sender of an erroneous payment order described in Subsection (a) is not obliged to pay all or part of the order, and (ii) the sender receives notification from the receiving bank that the order was accepted by the bank or that the sender's account was debited with respect to the order, the sender has a duty to exercise ordinary care, on the basis of information available to the sender, to discover the error with respect to the order and to advise the bank of the relevant facts within a reasonable time, not exceeding 90 days, after the bank's notification was received by the sender. If the bank proves that the sender failed to perform that duty, the sender is liable to the bank for the loss the bank proves it incurred as a result of the failure, but the liability of the sender may not exceed the amount of the sender's order.

(c) This section applies to amendments to payment orders to the same extent it applies to payment orders.

Sec. 4A.206. TRANSMISSION OF PAYMENT ORDER THROUGH FUNDS TRANSFER OR OTHER COMMUNICATION SYSTEM. (a) If a payment order addressed to a receiving bank is transmitted to a funds transfer system or other third-party communication system for transmittal to the bank, the system is deemed to be an agent of the sender for the purpose of transmitting the payment order to the bank. If there is a discrepancy between the terms of the payment order transmitted to the system and the terms of the payment order transmitted by the system to the bank, the terms of the payment order of the sender are those transmitted by the system. This section does not apply to a funds transfer system of the Federal Reserve Banks.

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

Sec. 4A.207. MISDESCRIPTION OF BENEFICIARY. (a) Subject to Subsection (b), if, in a payment order received by the beneficiary's bank, the name, bank account number, or other identification of the beneficiary refers to a nonexistent or unidentifiable person or account, no person has rights as a beneficiary of the order and acceptance of the order cannot occur.

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

(1) Except as provided in Subsection (c), if the beneficiary's bank does not know that the name and number refer to different persons or if the funds transfer is processed by the beneficiary bank in a fully automated manner, it may rely on the number as the proper identification of the beneficiary of the order. The beneficiary's bank need not determine whether the name and number refer to the same person.

(2) If the beneficiary's bank pays the person identified by name or any individual processing the funds transfer on behalf of the beneficiary bank knows that the name and number identify different persons, no person has rights as beneficiary except the person paid by the beneficiary's bank if that person was entitled to receive payment from the originator of the funds transfer. If no person has rights as beneficiary, acceptance of the order cannot occur.

(c) If (i) a payment order described in Subsection (b) is accepted, (ii) the originator's payment order described the beneficiary inconsistently by name and number, and (iii) the beneficiary's bank pays the person identified by number as permitted by Subsection (b)(1), the following rules apply:

(1) If the originator is a bank, the originator is obliged to pay its order.

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

(d) In a case governed by Subsection (b)(1), if the beneficiary's bank rightfully pays the person identified by number and that person was not entitled to receive payment from the originator, the amount paid may be recovered from that person to the extent allowed by the law governing mistake and restitution as follows:

(1) If the originator is obliged to pay its payment order as stated in Subsection (c), the originator has the right to recover.

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

Sec. 4A.208. MISDESCRIPTION OF INTERMEDIARY BANK OR BENEFICIARY'S BANK. (a) This subsection applies to a payment order identifying an intermediary bank or the beneficiary's bank only by an identifying number.

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

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

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

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

(2) If the sender is not a bank and the receiving bank proves that the sender, before the payment order was accepted, had notice that the receiving bank might rely on the number as the proper identification of the intermediary or beneficiary's bank even if it identifies a person different from the bank identified by name, the rights and obligations of the sender and the receiving bank are governed by Subsection (b)(1), as though the sender were a bank. Proof of notice may be made by any admissible evidence. The receiving bank satisfies the burden of proof if it proves that the sender, before the payment order was accepted, signed a writing stating the information to which the notice relates.

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

(4) If the receiving bank knows that the name and number identify different persons, reliance on either the name or the number in executing the sender's payment order is a breach of the obligation stated in Section 4A.302(a)(1).

Sec. 4A.209. ACCEPTANCE OF PAYMENT ORDER. (a) Subject to Subsection (d), a receiving bank other than the beneficiary's bank accepts a payment order when it executes the order.

(b) Subject to Subsections (c) and (d), a beneficiary's bank accepts a payment order at the earliest of the following times:

(1) when the bank (i) pays the beneficiary as stated in Section 4A.405(a) or (b), or (ii) notifies the beneficiary of receipt of the order or that the account of the beneficiary has been credited with respect to the order unless the notice indicates that the bank is rejecting the order or that funds with respect to the order may not be withdrawn or used until receipt of payment from the sender of the order;

(2) when the bank receives payment of the entire amount of the sender's order pursuant to Section 4A.403(a)(1) or (2); or

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

(c) Acceptance of a payment order cannot occur before the order is received by the receiving bank. Acceptance does not occur under Subsection (b)(2) or (3) if the beneficiary of the payment order does not have an account with the receiving bank, the account has been closed, or the receiving bank is not permitted by law to receive credits for the beneficiary's account.

(d) A payment order issued to the originator's bank cannot be accepted until the payment date if the bank is the beneficiary's bank, or the execution date if the bank is not the beneficiary's bank. If the originator's bank executes the originator's payment order before the execution date or pays the beneficiary of the originator's payment order before the payment date and the payment order is subsequently canceled pursuant to Section 4A.211(b), the bank may recover from the beneficiary any payment received to the extent allowed by the law governing mistake and restitution.

Sec. 4A.210. REJECTION OF PAYMENT ORDER. (a) A payment order is rejected by the receiving bank by a notice of rejection transmitted to the sender orally, electronically, or in writing. A notice of rejection need not use any particular words and is sufficient if it indicates that the receiving bank is rejecting the order or will not execute or pay the order. Rejection is effective when the notice is given if transmission is by a means that is reasonable under the circumstances. If notice of rejection is given by a means that is not reasonable, rejection is effective when the notice is received. If an agreement of the sender and receiving bank establishes the means to be used to reject a payment order:

(1) any means complying with the agreement is reasonable; and

(2) any means not complying is not reasonable unless no significant delay in receipt of the notice resulted from the use of the noncomplying means.

(b) This subsection applies if a receiving bank other than the beneficiary's bank fails to execute a payment order despite the existence on the execution date of a withdrawable credit balance in an authorized account of the sender sufficient to cover the order. If the sender does not receive notice of rejection of the order on the execution date and the authorized account of the sender does not bear interest, the bank is obliged to pay interest to the sender on the amount of the order for the number of days elapsing after the execution date to the earlier of the day the order is canceled pursuant to Section 4A.211(d) or the day the sender receives notice or learns that the order was not executed, counting the final day of the period as an elapsed day. If the withdrawable credit balance during that period falls below the amount of the order, the amount of interest is reduced accordingly.

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

(d) Acceptance of a payment order precludes a later rejection of the order. Rejection of a payment order precludes a later acceptance of the order.

Sec. 4A.211. CANCELLATION AND AMENDMENT OF PAYMENT ORDER. (a) A communication of the sender of a payment order cancelling or amending the order may be transmitted to the receiving bank orally, electronically, or in writing. If a security procedure is in effect between the sender and the receiving bank, the communication is not effective to cancel or amend the order unless the communication is verified pursuant to the security procedure or the bank agrees to the cancellation or amendment.

(b) Subject to Subsection (a), a communication by the sender cancelling or amending a payment order is effective to cancel or amend the order if notice of the communication is received at a time and in a manner affording the receiving bank a reasonable opportunity to act on the communication before the bank accepts the payment order.

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

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

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

(d) An unaccepted payment order is canceled by operation of law at the close of the fifth funds transfer business day of the receiving bank after the execution date or payment date of the order.

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

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

(g) A payment order is not revoked by the death or legal incapacity of the sender unless the receiving bank knows of the death or of an adjudication of incapacity by a court of competent jurisdiction and has reasonable opportunity to act before acceptance of the order.

(h) A funds transfer system rule is not effective to the extent it conflicts with Subsection (c)(2).

Sec. 4A.212. LIABILITY AND DUTY OF RECEIVING BANK REGARDING UNACCEPTED PAYMENT ORDER. If a receiving bank fails to accept a payment order that it is obliged by express agreement to accept, the bank is liable for breach of the agreement to the extent provided in the agreement or in this chapter, but does not otherwise have any duty to accept a payment order or, before acceptance, to take any action, or refrain from taking action, with respect to the order except as provided in this chapter or by express agreement. Liability based on acceptance arises only when acceptance occurs as stated in Section 4A.209, and liability is limited to that provided in this chapter. A receiving bank is not the agent of the sender or beneficiary of the payment order it accepts, or of any other party to the funds transfer, and the bank owes no duty to any party to the funds transfer except as provided in this chapter or by express agreement.

[Sections 4A.213–4A.300 reserved for expansion]

SUBCHAPTER C. EXECUTION OF SENDER'S PAYMENT ORDER BY RECEIVING BANK

Sec. 4A.301. EXECUTION AND EXECUTION DATE. (a) A payment order is "executed" by the receiving bank when it issues a payment order intended to carry out the payment order received by the bank. A payment order received by the beneficiary's bank can be accepted but cannot be executed.

(b) "Execution date" of a payment order means the date on which the receiving bank may properly issue a payment order in execution of the sender's order. The execution date may be determined by instruction of the sender but cannot be earlier than the day the order is received and, unless otherwise determined, is the day the order is received. If the sender's instruction states a payment date, the execution date is the payment date or an earlier date

on which execution is reasonably necessary to allow payment to the beneficiary on the payment date.

Sec. 4A.302. OBLIGATIONS OF RECEIVING BANK IN EXECUTION OF PAYMENT ORDER. (a) Except as provided in Subsections (b) through (d), if the receiving bank accepts a payment order pursuant to Section 4A.209(a), the bank has the following obligations in executing the order:

(1) The receiving bank is obliged to issue, on the execution date, a payment order complying with the sender's order and to follow the sender's instructions concerning (i) any intermediary bank or funds transfer system to be used in carrying out the funds transfer, or (ii) the means by which payment orders are to be transmitted in the funds transfer. If the originator's bank issues a payment order to an intermediary bank, the originator's bank is obliged to instruct the intermediary bank according to the instruction of the originator. An intermediary bank in the funds transfer is similarly bound by an instruction given to it by the sender of the payment order it accepts.

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

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

(c) Unless Subsection (a)(2) applies or the receiving bank is otherwise instructed, the bank may execute a payment order by transmitting its payment order by first class mail or by any means reasonable in the circumstances. If the receiving bank is instructed to execute the sender's order by transmitting its payment order by a particular means, the receiving bank may issue its payment order by the means stated or by any means as expeditious as the means stated.

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

Sec. 4A.303. ERRONEOUS EXECUTION OF PAYMENT ORDER. (a) A receiving bank that (i) executes the payment order of the sender by issuing a payment order in an amount greater than the amount of the sender's order or (ii) issues a payment order in execution of the sender's order and then issues a duplicate order, is entitled to payment of the amount of the sender's order under Section 4A.402(c) if that subsection is otherwise satisfied. The bank is entitled to recover from the beneficiary of the erroneous order the excess payment received to the extent allowed by the law governing mistake and restitution.

(b) A receiving bank that executes the payment order of the sender by issuing a payment order in an amount less than the amount of the sender's order is entitled to payment of the amount of the sender's order under Section 4A.402(c) if (i) that subsection is otherwise satisfied and (ii) the bank corrects its mistake by issuing an additional payment order for the benefit of the beneficiary of the sender's order. If the error is not corrected, the issuer of the erroneous order is entitled to receive or retain payment from the sender of the order it accepted only to the extent of the amount of the erroneous order. This subsection does not apply if the receiving bank executes the sender's payment order by issuing a payment order

in an amount less than the amount of the sender's order for the purpose of obtaining payment of its charges for services and expenses pursuant to instruction of the sender.

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

Sec. 4A.304. DUTY OF SENDER TO REPORT ERRONEOUSLY EXECUTED PAYMENT ORDER. If the sender of a payment order that is erroneously executed as stated in Section 4A.303 receives notification from the receiving bank that the order was executed or that the sender's account was debited with respect to the order, the sender has a duty to exercise ordinary care to determine, on the basis of information available to the sender, that the order was erroneously executed and to notify the bank of the relevant facts within a reasonable time not exceeding 90 days after the notification from the bank was received by the sender. If the sender fails to perform that duty, the bank is not obliged to pay interest on any amount refundable to the sender under Section 4A.402(d) for the period before the bank learns of the execution error. The bank is not entitled to any recovery from the sender on account of a failure by the sender to perform the duty stated in this section.

Sec. 4A.305. LIABILITY FOR LATE OR IMPROPER EXECUTION OR FAILURE TO EXECUTE PAYMENT ORDER. (a) If a funds transfer is completed but execution of a payment order by the receiving bank in breach of Section 4A.302 of this chapter results in delay in payment to the beneficiary, the bank is obliged to pay interest to either the originator or the beneficiary of the funds transfer for the period of delay caused by the improper execution. Except as provided by Subsection (c), additional damages are not recoverable.

(b) If execution of a payment order by a receiving bank in breach of Section 4A.302 results in (i) noncompletion of the funds transfer, (ii) failure to use an intermediary bank designated by the originator, or (iii) issuance of a payment order that does not comply with the terms of the payment order of the originator, the bank is liable to the originator for its expenses in the funds transfer and for incidental expenses and interest losses, to the extent not covered by Subsection (a) of this section, resulting from the improper execution. Except as provided by Subsection (c), additional damages are not recoverable.

(c) In addition to the amounts payable under Subsections (a) and (b), damages, including consequential damages, are recoverable to the extent provided in an express written agreement of the receiving bank.

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

(e) Reasonable attorney's fees are recoverable if demand for compensation under Subsection (a) or (b) is made and refused before an action is brought on the claim. If a claim is made for breach of an agreement under Subsection (d) and the agreement does not provide for damages, reasonable attorney's fees are recoverable if demand for compensation under Subsection (d) of this section is made and refused before an action is brought on the claim.

(f) Except as provided by this section, the liability of a receiving bank under Subsections (a) and (b) of this section may not be varied by agreement.

[Sections 4A.306–4A.400 reserved for expansion]

SUBCHAPTER D. PAYMENT

Sec. 4A.401. PAYMENT DATE. "Payment date" of a payment order means the day on which the amount of the order is payable to the beneficiary by the beneficiary's bank. The

payment date may be determined by instruction of the sender but cannot be earlier than the day the order is received by the beneficiary's bank and, unless otherwise determined, is the day the order is received by the beneficiary's bank.

Sec. 4A.402. OBLIGATION OF SENDER TO PAY RECEIVING BANK. (a) This section is subject to Sections 4A.205 and 4A.207.

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

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

(d) If the sender of a payment order pays the order and was not obliged to pay all or part of the amount paid, the bank receiving payment is obliged to refund payment to the extent the sender was not obliged to pay. Except as provided by Sections 4A.204 and 4A.304, interest is payable on the refundable amount from the date of payment.

(e) If a funds transfer is not completed as provided by Subsection (c) and an intermediary bank is obliged to refund payment as provided by Subsection (d) but is unable to do so because not permitted by applicable law or because the bank suspends payments, a sender in the funds transfer that executed a payment order in compliance with an instruction, as provided by Section 4A.302(a)(1), to route the funds transfer through that intermediary bank is entitled to receive or retain payment from the sender of the payment order that it accepted. The first sender in the funds transfer that issued an instruction requiring routing through that intermediary bank is subrogated to the right of the bank that paid the intermediary bank to a refund as stated in Subsection (d).

(f) The right of the sender of a payment order to be excused from the obligation to pay the order as stated in Subsection (c) or to receive a refund under Subsection (d) may not be varied by agreement.

Sec. 4A.403. PAYMENT BY SENDER TO RECEIVING BANK. (a) Payment of the sender's obligation under Section 4A.402 to pay the receiving bank occurs as follows:

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

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

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

(b) If the sender and receiving bank are members of a funds transfer system that nets obligations multilaterally among participants, the receiving bank receives final settlement when settlement is complete in accordance with the rules of the system. The obligation of the sender to pay the amount of a payment order transmitted through the funds transfer system may be satisfied, to the extent permitted by the rules of the system, by setting off and applying against the sender's obligation the right of the sender to receive payment from the receiving bank of the amount of any other payment order transmitted to the sender by the receiving bank through the funds transfer system. The aggregate balance of obligations owed by each sender to each receiving bank in the funds transfer system may be satisfied, to the extent permitted by the rules of the system, by setting off and applying against that balance the aggregate balance of obligations owed to the sender by other members of the system. The aggregate balance is determined after the right of setoff stated in the second sentence of this subsection has been exercised.

(c) If two banks transmit payment orders to each other under an agreement that settlement of the obligations of each bank to the other under Section 4A.402 will be made at the end of the day or other period, the total amount owed with respect to all orders transmitted by one bank shall be set off against the total amount owed with respect to all orders transmitted by the other bank. To the extent of the setoff, each bank has made payment to the other.

(d) In a case not covered by Subsection (a), the time when payment of the sender's obligation under Section 4A.402(b) or (c) occurs is governed by applicable principles of law that determine when an obligation is satisfied.

Sec. 4A.404. OBLIGATION OF BENEFICIARY'S BANK TO PAY AND GIVE NOTICE TO BENEFICIARY. (a) Subject to Sections 4A.211(e) and 4A.405(d) and (e), if a beneficiary's bank accepts a payment order, the bank is obliged to pay the amount of the order to the beneficiary of the order. Payment is due on the payment date of the order, but if acceptance occurs on the payment date after the close of the funds transfer business day of the bank, payment is due on the next funds transfer business day. If the bank refuses to pay after demand by the beneficiary and receipt of notice of particular circumstances that will give rise to consequential damages as a result of nonpayment, the beneficiary may recover damages resulting from the refusal to pay to the extent the bank had notice of the damages, unless the bank proves that it did not pay because of a reasonable doubt concerning the right of the beneficiary to payment.

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

(c) The right of a beneficiary to receive payment and damages as stated in Subsection (a) may not be varied by agreement or a funds transfer system rule. The right of a beneficiary to be notified as stated in Subsection (b) may be varied by agreement of the beneficiary or by a funds transfer system rule if the beneficiary is notified of the rule before initiation of the funds transfer.

Sec. 4A.405. PAYMENT BY BENEFICIARY'S BANK TO BENEFICIARY. (a) If the beneficiary's bank credits an account of the beneficiary of a payment order, payment of the bank's obligation under Section 4A.404(a) occurs when and to the extent:

(1) the beneficiary is notified of the right to withdraw the credit;

(2) the bank lawfully applies the credit to a debt of the beneficiary; or

(3) funds with respect to the order are otherwise made available to the beneficiary by the bank.

(b) If the beneficiary's bank does not credit an account of the beneficiary of a payment order, the time when payment of the bank's obligation under Section 4A.404(a) occurs is governed by principles of law that determine when an obligation is satisfied.

(c) Except as provided by Subsections (d) and (e), if the beneficiary's bank pays the beneficiary of a payment order under a condition to payment or agreement of the beneficiary giving the bank the right to recover payment from the beneficiary if the bank does not receive payment of the order, the condition to payment or agreement is not enforceable.

(d) A funds transfer system rule may provide that payments made to beneficiaries of funds transfers through the system are provisional until receipt of payment by the beneficiary's bank of the payment order is accepted. A beneficiary's bank that makes a payment that is provisional under the rule is entitled to refund from the beneficiary if (i) the rule requires that both the beneficiary and the originator be given notice of the provisional nature of the payment before the funds transfer is initiated, (ii) the beneficiary, the beneficiary's bank and

the originator's bank agreed to be bound by the rule, and (iii) the beneficiary's bank did not receive payment of the payment order that it accepted. If the beneficiary is obliged to refund payment to the beneficiary's bank, acceptance of the payment order by the beneficiary's bank is nullified and no payment by the originator of the funds transfer to the beneficiary occurs under Section 4A.406.

(e) This subsection applies to a funds transfer that includes a payment order transmitted over a funds transfer system that (i) nets obligations multilaterally among participants, and (ii) has in effect a loss-sharing agreement among participants for the purpose of providing funds necessary to complete settlement of the obligations of one or more participants that do not meet their settlement obligations. If the beneficiary's bank in the funds transfer accepts a payment order and the system fails to complete settlement pursuant to its rules with respect to any payment order in the funds transfer:

(1) the acceptance by the beneficiary's bank is nullified and no person has any right or obligation based on the acceptance;

(2) the beneficiary's bank is entitled to recover payment from the beneficiary;

(3) no payment by the originator to the beneficiary occurs under Section 4A.406; and

(4) subject to Section 4A.402(e), each sender in the funds transfer is excused from its obligation to pay its payment order under Section 4A.402(c) because the funds transfer has not been completed.

Sec. 4A.406. PAYMENT BY ORIGINATOR TO BENEFICIARY; DISCHARGE OF UNDERLYING OBLIGATION. (a) Subject to Sections 4A.211(e) and 4A.405(d) and (e), the originator of a funds transfer pays the beneficiary of the originator's payment order:

(1) at the time a payment order for the benefit of the beneficiary is accepted by the beneficiary's bank in the funds transfer; and

(2) in an amount equal to the amount of the order accepted by the beneficiary's bank, but not more than the amount of the originator's order.

(b) If payment under Subsection (a) is made to satisfy an obligation, the obligation is discharged to the same extent discharge would result from payment to the beneficiary of the same amount in money, unless (i) the payment under Subsection (a) of this section was made by a means prohibited by the contract of the beneficiary with respect to the obligation, (ii) the beneficiary, within a reasonable time after receiving notice of receipt of the order by the beneficiary's bank, notified the originator of the beneficiary's refusal of the payment, (iii) funds with respect to the order were not withdrawn by the beneficiary or applied to a debt of the beneficiary, and (iv) the beneficiary would suffer a loss that could reasonably have been avoided if payment had been made by a means complying with the contract. If payment by the originator does not result in discharge under this section, the originator is subrogated to the rights of the beneficiary to receive payment from the beneficiary's bank under Section 4A.404(a).

(c) For the purpose of determining whether discharge of an obligation occurs under Subsection (b), if the beneficiary's bank accepts a payment order in an amount equal to the amount of the originator's payment order less charges of one or more receiving banks in the funds transfer, payment to the beneficiary is deemed to be in the amount of the originator's order unless upon demand by the beneficiary the originator does not pay the beneficiary the amount of the deducted charges.

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

[Sections 4A.407–4A.500 reserved for expansion]

SUBCHAPTER E. MISCELLANEOUS PROVISIONS

Sec. 4A.501. VARIATION BY AGREEMENT AND EFFECT OF FUNDS TRANSFER SYSTEM RULE. (a) Except as otherwise provided in this chapter, the rights and obligations of a party to a funds transfer may be varied by agreement of the affected party.

(b) "Funds transfer system rule" means a rule of an association of banks (i) governing transmission of payment orders by means of a funds transfer system of the association or

rights and obligations with respect to those orders, or (ii) to the extent the rule governs rights and obligations between banks that are parties to a funds transfer in which a Federal Reserve Bank, acting as an intermediary bank, sends a payment order to the beneficiary's bank. Except as otherwise provided in this chapter, a funds transfer system rule governing rights and obligations between participating banks using the system may be effective even if the rule conflicts with this chapter and indirectly affects another party to the funds transfer who does not consent to the rule. A funds transfer system rule may also govern rights and obligations of parties other than participating banks using the system to the extent stated in Sections 4A.404(c), 4A.405(d), and 4A.507(c).

Sec. 4A.502. CREDITOR PROCESS SERVED ON RECEIVING BANK; SETOFF BY BENEFICIARY'S BANK. (a) As used in this section, "creditor process" means levy, attachment, garnishment, notice of lien, sequestration, or similar process issued by or on behalf of a creditor or other claimant with respect to an account.

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

(c) If a beneficiary's bank has received a payment order for payment to the beneficiary's account in the bank the following rules apply:

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

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

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

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

Sec. 4A.503. INJUNCTION OR RESTRAINING ORDER WITH RESPECT TO FUNDS TRANSFER. For proper cause and in compliance with applicable law, a court may restrain (i) a person from issuing a payment order to initiate a funds transfer, (ii) an originator's bank from executing the payment order of the originator, or (iii) the beneficiary's bank from releasing funds to the beneficiary or the beneficiary from withdrawing the funds. A court may not otherwise restrain a person from issuing a payment order, paying or receiving payment of a payment order, or otherwise acting with respect to a funds transfer.

Sec. 4A.504. ORDER IN WHICH ITEMS AND PAYMENT ORDERS MAY BE CHARGED TO ACCOUNT; ORDER OF WITHDRAWALS FROM ACCOUNT. (a) If a receiving bank has received more than one payment order of the sender or one or more payment orders and other items that are payable from the sender's account, the bank may charge the sender's account with respect to the various orders and items in any sequence.

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

Sec. 4A.505. PRECLUSION OF OBJECTION TO DEBIT OF CUSTOMER'S ACCOUNT. If a receiving bank has received payment from its customer with respect to a payment order issued in the name of the customer as sender and accepted by the bank, and the customer received notification reasonably identifying the order, the customer is precluded from asserting that the bank is not entitled to retain the payment unless the customer

notifies the bank of the customer's objection to the payment within one year after the notification was received by the customer.

Sec. 4A.506. RATE OF INTEREST. (a) If, under this chapter, a receiving bank is obliged to pay interest with respect to a payment order issued to the bank, the amount payable may be determined (i) by agreement of the sender and receiving bank, or (ii) by funds transfer system rule if the payment order is transmitted through a funds transfer system.

(b) If the amount of interest is not determined by an agreement or rule as stated in Subsection (a), the amount is calculated by multiplying the applicable Federal Funds rate by the amount on which interest is payable, and then multiplying the product by the number of days for which interest is payable. The applicable Federal Funds rate is the average of the Federal Funds rates published by the Federal Reserve Bank of New York for each of the days for which interest is payable divided by 360. The Federal Funds rate for any day on which a published rate is not available is the same as the published rate for the next preceding day for which there is a published rate. If a receiving bank that accepted a payment order is required to refund payment to the sender of the order because the funds transfer was not completed, but the failure to complete was not due to any fault by the bank, the interest payable is reduced by a percentage equal to the reserve requirement on deposits of the receiving bank.

Sec. 4A.507. CHOICE OF LAW. (a) The following rules apply unless the affected parties otherwise agree or Subsection (c) applies:

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

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

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

(b) If the parties described by each subdivision of Subsection (a) have made an agreement selecting the law of a particular jurisdiction to govern rights and obligations between each other, the law of that jurisdiction governs those rights and obligations as to matters of construction and interpretation, whether or not the payment order or the funds transfer bears a reasonable relation to that jurisdiction, and as to validity, to the extent permitted by Section 1.105 of this code.

(c) A funds transfer system rule may select the law of a particular jurisdiction to govern (i) rights and obligations between participating banks with respect to payment orders transmitted or processed through the system, or (ii) the rights and obligations of some or all parties to a funds transfer any part of which is carried out by means of the system. A choice of law made pursuant to clause (i) is binding on participating banks. A choice of law made pursuant to clause (ii) is binding on the originator, other sender, or a receiving bank having notice that the funds transfer system might be used in the funds transfer and of the choice of law by the system when the originator, other sender, or receiving bank issued or accepted a payment order. The beneficiary of a funds transfer is bound by the choice of law if, when the funds transfer is initiated, the beneficiary has notice that the funds transfer system might be used in the funds transfer and of the choice of law by the system. The law of a jurisdiction selected pursuant to this Subsection (c) may govern, as to matters of construction and interpretation, whether or not the law bears a reasonable relation to the matter in issue.

(d) In the event of inconsistency between an agreement under Subsection (b) and a choice-of-law rule under Subsection (c), the agreement under Subsection (b) prevails.

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

SECTION 8. Section 24.003(b), Business & Commerce Code, is amended to read as follows:

(b) A debtor who is generally not *paying* [~~able to pay~~] the debtor's debts as they become due is presumed to be insolvent.

SECTION 9. Section 24.004(d), Business & Commerce Code, is amended to read as follows:

(d) "Reasonably equivalent value" includes without limitation, a transfer or obligation that is within the range of values for which the transferor would have [~~wilfully~~] sold the assets in an *arm's* [~~arms~~] length transaction.

SECTION 10. Section 24.005(a), Business & Commerce Code, is amended to read as follows:

(a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose [~~within a reasonable time~~] before or *within a reasonable time* after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

(1) with actual intent to hinder, delay, or defraud any creditor of the debtor; or

(2) without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:

(A) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or

(B) intended to incur, or believed *or reasonably should have believed* that the debtor would incur, debts beyond the debtor's ability to pay as they became due.

SECTION 11. Sections 24.009(c) and (d), Business & Commerce Code, are amended to read as follows:

(c)*(1) Except as provided by Subdivision (2) of this subsection, if* [~~If~~] the judgment under Subsection (b) of this section is based upon the value of the asset transferred, the judgment must be for an amount equal to the value of the asset at the time of the transfer, subject to adjustment as the equities may require.

(2) The value of the asset transferred is not to be adjusted to include the value of improvements made by a good faith transferee, including:

(A) physical additions or changes to the asset transferred;

(B) repairs to the asset;

(C) payment of any tax on the asset;

(D) payment of any debt secured by a lien on the asset that is superior or equal to the rights of a voiding creditor under this chapter; and

(E) preservation of the asset.

(d)(1) Notwithstanding voidability of a transfer or an obligation under this chapter, a good faith transferee or obligee is entitled, at the transferee's or obligee's election, to the extent of the value [~~of any improvements made by a good faith transferee or obligee, and~~] given the debtor for the transfer or obligation, to:

(A) a lien, prior to the *rights of a voiding creditor under this chapter* [~~creditor's claim~~], or a right to retain any interest in the asset transferred;

(B) enforcement of any obligation incurred; or

(C) a reduction in the amount of the liability on the judgment.

(2) *Notwithstanding voidability of a transfer under this chapter, to the extent of the value of any improvements made by a good faith transferee, the good faith transferee is entitled to a lien on the asset transferred prior to the rights of a voiding creditor under this chapter* [~~In this subsection, "improvement" includes:~~

[~~(A) physical additions or changes to the property transferred;~~

[~~(B) repairs to such property;~~

[~~(C) payment of any tax on such property;~~

[~~(D) payment of any debt secured by a lien on such property that is superior or equal to the rights of the trustee; and~~

[~~(E) preservation of such property~~].

SECTION 12. Section 24.010, Business & Commerce Code, is amended to read as follows:

Sec. 24.010. EXTINGUISHMENT OF CAUSE OF ACTION. (a) *Except as provided by Subsection (b) of this section, a* [A] cause of action with respect to a fraudulent transfer or obligation under this chapter is extinguished unless action is brought:

(1) under Section 24.005(a)(1) of this code, within four years after the transfer was made or the obligation was incurred or, if later, within one year after the transfer or obligation was or could reasonably have been discovered by the claimant;

(2) under Section 24.005(a)(2) or 24.006(a) of this code, within four years after the transfer was made or the obligation was incurred; or

(3) under Section 24.006(b) of this code, within one year after the transfer was made [~~or the obligation was incurred~~].

(b) A cause of action *on behalf of a spouse, minor, or ward* with respect to a fraudulent transfer *or* [~~of~~] obligation under this chapter is extinguished [~~as to a spouse, minor, or ward~~] unless the action is brought:

(1) under Section 24.005(a) or 24.006(a) of this code, within two years after the cause of action accrues, or if later, within one year after the transfer or obligation was or could reasonably have been discovered by the claimant; *or*

(2) under Section 24.006(b) of this code within one year after the date the transfer was made[~~, subject to the provisions relating to disabilities under Chapter 16, Civil Practice and Remedies Code~~].

(c) If a creditor entitled to bring an action under this chapter is under a legal disability when a time period prescribed by this section starts, the time of the disability is not included in the period. A disability that arises after the period starts does not suspend the running of the period. A creditor may not tack one legal disability to another to extend the period. For the purposes of this subsection, a creditor is under a legal disability if the creditor is:

(1) younger than 18 years of age, regardless of whether the person is married; or

(2) of unsound mind.

SECTION 13. Subchapter D, Chapter 35, Business & Commerce Code, is amended by adding Sections 35.51 and 35.52 to read as follows:

Sec. 35.51. RIGHTS OF PARTIES TO CHOOSE LAW APPLICABLE TO CERTAIN TRANSACTIONS. (a) In this section:

(1) "Transaction" includes more than one substantially similar or related transaction entered into contemporaneously and having at least one common party.

(2) "Qualified transaction" means a transaction under which a party:

(A) pays or receives, or is obligated to pay or entitled to receive, consideration with an aggregate value of at least $1,000,000; or

(B) lends, advances, borrows, or receives, or is obligated to lend or advance or is entitled to borrow or receive, funds or credit with an aggregate value of at least $1,000,000.

(b) Except as provided by Subsection (e) or (f) of this section or Section 35.52 of this code, if the parties to a qualified transaction agree in writing that the law of a particular jurisdiction governs an issue relating to the transaction, including the validity or enforceability of an agreement relating to the transaction or a provision of the agreement, and the transaction bears a reasonable relation to that jurisdiction, the law, other than conflict of laws rules, of that jurisdiction governs the issue regardless of whether the application of that law is contrary to a fundamental or public policy of this state or of any other jurisdiction.

(c) Except as provided by Subsection (f) of this section and Section 35.52 of this code, if the parties to a qualified transaction agree in writing that the law of a particular jurisdiction governs the interpretation or construction of an agreement relating to the transaction or a provision of the agreement, the law, other than conflict of laws rules, of that jurisdiction

governs that issue regardless of whether the transaction bears a reasonable relation to that jurisdiction.

(d) For purposes of this section, a transaction bears a reasonable relation to a particular jurisdiction if the transaction, the subject matter of the transaction, or a party to the transaction is reasonably related to that jurisdiction. A transaction bears a reasonable relation to a particular jurisdiction if:

(1) a party to the transaction is a resident of that jurisdiction;

(2) a party to the transaction has its place of business or, if that party has more than one place of business, its chief executive office or an office from which it conducts a substantial part of the negotiations relating to the transaction, in that jurisdiction;

(3) all or part of the subject matter of the transaction is located in that jurisdiction;

(4) a party to the transaction is required to perform a substantial part of its obligations relating to the transaction, such as delivering payments, in that jurisdiction; or

(5) a substantial part of the negotiations relating to the transaction, and the signing of an agreement relating to the transaction by a party to the transaction, occurred in that jurisdiction.

(e) Except as provided by Subsection (f) of this section or Section 35.52 of this code, if:

(1) the parties to a qualified transaction agree in writing that the law of a particular jurisdiction governs the validity or enforceability of an agreement relating to the transaction or a provision of the agreement;

(2) the transaction bears a reasonable relation to that jurisdiction; and

(3) a term of the agreement or of that provision is invalid or unenforceable under the law, other than conflict of laws rules, of that jurisdiction but is valid or enforceable under the law, other than conflict of laws rules, of the jurisdiction that has the most significant relation to the transaction, the subject matter of the transaction, and the parties, then:

(A) the law, other than conflict of laws rules, of the jurisdiction that has the most significant relation to the transaction, the subject matter of the transaction, and the parties governs the validity or enforceability of that term; and

(B) the law, other than conflict of laws rules, of the jurisdiction that the parties agree would govern the validity or enforceability of that agreement or of that provision governs the validity or enforceability of the other terms of that agreement or provision.

(f) Subsections (b)–(e) of this section do not apply to the determination of the law that governs:

(1) whether a transaction transfers or creates an interest in real property for security purposes or otherwise, the nature of an interest in real property that is transferred or created by a transaction, the method for foreclosure of a lien on real property, the nature of an interest in real property that results from foreclosure, or the manner and effect of recording or failing to record evidence of a transaction that transfers or creates an interest in real property;

(2) the validity of a marriage or an adoption, whether a marriage has been terminated, or the effect of a marriage on property owned by a spouse at the time of the marriage or acquired by either spouse during the marriage;

(3) whether an instrument is a will, the rights of persons under a will, or the rights of persons in the absence of a will; or

(4) an issue that another statute of this state, or a statute of the United States, provides is governed by the law of a particular jurisdiction.

(g) Subsections (b)–(e) of this section apply to the determination of the law that governs an issue relating to a transaction involving real property other than those specified in Subsection (f)(1) of this section, including the validity or enforceability of an indebtedness incurred in consideration for the transfer of, or the payment of which is secured by a lien on, real property.

Sec. 35.52. LAW APPLICABLE TO CONSTRUCTION CONTRACTS. (a) If a contract is principally for the construction or repair of improvements to real property located in this

state and the contract contains a provision that makes the contract or any conflict arising under it subject to the law of another state, to litigation in the courts of another state, or to arbitration in another state, that provision is voidable by the party that is obligated by the contract to perform the construction or repair.

(b) A contract is principally for the construction or repair of improvements to real property located in this state if the contract obligates a party, as its principal obligation under the contract, to provide labor, or labor and materials, for the construction or repair of improvements to real property located in this state as a general contractor or subcontractor.

(c) A contract is not principally for the construction or repair of improvements to real property located in this state if:

(1) the contract is a partnership agreement or other agreement governing an entity or trust;

(2) the contract provides for a loan or other extension of credit and the party promising to construct or repair improvements does so as part of its agreements with the lender or other extender of credit; or

(3) the contract is for the management of real property or improvements and the obligation to construct or repair is part of that management.

(d) Subsections (b) and (c) of this section are not an exclusive list of situations in which a contract is or is not principally for the construction or repair of improvements to real property located in this state.

SECTION 14. Section 35.53(a), Business & Commerce Code, is amended to read as follows:

(a) This section applies to a contract[~~, other than a contract for the construction or repair of improvements to real property located in this state,~~] only if:

(1) the contract is for the sale, lease, exchange, or other disposition for value of goods for the price, rental, or other consideration of $50,000 or less; [~~and~~]

(2) any element of the execution of the contract occurred in this state and a party to the contract is:

(A) an individual resident of this state; or

(B) an association or corporation created under the laws of this state or having its principal place of business in this state; *and*

(3) Section 1.105 of this code does not apply to the contract.

SECTION 15. Section 9.402(a), Business & Commerce Code, is amended to read as follows:

(a) A financing statement is sufficient if it gives the names of the debtor and the secured party, is signed by the debtor, gives an address of the secured party from which information concerning the security interest may be obtained, gives a mailing address of the debtor and contains a statement indicating the types, or describing the items, of collateral. A financing statement may be filed before a security agreement is made or a security interest otherwise attaches. When the financing statement covers crops growing or to be grown, the statement must also contain a description of the real estate concerned. When the financing statement covers timber to be cut or covers minerals or the like (including oil and gas) or accounts subject to Subsection (e) of Section 9.103, or when the financing statement is filed as a fixture filing (Section 9.313) and the collateral is goods which are or are to become fixtures, the statement must also comply with Subsection (e). A [~~copy of a~~] security agreement is sufficient as a financing statement if it contains the above information and is signed by the debtor. A carbon, photographic or other reproduction of a security agreement or a financing statement is sufficient as a financing statement [~~if the security agreement so provides or if the original has been filed in this state~~].

SECTION 16. The following are repealed:

(1) Chapter 6, Business & Commerce Code;

(2) Section 9.111, Business & Commerce Code;

(3) Section 24.013, Business & Commerce Code; and

(4) Section 35.53(c), Business & Commerce Code.

SECTION 17. This Act takes effect September 1, 1993.

SECTION 18. The importance of this legislation and the crowded condition of the calendars in both houses create an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days in each house be suspended, and this rule is hereby suspended.

Passed by the House on April 19, 1993, by a non-record vote; the House refused to concur in Senate amendments to H.B. No. 1113 on May 22, 1993, and requested the appointment of a conference committee to consider the differences between the two houses; the House adopted the conference committee report on H.B. No. 1113 on May 30, 1993, by a non-record vote; passed by the Senate, with amendments, on May 18, 1993, by a viva-voce vote; at the request of the House, the Senate appointed a conference committee to consider the differences between the two houses; the Senate adopted the conference committee report on H.B. No. 1113 on May 29, 1993, by a viva-voce vote.

Approved June 11, 1993.

Effective Sept. 1, 1993.