CHAPTER 2A

Commercial Code—Leases

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Introduction

ARTICLE 2A of the Uniform Commercial Code, along with Conforming Amendments to ARTICLEs 1 and 9, is presented, upon the recommendation of the Permanent Editorial Board for the Uniform Commercial Code, by the National Conference for Commissioners on Uniform State Laws and the American Law Institute. It represents a major development in commercial law, addressing a type of business transaction, the leasing of personal property, that has long existed. Under present law, transactions of this type are governed partly by common law principles relating to personal property, partly by principles relating to real estate leases, and partly by reference to ARTICLEs 2 and 9 of the Uniform Commercial Code, dealing with Sales and Secured Transactions respectively. The legal rules and concepts derived from these sources imperfectly fit a transaction that involves personal property rather than realty, and a lease rather than either a sale or a security interest as such. A statute directly addressing the personal property lease is therefore appropriate.

Such a statute has become especially appropriate with the exponential expansion of the number and scale of personal property lease transactions. Article 2A will apply to transactions involving billions of dollars annually. It will apply to consumer’s rental of automobiles or do‑it‑yourself equipment, on the one hand, and to leases of such items as commercial aircraft (to the extent not preempted by federal law) and industrial machinery, on the other. The text recognizes the differences between consumer and business leasing, while resting upon concepts that apply generally to any personal property lease transactions.

The final product represents an important undertaking of the Conference and the Institute. It has proceeded, following recommendations by the Conference’s Study Committee in 1981, through preparation and review by the Conference’s Drafting Committee first of a proposed free‑standing Uniform Personal Property Leasing Act, which was approved by the Conference, and later of Article 2A, which proceeded through the Permanent Editorial Board, the Executive Committee of the Conference, the Conference, and the Council of the Institute and the Annual Meeting of the members of the Institute. Carrying the text through these several stages has required coordination of somewhat different procedures, and continued patience and mutual forbearance. At the same time, the text has been subjected to analysis and criticism from many points of view and thereby steadily improved.

The resulting product borrows from both Articles 2 and 9. These existing Articles of the Uniform Commercial Code have certain imperfections revealed by the long experience since their adoption. Article 2A cannot overcome those imperfections but seeks to minimize their significance as applied to leases. More fundamentally, there is important conceptual dissonance between Article 2 and Article 9. The formulation of Article 2A takes Articles 2 and 9 as they are for the time being and hence has required careful adjustment to this dissonance.

CROSS REFERENCES

Warehouse receipts and bills of lading, adequate compliance with commercial contract, see Section 36‑7‑509.

Part 1

General Provisions

**SECTION 36‑2A‑101.** Short title.

This chapter may be cited as the Uniform Commercial Code—Leases.

HISTORY: 2001 Act No. 67, Section 2.

OFFICIAL COMMENT

Rationale for Codification: There are several reasons for codifying the law with respect to leases of goods. An analysis of the case law as it applies to leases of goods suggests at least three significant issues to be resolved by codification. First, what is a lease? It is necessary to define lease to determine whether a transaction creates a lease or a security interest disguised as a lease. If the transaction creates a security interest disguised as a lease, the lessor will be required to file a financing statement or take other action to perfect its interest in the goods against third parties. There is no such requirement with respect to leases. Yet the distinction between a lease and a security interest disguised as a lease is not clear. Second, will the lessor be deemed to have made warranties to the lessee? If the transaction is a sale the express and implied warranties of Article 2 of the Uniform Commercial Code apply. However, the warranty law with respect to leases is uncertain. Third, what remedies are available to the lessor upon the lessee’s default? If the transaction is a security interest disguised as a lease, the answer is stated in Part 5 of the Article on Secured Transactions (Article 9). There is no clear answer with respect to leases.

There are reasons to codify the law with respect to leases of goods in addition to those suggested by a review of the reported cases. The answer to this important question should not be limited to the issues raised in these cases. Is it not also proper to determine the remedies available to the lessee upon the lessor’s default? It is, but that issue is not reached through a review of the reported cases. This is only one of the many issues presented in structuring, negotiating and documenting a lease of goods.

Statutory Analogue: After it was decided to proceed with the codification project, the drafting committee of the National Conference of Commissioners on Uniform State Laws looked for a statutory analogue, gradually narrowing the focus to the Article on Sales (Article 2) and the Article on Secured Transactions (Article 9). A review of the literature with respect to the sale of goods reveals that Article 2 is predicated upon certain assumptions: Parties to the sales transaction frequently are without counsel; the agreement of the parties often is oral or evidenced by scant writings; obligations between the parties are bilateral; applicable law is influenced by the need to preserve freedom of contract. A review of the literature with respect to personal property security law reveals that Article 9 is predicated upon very different assumptions: Parties to a secured transaction regularly are represented by counsel; the agreement of the parties frequently is reduced to a writing, extensive in scope; the obligations between the parties are essentially unilateral; and applicable law seriously limits freedom of contract.

The lease is closer in spirit and form to the sale of goods than to the creation of a security interest. While parties to a lease are sometimes represented by counsel and their agreement is often reduced to a writing, the obligations of the parties are bilateral and the common law of leasing is dominated by the need to preserve freedom of contract. Thus the drafting committee concluded that Article 2 was the appropriate statutory analogue.

Issues: The drafting committee then identified and resolved several issues critical to codification:

Scope: The scope of the Article was limited to leases (Section 2A‑102). There was no need to include leases intended as security, i.e., security interests disguised as leases, as they are adequately treated in Article 9. Further, even if leases intended as security were included, the need to preserve the distinction would remain, as policy suggests treatment significantly different from that accorded leases.

Definition of Lease: Lease was defined to exclude leases intended as security (Section 2A‑103(1)(j)). Given the litigation to date a revised definition of security interest was suggested for inclusion in the Act. (Section 1‑201(37)). This revision sharpens the distinction between leases and security interests disguised as leases.

Filing: The lessor was not required to file a financing statement against the lessee or take any other action to protect the lessor’s interest in the goods (Section 2A‑301). The refined definition of security interest will more clearly signal the need to file to potential lessors of goods. Those lessors who are concerned will file a protective financing statement (Section 9‑505).

Warranties: All of the express and implied warranties of the Article on Sales (Article 2) were included (Sections 2A‑210 through 2A‑216), revised to reflect differences in lease transactions. The lease of goods is sufficiently similar to the sale of goods to justify this decision. Further, many courts have reached the same decision.

Certificate of Title Laws: Many leasing transactions involve goods subject to certificate of title statutes. To avoid conflict with those statutes, this Article is subject to them (Section 2A‑104(1)(a)).

Consumer Leases: Many leasing transactions involve parties subject to consumer protection statutes or decisions. To avoid conflict with those laws this Article is subject to them to the extent provided in Section 2A‑104(1)(c) and (2). Further, certain consumer protections have been incorporated in the Article.

Finance Leases: Certain leasing transactions substitute the supplier of the goods for the lessor as the party responsible to the lessee with respect to warranties and the like. The definition of finance lease ( Section 2A‑103(1)(g)) was developed to describe these transactions. Various sections of the Article implement the substitution of the supplier for the lessor, including Sections 2A‑209 and 2A‑407. No attempt was made to fashion a special rule where the finance lessor is an affiliate of the supplier of goods; this is to be developed by the courts, case by case.

Sale and Leaseback: Sale and leaseback transactions are becoming increasingly common. A number of state statutes treat transactions where possession is retained by the seller as fraudulent per se or prima facie fraudulent. That position is not in accord with modern practice and thus is changed by the Article “if the buyer bought for value and in good faith” ( Section 2A‑308(3)).

Remedies: The Article has not only provided for lessor’s remedies upon default by the lessee (Sections 2A‑523 through 2A‑531), but also for lessee’s remedies upon default by the lessor (Sections 2A‑508 through 2A‑522). This is a significant departure from Article 9, which provides remedies only for the secured party upon default by the debtor. This difference is compelled by the bilateral nature of the obligations between the parties to a lease.

Damages: Many leasing transactions are predicated on the parties’ ability to stipulate an appropriate measure of damages in the event of default. The rule with respect to sales of goods (Section 2‑718) is not sufficiently flexible to accommodate this practice. Consistent with the common law emphasis upon freedom to contract, the Article has created a revised rule that allows greater flexibility with respect to leases of goods (Section 2A‑504(1)).

History: This Article is a revision of the Uniform Personal Property Leasing Act, which was approved by the National Conference of Commissioners on Uniform State Laws in August, 1985. However, it was believed that the subject matter of the Uniform Personal Property Leasing Act would be better treated as an Article of this Act. Thus, although the Conference promulgated the Uniform Personal Property Leasing Act as a Uniform Law, activity was held in abeyance to allow time to restate the Uniform Personal Property Leasing Act as Article 2A.

In August, 1986 the Conference approved and recommended this Article ( including conforming amendments to Article 1 and Article 9) for promulgation as an amendment to this Act. In December, 1986 the Council of the American Law Institute approved and recommended this Article (including conforming amendments to Article 1 and Article 9), with Official Comments, for promulgation as an amendment to this Act. In March, 1987 the Permanent Editorial Board for the Uniform Commercial Code approved and recommended this Article (including conforming amendments to Article 1 and Article 9), with Official Comments, for promulgation as an amendment to this Act. In May, 1987 the American Law Institute approved and recommended this Article (including conforming amendments to Article 1 and Article 9), with Official Comments, for promulgation as an amendment to this Act. In August, 1987 the Conference confirmed its approval of the final text of this Article.

Upon its initial promulgation, Article 2A was rapidly enacted in several states, was introduced in a number of other states, and underwent bar association, law revision commission and legislative study in still further states. In that process debate emerged, principally sparked by the study of Article 2A by the California Bar Association, California’s non‑uniform amendments to Article 2A, and Articles appearing in a symposium on Article 2A published after its promulgation in the Alabama Law Review. The debate chiefly centered on whether Article 2A had struck the proper balance or was clear enough concerning the ability of a lessor to grant a security interest in its leasehold interest and in the residual, priority between a secured party and the lessee, and the lessor’s remedy structure under Article 2A.

This debate over issues on which reasonable minds could and did differ began to affect the enactment effort for Article 2A in a deleterious manner. Consequently, the Standby Committee for Article 2A, composed predominantly of the former members of the drafting committee, reviewed the legislative actions and studies in the various states, and opened a dialogue with the principal proponents of the non‑uniform amendments. Negotiations were conducted in conjunction with, and were facilitated by, a study of the uniform Article and the non‑uniform Amendments by the New York Law Revision Commission. Ultimately, a consensus was reached, which has been approved by the membership of the Conference, the Permanent Editorial Board, and the Council of the Institute. Rapid and uniform enactment of Article 2A is expected as a result of the completed amendments. The Article 2A experience reaffirms the essential viability of the procedures of the Conference and the Institute for creating and updating uniform state law in the commercial law area.

Relationship of Article 2A to Other Articles: The Article on Sales provided a useful point of reference for codifying the law of leases. Many of the provisions of that Article were carried over, changed to reflect differences in style, leasing terminology or leasing practices. Thus, the Official Comments to those sections of Article 2 whose provisions were carried over are incorporated by reference in Article 2A, as well; further, any case law interpreting those provisions should be viewed as persuasive but not binding on a court when deciding a similar issue with respect to leases. Any change in the sequence that has been made when carrying over a provision from Article 2 should be viewed as a matter of style, not substance. This is not to suggest that in other instances Article 2A did not also incorporate substantially revised provisions of Article 2, Article 9 or otherwise where the revision was driven by a concern over the substance; but for the lack of a mandate, the drafting committee might well have made the same or a similar change in the statutory analogue. Those sections in Article 2A include Sections 2A‑104, 2A‑105, 2A‑106, 2A‑108(2) and (4), 2A‑109(2), 2A‑208, 2A‑214(2) and (3)(a), 2A‑216, 2A‑303, 2A‑306, 2A‑503, 2A‑504(3)(b), 2A‑506(2), and 2A‑515. For lack of relevance or significance not all of the provisions of Article 2 were incorporated in Article 2A.

This codification was greatly influenced by the fundamental tenet of the common law as it has developed with respect to leases of goods: freedom of the parties to contract. Note that, like all other Articles of this Act, the principles of construction and interpretation contained in Article 1 are applicable throughout Article 2A (Section 2A‑103(4)). These principles include the ability of the parties to vary the effect of the provisions of Article 2A, subject to certain limitations including those that relate to the obligations of good faith, diligence, reasonableness and care (Section 1‑102(3)). Consistent with those principles no negative inference is to be drawn by the episodic use of the phrase “unless otherwise agreed” in certain provisions of Article 2A. Section 1‑102(4). Indeed, the contrary is true, as the general rule in the Act, including this Article, is that the effect of the Act’s provisions may be varied by agreement. Section 1‑102(3). This conclusion follows even where the statutory analogue contains the phrase and the correlative provision in Article 2A does not.

SOUTH CAROLINA REPORTER’S COMMENTS

The South Carolina enactment of Article 2A is the result of careful study by the South Carolina Law Institute at the behest of the Senate Judiciary Committee. South Carolina has adopted the uniform version of Article 2A, thus preserving the advantages of uniform commercial laws. The fundamental effects of adding Article 2A to the South Carolina Uniform Commercial Code are to extend the provisions of Article 2 governing sales of goods to analogous leasing transactions, to bring lease contracts within the scope of the general provisions of the Uniform Commercial Code, and to bring South Carolina law back into conformity with the law of our sister states.

CROSS REFERENCES

Rights of secured party after default by debtor, governing law, see Section 36‑9‑110.

RESEARCH REFERENCES

Forms

South Carolina Legal and Business Forms Section 14:1 , Legal Principles.

**SECTION 36‑2A‑102.** Scope.

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

HISTORY: 2001 Act No. 67, Section 2.

OFFICIAL COMMENT

Uniform Statutory Source: Former Section 9‑102(1) (now codified as Section 9‑109). Throughout this Article, unless otherwise stated, references to “Section” are to other sections of this Act.

Changes: Substantially revised.

Purposes: This Article governs transactions as diverse as the lease of a hand tool to an individual for a few hours and the leveraged lease of a complex line of industrial equipment to a multi‑national organization for a number of years.

To achieve that end it was necessary to provide that this Article applies to any transaction, regardless of form, that creates a lease. Since lease is defined as a transfer of an interest in goods (Section 2A‑103(1)(j)) and goods is defined to include fixtures (Section 2A‑103(1)(h)) , application is limited to the extent the transaction relates to goods, including fixtures. Further, since the definition of lease does not include a sale (Section 2‑106(1)) or retention or creation of a security interest ( Section 1‑201(37)), application is further limited; sales and security interests are governed by other Articles of this Act.

Finally, in recognition of the diversity of the transactions to be governed, the sophistication of many of the parties to these transactions, and the common law tradition as it applies to the bailment for hire or lease, freedom of contract has been preserved. DeKoven, Proceedings After Default by the Lessee Under a True Lease of Equipment, in 1C P. Coogan, W. Hogan, D. Vagts, Secured Transactions Under the Uniform Commercial Code, Section 29B.02[2] (1986). Thus, despite the extensive regulatory scheme established by this Article, the parties to a lease will be able to create private rules to govern their transaction. Sections 2A‑103(4) and 1‑102(3). However, there are special rules in this Article governing consumer leases, as well as other state and federal statutes, that may further limit freedom of contract with respect to consumer leases.

A court may apply this Article by analogy to any transaction, regardless of form, that creates a lease of personal property other than goods, taking into account the expressed intentions of the parties to the transaction and any differences between a lease of goods and a lease of other property. Such application has precedent as the provisions of the Article on Sales (Article 2) have been applied by analogy to leases of goods. E.g., Hawkland, The Impact of the Uniform Commercial Code on Equipment Leasing, 1972 Ill. L.F. 446; Murray, Under the Spreading Analogy of Article 2 of the Uniform Commercial Code, 39 Fordham L. Rev. 447 (1971). Whether such application would be appropriate for other bailments of personal property, gratuitous or for hire, should be determined by the facts of each case. See Mieske v. Bartell Drug Co., 92 Wash. 2d 40, 46‑48, 593 P.2d 1308, 1312 (1979).

Further, parties to a transaction creating a lease of personal property other than goods, or a bailment of personal property may provide by agreement that this Article applies. Upholding the parties’ choice is consistent with the spirit of this Article.

Cross References: Sections 1‑102(3), 1‑201(37), Article 2, esp. Section 2‑106(1), and Sections 2A‑103(1)(h), 2A‑103(1)(j) and 2A‑103(4).

Definitional Cross References:

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| “Lease” | Section 2A‑103(1)(j). |

SOUTH CAROLINA REPORTER’S COMMENTS

The South Carolina Supreme Court has declined to apply the provisions of Article 2 to all personal property leases by analogy. D&D Leasing Co. v. Gentry, 298 S.C. 342, 380 S.E.2d 823 (1989). Instead, South Carolina courts have analyzed the characteristics of a “lease” to determine if it was a true lease, governed by the common law prior to the enactment of Article 2A, or if that contract was in essence a sale, though in the form of a lease, properly governed by Article 2 and the general provisions of the Uniform Commercial Code. See Mid‑Continent Refrigerator Co. v. Way, 263 S.C. 101, 208 S.E.2d 31 (1974) (option to purchase leased equipment at the end of the lease upon payment of “relatively nominal” additional consideration, where the “true and real consideration for the sale of the goods” was the rental payments, rendered the “lease” a sale of goods governed by Article 2), and D&D Leasing Co. v. Gentry, supra (lease without any option to purchase the leased goods is a “true lease” and not subject to Article 2). Cf. Jones Leasing, Inc. v. Gene Phillips & Assoc., 282 S.C. 327, 318 S.E.2d 31 (Ct. App. 1984) (holding two automobile TRAC leases to be subject to Article 2 because “the lessee could at some point purchase the goods.”).

No reported decisions of the South Carolina courts, however, analyze the distinction between a lease and a security interest disguised as a lease. This distinction is often not readily apparent. Revised Section 1‑201(37) provides that whether a lease creates a security interest will depend on the economic realities of the transaction, particularly the economic life test. The distinction is important because if the lease is a security interest, the secured party (lessor) must comply with the filing and perfection requirements under Article 9 in order to maintain priority of interest in the subject property—and even then may have only a security interest and not ownership of the goods.

LIBRARY REFERENCES

Bailment 2.

Westlaw Key Number Search: 50k2.

C.J.S. Bailments Sections 5, 14, 16 to 18.

**SECTION 36‑2A‑103.** Definitions and index of definitions.

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

(a) “Buyer in ordinary course of business” means a person who in good faith and without knowledge that the sale to him is in violation of the ownership rights or security interest or leasehold interest of a third party in the goods, buys in ordinary course from a person in the business of selling goods of that kind but does not include a pawnbroker. “Buying” may be for cash or by exchange of other property or on secured or unsecured credit and includes acquiring 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.

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

(c) “Commercial unit” means such a unit of goods as by commercial usage is a single whole for purposes of lease and division of which materially impairs its character or value on the market or in use. A commercial unit may be a single chapter, as a machine, or a set of chapters, as a suite of furniture or a line of machinery, or a quantity, as a gross or carload, or any other unit treated in use or in the relevant market as a single whole.

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

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

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

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

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

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

(iii) one of the following occurs:

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

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

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

(D) if the lease is not a consumer lease, the lessor, before the lessee signs the lease contract, informs the lessee in writing (i) 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, (ii) 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 (iii) that the lessee may communicate with the person supplying the goods to the lessor and receive an accurate and complete statement of those promises and warranties, including any disclaimers and limitations of them or of remedies.

(h) “Goods” means all things that are movable at the time of identification to the lease contract, or are fixtures (Section 36‑2A‑309), but the term does not include money, documents, instruments, accounts, chattel paper, general intangibles, or minerals or the like, including oil and gas, before extraction. The term also includes the unborn young of animals.

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

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

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

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

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

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

(o) “Lessee in ordinary course of business” means a person who in good faith and without knowledge that the lease to the person 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 acquiring 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.

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

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

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

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

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

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

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

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

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

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

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

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

Accessions. Section 36‑2A‑310(1).

Construction mortgage. Section 36‑2A‑309(1)(d).

Encumbrance. Section 36‑2A‑309(1)(e).

Fixtures. Section 36‑2A‑309(1)(a).

Fixture filing. Section 36‑2A‑309(1)(b).

Purchase money lease. Section 36‑2A‑309(1)(c).

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

“Account” Section 36‑9‑102.

“Between merchants” Section 36‑2‑104(3).

“Buyer” Section 36‑2‑103(1)(a).

“Chattel paper” Section 36‑9‑102.

“Consumer goods” Section 36‑9‑102.

“Document” Section 36‑9‑102.

“Entrusting” Section 36‑2‑403(3).

“General intangibles” Section 36‑9‑102(a)(42).

“Instrument” Section 36‑9‑102.

“Merchant” Section 36‑2‑104(1).

“Mortgage” Section 36‑9‑102.

“Pursuant to commitment” Section 36‑9‑102.

“Receipt” Section 36‑2‑103(1)(c).

“Sale” Section 36‑2‑106(1).

“Sale on approval” Section 36‑2‑326.

“Sale or return” Section 36‑2‑326.

“Seller” Section 36‑2‑103(1)(d).

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

HISTORY: 2001 Act No. 67, Section 2; 2014 Act No. 213 (S.343), Sections 16, 17, eff October 1, 2014.

OFFICIAL COMMENT

(a) “Buyer in ordinary course of business”. Section 1‑201(9).

(b) “Cancellation”. Section 2‑106(4). The effect of a cancellation is provided in Section 2A‑505(1).

(c) “Commercial unit”. Section 2‑105(6).

(d) “Conforming”. Section 2‑106(2).

(e) “Consumer lease”. New. This Article includes a subset of rules that applies only to consumer leases. Sections 2A‑106, 2A‑108(2), 2A‑108(4), 2A‑109(2), 2A‑221, 2A‑309, 2A‑406, 2A‑407, 2A‑504(3)(b) , and 2A‑516(3)(b).

For a transaction to qualify as a consumer lease it must first qualify as a lease. Section 2A‑103(1)(j). Note that this Article regulates the transactional elements of a lease, including a consumer lease; consumer protection statutes, present and future, and existing consumer protection decisions are unaffected by this Article. Section 2A‑104(1)(c) and (2). Of course, Article 2A as state law also is subject to federal consumer protection law.

This definition is modeled after the definition of consumer lease in the Consumer Leasing Act, 15 U.S.C. Section 1667 (1982), and in the Unif. Consumer Credit Code Section 1.301(14), 7A U.L.A. 43 (1974). However, this definition of consumer lease differs from its models in several respects: the lessor can be a person regularly engaged either in the business of leasing or of selling goods, the lease need not be for a term exceeding four months, a lease primarily for an agricultural purpose is not covered, and whether there should be a limitation by dollar amount and its amount is left up to the individual states.

This definition focuses on the parties as well as the transaction. If a lease is within this definition, the lessor must be regularly engaged in the business of leasing or selling, and the lessee must be an individual not an organization; note that a lease to two or more individuals having a common interest through marriage or the like is not excluded as a lease to an organization under Section 1‑201(28). The lessee must take the interest primarily for a personal, family or household purpose. If required by the enacting state, total payments under the lease contract, excluding payments for options to renew or buy, cannot exceed the figure designated.

(f) “Fault”. Section 1‑201(16).

(g) “Finance Lease”. New. This Article includes a subset of rules that applies only to finance leases. Sections 2A‑209, 2A‑211(2), 2A‑212(1), 2A‑213, 2A‑219(1), 2A‑220(1)(a), 2A‑221, 2A‑405(c), 2A‑407, 2A‑516(2) and 2A‑517(1)(a) and (2).

For a transaction to qualify as a finance lease it must first qualify as a lease. Section 2A‑103(1)(j). Unless the lessor is comfortable that the transaction will qualify as a finance lease, the lease agreement should include provisions giving the lessor the benefits created by the subset of rules applicable to the transaction that qualifies as a finance lease under this Article.

A finance lease is the product of a three party transaction. The supplier manufactures or supplies the goods pursuant to the lessee’s specification, perhaps even pursuant to a purchase order, sales agreement or lease agreement between the supplier and the lessee. After the prospective finance lease is negotiated, a purchase order, sales agreement, or lease agreement is entered into by the lessor (as buyer or prime lessee) or an existing order, agreement or lease is assigned by the lessee to the lessor, and the lessor and the lessee then enter into a lease or sublease of the goods. Due to the limited function usually performed by the lessor, the lessee looks almost entirely to the supplier for representations, covenants and warranties. If a manufacturer’s warranty carries through, the lessee may also look to that. Yet, this definition does not restrict the lessor’s function solely to the supply of funds; if the lessor undertakes or performs other functions, express warranties, covenants and the common law will protect the lessee.

This definition focuses on the transaction, not the status of the parties; to avoid confusion it is important to note that in other contexts, e.g., tax and accounting, the term finance lease has been used to connote different types of lease transactions, including leases that are disguised secured transactions. M. Rice, Equipment Financing, 62‑71 (1981). A lessor who is a merchant with respect to goods of the kind subject to the lease may be a lessor under a finance lease. Many leases that are leases back to the seller of goods (Section 2A‑308(3)) will be finance leases. This conclusion is easily demonstrated by a hypothetical. Assume that B has bought goods from C pursuant to a sales contract. After delivery to and acceptance of the goods by B, B negotiates to sell the goods to A and simultaneously to lease the goods back from A, on terms and conditions that, we assume, will qualify the transaction as a lease. Section 2A‑103(1)(j). In documenting the sale and lease back, B assigns the original sales contract between B, as buyer, and C, as seller, to A. A review of these facts leads to the conclusion that the lease from A to B qualifies as a finance lease, as all three conditions of the definition are satisfied. Subparagraph (i) is satisfied as A, the lessor, had nothing to do with the selection, manufacture, or supply of the equipment. Subparagraph (ii) is satisfied as A, the lessor, bought the equipment at the same time that A leased the equipment to B, which certainly is in connection with the lease. Finally, subparagraph (iii) (A) is satisfied as A entered into the sales contract with B at the same time that A leased the equipment back to B. B, the lessee, will have received a copy of the sales contract in a timely fashion.

Subsection (i) requires the lessor to remain outside the selection, manufacture and supply of the goods; that is the rationale for releasing the lessor from most of its traditional liability. The lessor is not prohibited from possession, maintenance or operation of the goods, as policy does not require such prohibition. To insure the lessee’s reliance on the supplier, and not on the lessor, subsection (ii) requires that the goods ( where the lessor is the buyer of the goods) or that the right to possession and use of the goods (where the lessor is the prime lessee and the sublessor of the goods) be acquired in connection with the lease (or sublease) to qualify as a finance lease. The scope of the phrase “in connection with” is to be developed by the courts, case by case. Finally, as the lessee generally relies almost entirely upon the supplier for representations and covenants, and upon the supplier or a manufacturer, or both, for warranties with respect to the goods, subsection (iii) requires that one of the following occur: (A) the lessee receive a copy of the supply contract before signing the lease contract; (B) the lessee’s approval of the supply contract is a condition to the effectiveness of the lease contract; ( C) the lessee receive a statement describing the promises and warranties and any limitations relevant to the lessee before signing the lease contract; or (D) before signing the lease contract and except in a consumer lease, the lessee receive a writing identifying the supplier (unless the supplier was selected and required by the lessee) and the rights of the lessee under Section 2A‑209, and advising the lessee a statement of promises and warranties is available from the supplier. Thus, even where oral supply orders or computer placed supply orders are compelled by custom and usage the transaction may still qualify as a finance lease if the lessee approves the supply contract before the lease contract is effective and such approval was a condition to the effectiveness of the lease contract. Moreover, where the lessor does not want the lessee to see the entire supply contract, including price information, the lessee may be provided with a separate statement of the terms of the supply contract relevant to the lessee; promises between the supplier and the lessor that do not affect the lessee need not be included. The statement can be a restatement of those terms or a copy of portions of the supply contract with the relevant terms clearly designated. Any implied warranties need not be designated, but a disclaimer or modification of remedy must be designated. A copy of any manufacturer’s warranty is sufficient if that is the warranty provided. However, a copy of any Regulation M disclosure given pursuant to 12 C.F.R. Section 213.4(g) concerning warranties in itself is not sufficient since those disclosures need only briefly identify express warranties and need not include any disclaimer of warranty.

If a transaction does not qualify as a finance lease, the parties may achieve the same result by agreement; no negative implications are to be drawn if the transaction does not qualify. Further, absent the application of special rules (fraud, duress, and the like), a lease that qualifies as a finance lease and is assigned by the lessor or the lessee to a third party does not lose its status as a finance lease under this Article. Finally, this Article creates no special rule where the lessor is an affiliate of the supplier; whether the transaction qualifies as a finance lease will be determined by the facts of each case.

(h) “Goods”. Section 9‑102(a)(44). See Section 2A‑103(3) for reference to the definition of “Account”, “Chattel paper”, “Document”, “General intangibles” and “Instrument”. See Section 2A‑217 for determination of the time and manner of identification.

(i) “Installment lease contract”. Section 2‑612(1).

(j) “Lease”. New. There are several reasons to codify the law with respect to leases of goods. An analysis of the case law as it applies to leases of goods suggests at least several significant issues to be resolved by codification. First and foremost is the definition of a lease. It is necessary to define lease to determine whether a transaction creates a lease or a security interest disguised as a lease. If the transaction creates a security interest disguised as a lease, the transaction will be governed by the Article on Secured Transactions (Article 9) and the lessor will be required to file a financing statement or take other action to perfect its interest in the goods against third parties. There is no such requirement with respect to leases under the common law and, except with respect to leases of fixtures (Section 2A‑309), this Article imposes no such requirement. Yet the distinction between a lease and a security interest disguised as a lease is not clear from the case law at the time of the promulgation of this Article. DeKoven, Leases of Equipment: Puritan Leasing Company v. August, A Dangerous Decision, 12 U.S.F. L. Rev. 257 (1978).

At common law a lease of personal property is a bailment for hire. While there are several definitions of bailment for hire, all require a thing to be let and a price for the letting. Thus, in modern terms and as provided in this definition, a lease is created when the lessee agrees to furnish consideration for the right to the possession and use of goods over a specified period of time. Mooney, Personal Property Leasing: A Challenge, 36 Bus. Law. 1605, 1607 (1981). Further, a lease is neither a sale (Section 2‑106(1)) nor a retention or creation of a security interest (Section 1‑201( 37)). Due to extensive litigation to distinguish true leases from security interests, an amendment to Section 1‑201(37) has been promulgated with this Article to create a sharper distinction.

This section as well as Section 1‑201(37) must be examined to determine whether the transaction in question creates a lease or a security interest. The following hypotheticals indicate the perimeters of the issue. Assume that A has purchased a number of copying machines, new, for $1,000 each; the machines have an estimated useful economic life of three years. A advertises that the machines are available to rent for a minimum of one month and that the monthly rental is $100.00. A intends to enter into leases where A provides all maintenance, without charge to the lessee. Further, the lessee will rent the machine, month to month, with no obligation to renew. At the end of the lease term the lessee will be obligated to return the machine to A’s place of business. This transaction qualifies as a lease under the first half of the definition, for the transaction includes a transfer by A to a prospective lessee of possession and use of the machine for a stated term, month to month. The machines are goods (Section 2A‑103(1)( h)). The lessee is obligated to pay consideration in return, $100.00 for each month of the term.

However, the second half of the definition provides that a sale or a security interest is not a lease. Since there is no passing of title, there is no sale. Sections 2A‑103(3) and 2‑106(1). Under pre‑Act security law this transaction would have created a bailment for hire or a true lease and not a conditional sale. Da Rocha v. Macomber, 330 Mass. 611, 614‑15, 116 N.E.2d 139, 142 (1953). Under Section 1‑201(37), as amended with the promulgation of this Article, the same result would follow. While the lessee is obligated to pay rent for the one month term of the lease, one of the other four conditions of the second paragraph of Section 1‑201(37) must be met and none is. The term of the lease is one month and the economic life of the machine is 36 months; thus, subparagraph (a) of Section 1‑201(37) is not now satisfied. Considering the amount of the monthly rent, absent economic duress or coercion, the lessee is not bound either to renew the lease for the remaining economic life of the goods or to become the owner. If the lessee did lease the machine for 36 months, the lessee would have paid the lessor $3,600 for a machine that could have been purchased for $1,000; thus, subparagraph (b) of Section 1‑201(37) is not satisfied. Finally, there are no options; thus, subparagraphs (c) and (d) of Section 1‑201(37) are not satisfied. This transaction creates a lease, not a security interest. However, with each renewal of the lease the facts and circumstances at the time of each renewal must be examined to determine if that conclusion remains accurate, as it is possible that a transaction that first creates a lease, later creates a security interest.

Assume that the facts are changed and that A requires each lessee to lease the goods for 36 months, with no right to terminate. Under pre‑Act security law this transaction would have created a conditional sale, and not a bailment for hire or true lease. Hervey v. Rhode Island Locomotive Works, 93 U.S. 664, 672‑73 (1876). Under this subsection, and Section 1‑201(37), as amended with the inclusion of this Article in the Act, the same result would follow. The lessee’s obligation for the term is not subject to termination by the lessee and the term is equal to the economic life of the machine.

Between these extremes there are many transactions that can be created. Some of the transactions have not been properly categorized by the courts in applying the 1978 and earlier Official Texts of Section 1‑201(37). This subsection, together with Section 1‑201(37), as amended with the promulgation of this Article, draws a brighter line, which should create a clearer signal to the professional lessor and lessee.

(k) “Lease agreement”. This definition is derived from the first sentence of Section 1‑201(3). Because the definition of lease is broad enough to cover future transfers, lease agreement includes an agreement contemplating a current or subsequent transfer. Thus it was not necessary to make an express reference to an agreement for the future lease of goods (Section 2‑106(1)). This concept is also incorporated in the definition of lease contract. Note that the definition of lease does not include transactions in ordinary building materials that are incorporated into an improvement on land. Section 2A‑309(2).

The provisions of this Article, if applicable, determine whether a lease agreement has legal consequences; otherwise the law of bailments and other applicable law determine the same. Sections 2A‑103(4) and 1‑103.

(l) “Lease contract”. This definition is derived from the definition of contract in Section 1‑201(11). Note that a lease contract may be for the future lease of goods, since this notion is included in the definition of lease.

(m) “Leasehold interest”. New.

(n) “Lessee”. New.

(o) “Lessee in ordinary course of business”. Section 1‑201(9).

(p) “Lessor”. New.

(q) “Lessor’s residual interest”. New.

(r) “Lien”. New. This term is used in Section 2A‑307

(Priority of Liens Arising by Attachment or Levy on, Security Interests in, and Other Claims to Goods).

(s) “Lot”. Section 2‑105(5).

(t) “Merchant lessee”. New. This term is used in Section 2A‑511 (Merchant Lessee’s Duties as to Rightfully Rejected Goods). A person may satisfy the requirement of dealing in goods of the kind subject to the lease as lessor, lessee, seller, or buyer.

(u) “Present value”. New. Authorities agree that present value should be used to determine fairly the damages payable by the lessor or the lessee on default. E.g., Taylor v. Commercial Credit Equip. Corp., 170 Ga. App. 322, 316 S.E.2d 788 (Ct. App. 1984). Present value is defined to mean an amount that represents the discounted value as of a date certain of one or more sums payable in the future. This is a function of the economic principle that a dollar today is more valuable to the holder than a dollar payable in two years. While there is no question as to the principle, reasonable people would differ as to the rate of discount to apply in determining the value of that future dollar today. To minimize litigation, this Article allows the parties to specify the discount or interest rate, if the rate was not manifestly unreasonable at the time the transaction was entered into. In all other cases, the interest rate will be a commercially reasonable rate that takes into account the facts and circumstances of each case, as of the time the transaction was entered into.

(v) “Purchase”. Section 1‑201(32). This definition omits the reference to lien contained in the definition of purchase in Article 1 (Section 1‑201(32)). This should not be construed to exclude consensual liens from the definition of purchase in this Article; the exclusion was mandated by the scope of the definition of lien in Section 2A‑103(1)(r). Further, the definition of purchaser in this Article adds a reference to lease; as purchase is defined in Section 1‑201(32) to include any other voluntary transaction creating an interest in property, this addition is not substantive.

(w) “Sublease”. New.

(x) “Supplier”. New.

(y) “Supply contract”. New.

(z) “Termination”. Section 2‑106(3). The effect of a termination is provided in Section 2A‑505(2).

SOUTH CAROLINA REPORTER’S COMMENTS

Significant changes in South Carolina law are effected by the definitions of “Consumer lease” and “Finance lease” and the provisions throughout Article 2A relating to those terms, as is discussed generally in the Official Comment. The indexed $25,000.00 upper limit used in the definition of Consumer Lease is the same as that for consumer credit sales, Section 37‑2‑104(1)(e), and consumer leases, Section 37‑2‑106(1)(b), under the South Carolina Consumer Protection Code and is subject to the same indexing process, under Section 37‑1‑109, so that the upper limits will always be the same under all three definitions.

The definition of “Lease” is significant in determining the scope of application of Article 2A and Articles 2 and 9, as discussed in the South Carolina Reporter’s Comment to the preceding section, 2A‑102, and the Official Comment to this section.

“Present value” is a newly‑defined concept relating to the calculation of damages; the definition permits the parties to specify a reasonable interest or discount rate to be used in calculating present value.

The other definitions are in accord with previous Uniform Commercial Code definitions that have been a part of South Carolina law.

Editor’s Note

2014 Act No. 213, Section 51, provides as follows:

“SECTION 51. This act becomes effective on October 1, 2014. It applies to transactions entered into and events occurring after that date.”

Effect of Amendment

2014 Act No. 213, Section 16, in subsections (1)(a) and (1)(o), substituted “and includes acquiring goods” for “and includes receiving goods”, and made other nonsubstantive changes.

2014 Act No. 213, Section 17, in subsection (3), deleted the cross reference for “good faith”, and changed the section references for “account”, “chattel paper”, “consumer good”, “document”, “instrument”, “mortgage”, and “pursuant to commitment”.

CROSS REFERENCES

Warehouse receipts, bills of lading and other documents of title, “lessee in the ordinary course of business” defined, see Section 36‑7‑102.

LIBRARY REFERENCES

Bailment 1, 2.

Westlaw Key Number Search: 50k1; 50k2.

C.J.S. Bailments Sections 2 to 19, 22 to 24, 31.

**SECTION 36‑2A‑104.** Leases subject to other law.

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

(a) certificate of title statute of this State;

(b) certificate of title statute of another jurisdiction (Section 36‑2A‑105); or

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

(2) In case of conflict between this chapter, other than Sections 36‑2A‑105, 36‑2A‑304(3), and 36‑2A‑305(3), and a statute or decision referred to in subsection (1), the statute or decision controls.

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

HISTORY: 2001 Act No. 67, Section 2.

OFFICIAL COMMENT

Uniform Statutory Source: Former Sections 9‑203(4) and 9‑302(3)(b) and (c) (now codified as Sections 9‑201 and 9‑311(a)(2) and (3).

Changes: Substantially revised.

Purposes: 1. This Article creates a comprehensive scheme for the regulation of transactions that create leases. Section 2A‑102. Thus, the Article supersedes all prior legislation dealing with leases, except to the extent set forth in this Section.

2. Subsection (1) states the general rule that a lease, although governed by the scheme of this Article, also may be governed by certain other applicable laws. This may occur in the case of a consumer lease. Section 2A‑103(1)(e). Those laws may be state statutes existing prior to enactment of Article 2A or passed afterward. In this case, it is desirable for this Article to specify which statute controls. Or the law may be a pre‑existing consumer protection decision. This Article preserves such decisions. Or the law may be a statute of the United States. Such a law controls without any statement in this Article under applicable principles of preemption.

An illustration of a statute of the United States that governs consumer leases is the Consumer Leasing Act, 15 U.S.C. Sections 1667‑1667(e) (1982) and its implementing regulation, Regulation M, 12 C.F.R. Section 213 (1986); the statute mandates disclosures of certain lease terms, delimits the liability of a lessee in leasing personal property, and regulates the advertising of lease terms. An illustration of a state statute that governs consumer leases and which if adopted in the enacting state prevails over this Article is the Unif. Consumer Credit Code, which includes many provisions similar to those of the Consumer Leasing Act, e.g, Unif. Consumer Credit Code Sections 3.202, 3.209, 3.401, 7A U.L.A. 108‑09, 115, 125 (1974), as well as provisions in addition to those of the Consumer Leasing Act, e.g., Unif. Consumer Credit Code Sections 5.109‑.111, 7A U.L.A. 171‑76 ( 1974) (the right to cure a default). Such statutes may define consumer lease so as to govern transactions within and without the definition of consumer lease under this Article.

3. Under subsection (2), subject to certain limited exclusions, in case of conflict a statute or a decision described in subsection (1) prevails over this Article. For example, a provision like Unif. Consumer Credit Code Section 5.112, 7A U.L.A. 176 (1974), limiting self‑help repossession, prevails over Section 2A‑525(3). A consumer protection decision rendered after the effective date of this Article may supplement its provisions. For example, in relation to Article 9 a court might conclude that an acceleration clause may not be enforced against an individual debtor after late payments have been accepted unless a prior notice of default is given. To the extent the decision establishes a general principle applicable to transactions other than secured transactions, it may supplement Section 2A‑502.

4. Consumer protection in lease transactions is primarily left to other law. However, several provisions of this Article do contain special rules that may not be varied by agreement in the case of a consumer lease. E.g., Sections 2A‑106, 2A‑108, and 2A‑109(2). Were that not so, the ability of the parties to govern their relationship by agreement together with the position of the lessor in a consumer lease too often could result in a one‑sided lease agreement.

5. In construing this provision the reference to statute should be deemed to include applicable regulations. A consumer protection decision is “final” on the effective date of this Article if it is not subject to appeal on that date or, if subject to appeal, is not later reversed on appeal. Of course, such a decision can be overruled by a later decision or superseded by a later statute.

Cross References: Sections 2A‑103(1)(e), 2A‑106, 2A‑108, 2A‑109(2) and 2A‑525(3).

Definitional Cross References:

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|  |  |
| “Lease” | Section 2A‑103(1)(j). |

SOUTH CAROLINA REPORTER’S COMMENTS

South Carolina’s Consumer Protection Code, Title 37 of the South Carolina Code, contains many provisions that regulate consumer leases. Numerous sections of Article 2A will be affected by the rule of Subsection (2) that in such conflicts, the consumer protection laws control: Sections 2A‑106, ‑107, ‑108, ‑109, ‑303, ‑305, ‑502.

**SECTION 36‑2A‑105.** Territorial application of chapter to goods covered by certificate of title.

Subject to the provisions of Sections 36‑2A‑304(3) and 36‑2A‑305(3), with respect to goods covered by a certificate of title issued under a statute of this State or of another jurisdiction, compliance and the effect of compliance or noncompliance with a certificate of title statute are governed by the law (including the conflict of laws rules) of the jurisdiction issuing the certificate until the earlier of (a) surrender of the certificate, or (b) four months after the goods are removed from that jurisdiction and thereafter until a new certificate of title is issued by another jurisdiction.

HISTORY: 2001 Act No. 67, Section 2.

OFFICIAL COMMENT

Uniform Statutory Source: Former Section 9‑103(2)(a) and (b) (now codified as Sections 9‑303 and 9‑316).

Changes: Substantially revised. The provisions of the last sentence of former Section 9‑103(2)(b) were not incorporated as they are superfluous in this context. The provisions of former Section 9‑103(2)(d) were not incorporated because the problems dealt with are adequately addressed by this section and Sections 2A‑304(3) and 305(3).

Purposes: The new certificate referred to in (b) must be permanent, not temporary. Generally, the lessor or creditor whose interest is indicated on the most recently issued certificate of title will prevail over interests indicated on certificates issued previously by other jurisdictions. This provision reflects a policy that it is reasonable to require holders of interests in goods covered by a certificate of title to police the goods or risk losing their interests when a new certificate of title is issued by another jurisdiction.

Cross References: Sections 2A‑304(3) and 2A‑305(3); former Sections 9‑103(2)(b) and 9‑103(2)(d) (now codified as Sections 9‑303, 9‑316, and 9‑337).

Definitional Cross References:

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| “Goods” | Section 2A‑103(1)(h). |

SOUTH CAROLINA REPORTER’S COMMENT

This provision is new in South Carolina law.

LIBRARY REFERENCES

Bailment 1.

Westlaw Key Number Search: 50k1.

C.J.S. Bailments Sections 2 to 13, 15, 19, 22 to 24, 31.

**SECTION 36‑2A‑106.** Limitation on power of parties to consumer lease to choose applicable law and judicial forum.

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

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

HISTORY: 2001 Act No. 67, Section 2.

OFFICIAL COMMENT

Uniform Statutory Source: Unif. Consumer Credit Code Section 1.201(8), 7A U.L.A. 36 (1974).

Changes: Substantially revised.

Purposes: There is a real danger that a lessor may induce a consumer lessee to agree that the applicable law will be a jurisdiction that has little effective consumer protection, or to agree that the applicable forum will be a forum that is inconvenient for the lessee in the event of litigation. As a result, this section invalidates these choice of law or forum clauses, except where the law chosen is that of the state of the consumer’s residence or where the goods will be kept, or the forum chosen is one that otherwise would have jurisdiction over the lessee.

Subsection (1) limits potentially abusive choice of law clauses in consumer leases. The 30‑day rule in subsection (1) was suggested by former Section 9‑103(1)(c). This section has no effect on choice of law clauses in leases that are not consumer leases. Such clauses would be governed by other law.

Subsection (2) prevents enforcement of potentially abusive jurisdictional consent clauses in consumer leases. By using the term judicial forum, this section does not limit selection of a nonjudicial forum, such as arbitration. This section has no effect on choice of forum clauses in leases that are not consumer leases; such clauses are, as a matter of current law, “prima facie valid”. The Bremen v. Zapata Off‑Shore Co., 407 U.S. 1, 10 (1972). Such clauses would be governed by other law, including the Model Choice of Forum Act (1968).

Cross References: Former Section 9‑103(1)(c).

Definitional Cross References:

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| “Consumer lease” | Section 2A‑103(1)(e). |
| “Lease agreement” | Section 2A‑103(1)(k). |
| “Lessee” | Section 2A‑103(1)(n). |
| “Goods” | Section 2A‑103(1)(h). |
| “Party” | Section 1‑201(29). |

SOUTH CAROLINA REPORTER’S COMMENTS

This section is generally in accord with South Carolina consumer protection statutes, although paragraph 1 departs somewhat from the ordinary South Carolina rule governing contractual choice of laws. See Section 37‑1‑201(10), requiring South Carolina law to be applied in disputes over consumer credit transactions. To the extent that this section, like any other provision of Article 2A, is found to conflict with any South Carolina consumer protection statute, the consumer law controls. Section 2A‑104(2).

In non‑consumer transactions, choice of law clauses are generally upheld as prima facie valid, as the Official Comment notes. The Fourth Circuit upheld a choice of law clause governing a lease agreement for cattle in Hoffman v. National Equipment Rental, Ltd., 643 F.2d 987 (4th Cir. 1981). In that case the lessees were experienced cattle farmers, so the lease could not be characterized as a consumer transaction. Presumably, this section would have no effect on the holding of Hoffman. Where no provision in the agreement specifies the applicable law, South Carolina applies the “place of making” rule. See Pennsylvania Thresherman & F.M. Cas. Ins. Co. v. Owens, 238 F.2d 549 (4th Cir. 1986), where the Fourth Circuit applied South Carolina law in interpreting an insurance contract entered into in South Carolina.

Forum‑selection clauses are also presumptively valid. See The Bremen v. Zapata Off‑Shore Co. 407 U.S. 1, 10 (1972) (holding that, in spite of historical reluctance, federal courts should treat forum‑selection clauses as prima facie valid), and Carnival Cruise Lines v. Shute, 499 U.S. 585 ( 1991) (holding that the rule of The Bremen was subject only to the narrowest of exceptions and that the prima facie validity of forum‑selection clauses would govern a form contract passenger ticket); International Software Systems v. Amplicon, Inc., 77 F.3d 112 (5th Cir. 1996) (holding that the rule of The Bremen applied to validate a forum‑selection clause in a commercial lease).

Fundamental principles of freedom of contract and economic efficiency demanding that courts enforce choice‑of‑law and jurisdiction and venue clauses in finance leases and other commercial leases are balanced in consumer leases by the policies underlying consumer protection legislation. Under this section, choice‑of‑law and jurisdiction and venue clauses in commercial leases, including finance leases, should continue to be upheld and enforced by South Carolina courts, whereas in consumer leases their validity and enforcement will be limited.

LIBRARY REFERENCES

Contracts 127(4).

Westlaw Key Number Search: 95k127(4).

C.J.S. Contracts Section 237.

**SECTION 36‑2A‑107.** Waiver or renunciation of claim or right after default.

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

HISTORY: 2001 Act No. 67, Section 2.

OFFICIAL COMMENT

Uniform Statutory Source: Section 1‑107.

Changes: Revised to reflect leasing practices and terminology. This clause is used throughout the Official Comments to this Article to indicate the scope of change in the provisions of the Uniform Statutory Source included in the section; these changes range from one extreme, e.g., a significant difference in practice (a warranty as to merchantability is not implied in a finance lease (Section 2A‑212)) to the other extreme, e.g., a modest difference in style or terminology (the transaction governed is a lease not a sale (Section 2A‑103)).

Cross References: Sections 2A‑103 and 2A‑212.

Definitional Cross References:

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| “Aggrieved party” | Section 1‑201(2). |
| “Delivery” | Section 1‑201(14). |
| “Rights” | Section 1‑201(36). |
| “Signed” | Section 1‑201(39). |
| “Written” | Section 1‑201(46). |

SOUTH CAROLINA REPORTER’S COMMENTS

Although this section eliminates the consideration requirement from waivers after default on a lease agreement, the parties to the agreement are still obligated to act in good faith as required in Section 36‑1‑203 [see now Section 36‑1‑304]. Additionally, oral waivers are subject to both the Statute of Frauds provisions contained in Section 2A‑201 and the provisions regarding modification of written agreements contained in Section 2A‑208. See also the statutory source, as enacted in South Carolina (Section 36‑1‑107), and its Official Comment [see now Section 36‑1‑306].

Additionally, the effect of this section on waivers under Consumer Leases is limited by Section 37‑1‑107 which makes any waiver of consumer rights under Title 37 of the South Carolina Code void.

LIBRARY REFERENCES

Bailment 9.

Westlaw Key Number Search: 50k9.

C.J.S. Bailments Sections 37 to 45.

**SECTION 36‑2A‑108.** Unconscionability.

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

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

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

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

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

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

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

HISTORY: 2001 Act No. 67, Section 2.

OFFICIAL COMMENT

Uniform Statutory Source: Section 2‑302 and Unif. Consumer Credit Code Section 5.108, 7A U.L.A. 167‑69 (1974).

Changes: Subsection (1) is taken almost verbatim from the provisions of Section 2‑302(1). Subsection (2) is suggested by the provisions of Unif. Consumer Credit Code Section 5.108(1), (2), 7A U.L.A. 167 (1974). Subsection (3), taken from the provisions of Section 2‑302(2), has been expanded to cover unconscionable conduct. Unif. Consumer Credit Code Section 5.108(3), 7A U.L.A. 167 (1974). The provision for the award of attorney’s fees to consumers, subsection (4), covers unconscionability under subsection (1) as well as (2). Subsection (4) is modeled on the provisions of Unif. Consumer Credit Code Section 5.108(6), 7A U.L.A. 169 (1974).

Purposes: Subsections (1) and (3) of this section apply the concept of unconscionability reflected in the provisions of Section 2‑302 to leases. See Dillman & Assocs. v. Capitol Leasing Co., 110 Ill. App. 3d 335, 342, 442 N.E.2d 311, 316 (App. Ct. 1982). Subsection (3) omits the adjective “commercial” found in subsection 2‑302(2) because subsection (3) is concerned with all leases and the relevant standard of conduct is determined by the context.

The balance of the section is modeled on the provisions of Unif. Consumer Credit Code Section 5.108, 7A U.L.A. 167‑69 (1974). Thus subsection (2) recognizes that a consumer lease or a clause in a consumer lease may not itself be unconscionable but that the agreement would never have been entered into if unconscionable means had not been employed to induce the consumer to agree. To make a statement to induce the consumer to lease the goods, in the expectation of invoking an integration clause in the lease to exclude the statement’s admissibility in a subsequent dispute, may be unconscionable. Subsection (2) also provides a consumer remedy for unconscionable conduct, such as using or threatening to use force or violence, in the collection of a claim arising from a lease contract. These provisions are not exclusive. The remedies of this section are in addition to remedies otherwise available for the same conduct under other law, for example, an action in tort for abusive debt collection or under another statute of this State for such conduct. The reference to appropriate relief in subsection (2) is intended to foster liberal administration of this remedy. Sections 2A‑103(4) and 1‑106(1).

Subsection (4) authorizes an award of reasonable attorney’s fees if the court finds unconscionability with respect to a consumer lease under subsections (1) or (2). Provision is also made for recovery by the party against whom the claim was made if the court does not find unconscionability and does find that the consumer knew the action to be groundless. Further, subsection (4)(b) is independent of, and thus will not override, a term in the lease agreement that provides for the payment of attorney’s fees.

Cross References: Sections 1‑106(1), 2‑302 and 2A‑103(4).

Definitional Cross References:

|  |  |
| --- | --- |
|  |  |
| “Action” | Section 1‑201(1). |
| “Consumer lease” | Section 2A‑103(1)(e). |
| “Lease contract” | Section 2A‑103(1)(l). |
| “Lessee” | Section 2A‑103(1)(n). |
| “Party” | Section 1‑201(29). |

SOUTH CAROLINA REPORTER’S COMMENTS

South Carolina courts of equity have long demonstrated their willingness to employ the concept of unconscionability in refusing to decree specific performance of contracts found to be unconscionable, either in whole or in part. See, e.g., Marthinson v. McCutchen, 84 S.C. 256, 66 S.E. 120 (1909); Anthony v. Eve, 109 S.C. 255, 95 S.E. 513 (1917), both to the effect that the court will not order specific performance of a contract that is not found to be “fair, just and reasonable.”

Courts of law in South Carolina have reached similar results, despite the traditionally‑held view that a court of law will not interfere with the parties’ freedom of contract. See Philadelphia Storage Battery Co. v. Mutual Tire Stores, 161 S.C. 487, 159 S.E. 825 (1931) and Gaines W. Harrison & Sons, Inc. v. J.I. Case Co., 180 F.Supp. 243 (1960) (despite a broad provision concerning the parties’ right to terminate the contract, a cause of action will lie against one who exercises that right “against equity and good conscience”). In striking or modifying objectionable terms of a contract, courts in this and other jurisdictions frequently use the common law concepts of duress, fraud, misrepresentation, and undue influence. See 1 Corbin, Contracts, Section 128 (1950) (“There is sufficient flexibility in the concepts of fraud, duress, misrepresentation, and undue influence...to enable the courts to avoid enforcement of unconscionable provisions in long printed standardized contacts.”)

A contract for lease which is not in itself unconscionable at the time the contract is made but which has an unconscionable effect at some later date, perhaps due to a change in market conditions, is not covered by this section. However, the common law concepts of impossibility and impracticability of performance would still apply to those situations.

Previously, lease contracts in South Carolina which were claimed by one party to be unconscionable were analyzed under Section 36‑2‑302 if the lease contract was found to have the characteristics of a sale of goods by inclusion of an option to purchase. In Jones Leasing, Inc. v. Gene Phillips & Assocs., 282 S.C. 327, 318 S.E.2d 31 (App. 1984), the Court of Appeals held that the trial judge properly found that the automobile lease contracts in question were not unconscionable under Section 36‑2‑302 where the provisions were not so oppressive, unreasonable, or one‑sided as to have been unconscionable at the time the contracts were made. The court further noted that even if some of the provisions were unconscionable, the remaining provisions were still enforceable. In the alternative, the court stated that it could strike or modify those unconscionable provisions, or limit their effect so as to avoid an unconscionable result.

The requirement of Paragraph (4)(b) that the court “shall” award attorney’s fees against a consumer lessee who knowingly brought a groundless action claiming unconscionability is inconsistent with Section 37‑5‑108(6), which provides that in such circumstances the court “may” award fees. Under Section 2A‑104(2) the permissive language of Section 37‑5‑108(6) controls.

LIBRARY REFERENCES

Bailment 3.

Westlaw Key Number Search: 50k3.

C.J.S. Bailments Sections 4, 19, 21 to 22, 25 to 27.

**SECTION 36‑2A‑109.** Option to accelerate at will.

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

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

HISTORY: 2001 Act No. 67, Section 2.

OFFICIAL COMMENT

Uniform Statutory Source: Section 1‑208 and Unif. Consumer Credit Code Section 5.109(2), 7A U.L.A. 171 (1974).

Purposes: Subsection (1) reflects modest changes in style to the provisions of the first sentence of Section 1‑208.

Subsection (2), however, reflects a significant change in the provisions of the second sentence of Section 1‑208 by creating a new rule with respect to a consumer lease. A lease provision allowing acceleration at the will of the lessor or when the lessor deems itself insecure is of critical importance to the lessee. In a consumer lease it is a provision that is not usually agreed to by the parties but is usually mandated by the lessor. Therefore, where its invocation depends not on specific criteria but on the discretion of the lessor, its use should be regulated to prevent abuse. Subsection (1) imposes a duty of good faith upon its exercise. Subsection (2) shifts the burden of establishing good faith to the lessor in the case of a consumer lease, but not otherwise.

Cross References: Section 1‑208.

Definitional Cross References:

|  |  |
| --- | --- |
|  |  |
| “Burden of establishing” | Section 1‑201(8). |
| “Consumer lease” | Section 2A‑103(1)(e). |
| “Good faith” | Sections 1‑201(19) and 2‑103(1)(b). |
| “Party” | Section 1‑201(29). |
| “Term” | Section 1‑201(42). |

SOUTH CAROLINA REPORTER’S COMMENTS

Subsection (1) expands the basic rule in South Carolina, as enunciated in Section 36‑1‑208 [see now Section 36‑1‑309], to cover leases. The new rule of subsection (2), which applies only to consumer leases, is in general accord with the purpose and policy of South Carolina’s consumer protection statutes. However the Consumer Protection Code provides in Section 37‑5‑109 that the only permissible events of default are failure to make a payment as required and significant impairment of the prospect of payment, performance, or the realization of collateral; other occurrences may not be treated as defaults. Additionally, Sections 37‑5‑110 & ‑111 require the creditor to give the consumer debtor (consumer lessee) notice of right to cure. Section 2A‑104(2) provides that the limitations of the Consumer Protection Code prevail over inconsistent provisions in Article 2A.

Even prior to the enactment of Section 36‑1‑208 [see now Section 36‑1‑309], South Carolina adhered to a similar rule. See Cook v C.I.T. Corporation, 191 S.C. 440, 4 S.E.2d 801 (1939), holding that a clause in a mortgage permitting the mortgagee to repossess when the mortgagee feels insecure confers a right which must be exercised in good faith and only in circumstances where the mortgagee has a reasonable apprehension of danger.

LIBRARY REFERENCES

Bailment 20, 31(1).

Westlaw Key Number Search: 50k20; 50k31(1).

C.J.S. Bailments Sections 76 to 78, 110 to 112.

Part 2

Formation and Construction of Lease Contract

**SECTION 36‑2A‑201.** Statute of frauds.

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

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

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

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

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

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

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

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

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

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

(a) the term so specified 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;

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

(c) a reasonable lease term.

HISTORY: 2001 Act No. 67, Section 2.

OFFICIAL COMMENT

Uniform Statutory Source: Section 2‑201, and former sections 9‑203(1) and 9‑110 (now codified as Sections 9‑203(b) and 9‑108).

Changes: This section is modeled on Section 2‑201, with changes to reflect the differences between a lease contract and a contract for the sale of goods. In particular, subsection (1)(b) adds a requirement that the writing “describe the goods leased and the lease term”, borrowing that concept, with revisions, from the provisions of former Section 9‑203(1)(a) (now codified as Section 9‑203(b)(3)(A). Subsection (2), relying on the statutory analogue in former Section 9‑110 (now codified as section 9‑108), sets forth the minimum criterion for satisfying that requirement.

Purposes: The changes in this section conform the provisions of Section 2‑201 to custom and usage in lease transactions. Section 2‑201(2), stating a special rule between merchants, was not included in this section as the number of such transactions involving leases, as opposed to sales, was thought to be modest. Subsection (4) creates no exception for transactions where payment has been made and accepted. This represents a departure from the analogue, Section 2‑201(3)(c). The rationale for the departure is grounded in the distinction between sales and leases. Unlike a buyer in a sales transaction, the lessee does not tender payment in full for goods delivered, but only payment of rent for one or more months. It was decided that, as a matter of policy, this act of payment is not a sufficient substitute for the required memorandum. Subsection (5) was needed to establish the criteria for supplying the lease term if it is omitted, as the lease contract may still be enforceable under subsection (4).

Cross References: Sections 2‑201, 9‑108 and 9‑203(b)(3)(A).

Definitional Cross References:

|  |  |
| --- | --- |
|  |  |
| “Action” | Section 1‑201(1). |
| “Agreed” | Section 1‑201(3). |
| “Buying” | Section 2A‑103(1)(a). |
| “Goods” | Section 2A‑103(1)(h). |
| “Lease” | Section 2A‑103(1)(j). |
| “Lease contract” | Section 2A‑103(1)(l). |
| “Lessee” | Section 2A‑103(1)(n). |
| “Lessor” | Section 2A‑103(1)(p). |
| “Notice” | Section 1‑201(25). |
| “Party” | Section 1‑201(29). |
| “Sale” | Section 2‑106(1). |
| “Signed” | Section 1‑201(39). |
| “Term” | Section 1‑201(42). |
| “Writing” | Section 1‑201(46). |

SOUTH CAROLINA REPORTER’S COMMENTS

This provision is based on the Article 2 Statute of Frauds, S.C. Code Section 36‑2‑201, which modified South Carolina’s pre‑UCC Statute of Frauds. That statute exempted future goods. See Noland Co. v. Graver Tank & Mfg. Co., 301 F.2d 43, 48 (4th Cir. 1962) (Statute does not apply to goods which “are to be made, or something is to be done, to put them in condition to be delivered”) (quoting Wallace v. Dowling, 68 S.E. 571, 572‑73 (S.C. 1910)). The previous statute also required strict compliance with the traditional rule that all material terms must be specified in the writing. See Boozer v. Teague, 27 S.C. 348 (1887). See also Speed v. Speed, 213 S.C. 401, 49 S.E.2d 588 (1948) (writing must clearly identify the contracting parties, the subject matter of the sale, and the consideration exchanged); Pitts v. Edwards, 141 S.C. 126, 139 S.E. 219 ( 1927) (memorandum of sale of cotton did not satisfy the statute because it omitted the grade of cotton to be sold, referring only to a telephone conversation on the subject); Rigby v. Gaymon, 95 S.C. 489, 79 S.E. 518 ( 1913) (writing insufficient to satisfy statute because no price term shown). As with Section 36‑2‑201, the writing had to be signed by the party to be charged or his agent. See A.M. Law & Co. v. Cleveland, 172 S.C. 200, 173 S.E. 638 (1934). The previous statute also recognized the exception found in Section 36‑2‑201(3)(b), that a contract admitted by a party in his testimony satisfied the statute’s requirements. See Walker v. Preacher, 188 S.C. 431, 199 S.E. 675 (1938).

Meeting the requirements of this section does not, in and of itself, prove the terms of a contract, but merely eliminates the use of the statute of frauds as an affirmative defense to the contract’s enforceability. See Hinson‑Barr, Inc. v. Pinckard, 356 S.E.2d 115 (S.C. 1987).

Courts in some other states have continued to recognize exceptions to the statute of frauds —in particular, the theory of promissory estoppel. However, in South Carolina, promissory estoppel is not available to circumvent the Article 2 statute of frauds. See McDabco, Inc. v. Chet Adams Co., 548 F. Supp. 456 (D.S.C. 1982). The interpretation of this Article 2A Statute of Frauds should be consistent with the interpretation of its Article 2 source.

LIBRARY REFERENCES

Frauds, Statute of 84, 103 to 144.

Westlaw Key Number Search: 185k84; 185k103 to 185k144.

C.J.S. Frauds, Statute of Sections 2 to 4, 104 to 183.

RESEARCH REFERENCES

Encyclopedias

134 Am. Jur. Trials 199, Litigating Escape from Statute of Frauds in Contract Claim.

**SECTION 36‑2A‑202.** Final written expression: parol or extrinsic evidence.

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

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

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

HISTORY: 2001 Act No. 67, Section 2.

OFFICIAL COMMENT

Uniform Statutory Source: Section 2‑202.

Definitional Cross References:

|  |  |
| --- | --- |
|  |  |
| “Agreement” | Section 1‑201(3). |
| “Course of dealing” | Section 1‑205. |
| “Party” | Section 1‑201(29). |
| “Term” | Section 1‑201(42). |
| “Usage of trade” | Section 1‑205. |
| “Writing” | Section 1‑201(46). |

SOUTH CAROLINA REPORTER’S COMMENTS

This section makes no changes in current South Carolina law, but merely extends the parol evidence rule contained in Article 2 to leases. As Dean Robert W. Foster demonstrated in his thorough analysis of the South Carolina cases in his Reporter’s Comments to Section 36‑2‑202 (the Article 2 parol evidence rule, upon which this section is modeled), these statutory versions are consistent with the pre‑code South Carolina common law parol evidence rule.

The increased use of electronic and other modern communications places a greater emphasis on speed in the contracting process. When a lease is transmitted electronically, the burden falls on the sender (usually the lessor) to communicate the terms of the entire agreement in a way such that a reasonable lessee would be on notice of additional terms and conditions of the lease if these terms are to form a part of the final agreement of the parties. If the lessor fails to take steps notifying a reasonable lessee of the presence of additional terms, that failure will ordinarily bar introduction of prior or contemporaneous agreements containing those terms, unless they are supported by a course of dealing, usage of trade, or course of performance. The terms of the lease agreement will be those transmitted and thus found in the writing adopted by the parties as the final expression of their agreement.

LIBRARY REFERENCES

Evidence 384 to 469.

Westlaw Key Number Searches: 157k384 to 157k469.

C.J.S. Evidence Sections 1132 to 1298.

**SECTION 36‑2A‑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.

HISTORY: 2001 Act No. 67, Section 2.

OFFICIAL COMMENT

Uniform Statutory Source: Section 2‑203.

Changes: Revised to reflect leasing practices and terminology.

Definitional Cross References:

|  |  |
| --- | --- |
|  |  |
| “Lease contract” | Section 2A‑103(1)(l). |
| “Writing” | Section 1‑201(46). |

SOUTH CAROLINA REPORTER’S COMMENTS

The South Carolina enactment of the Article 2 source for this section, Section 36‑2‑203, made little practical change in then‑existing law. As noted in Dean Robert W. Foster’s Reporter’s Comments to that section, contracts under seal were given a twenty‑year statute of limitations, while contracts not under seal were given a six‑year statute of limitations. However, Section 2‑725 set a uniform statute of limitations of six years for all transactions governed by Article 2. Additionally, Dean Foster noted that contracts under seal had fallen out of use. Article 2A handles these matters analogously: Section 2A‑506 provides a four‑year statute of limitations for all agreements within the scope of Article 2A. Therefore, as with the Article 2 source, this section will have little effect on South Carolina law.

This provision does not affect the use of corporate and other seals in authenticating signatures. See, e.g., Sections 33‑3‑102(2) and 33‑1‑200(g).

**SECTION 36‑2A‑204.** Formation in general.

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

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

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

HISTORY: 2001 Act No. 67, Section 2.

OFFICIAL COMMENT

Uniform Statutory Source: Section 2‑204.

Changes: Revised to reflect leasing practices and terminology.

Definitional Cross References:

|  |  |
| --- | --- |
|  |  |
| “Agreement” | Section 1‑201(3). |
| “Lease contract” | Section 2A‑103(1)(l). |
| “Party” | Section 1‑201(29). |
| “Remedy” | Section 1‑201(34). |
| “Term” | Section 1‑201(42). |

SOUTH CAROLINA REPORTER’S COMMENTS

The provisions of this section generally follow both pre‑UCC South Carolina common law and the Article 2 provision on which this section is based (Section 36‑2‑204 on formation of contracts for the sale of goods).

Shealy v. Fowler, 182 S.C. 81, 188 S.E. 499 (1936) held that conduct of the parties which recognizes the existence of a contract was sufficient to show acceptance of an offer. Dowling v. Charleston & W.C. Ry. Co., 105 S.C. 475, 81 S.E. 313 (1912), stated that “the law implies a contract between persons where the ordinary course of dealings between them, considered in light of all circumstances, reasonably warrants the inference that they mutually intended to contract.”

However, early South Carolina common law was considerably stricter than the UCC about the definiteness of terms required for enforceability. See McLaurin v. Hamer, 165 S.C. 411, 164 S.E. 2 (1931) (“material terms cannot be left for future settlement”).

ARTICLE 2A lacks the “gap‑filler” provisions found in ARTICLE 2 (see, e.g., Section 36‑2‑305 (open price terms); 36‑2‑306 (output and requirements contracts); 36‑2‑307 (mode of delivery); 36‑2‑308 (place of delivery); 36‑2‑309 (time for performance)).

LIBRARY REFERENCES

Bailment 1 to 5.

Westlaw Key Number Searches: 50k1 to 50k5.

C.J.S. Bailments Sections 2 to 27, 31.

**SECTION 36‑2A‑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 term of assurance on a form supplied by the offeree must be separately signed by the offeror.

HISTORY: 2001 Act No. 67, Section 2.

OFFICIAL COMMENT

Uniform Statutory Source: Section 2‑205.

Changes: Revised to reflect leasing practices and terminology.

Definitional Cross References:

|  |  |
| --- | --- |
|  |  |
| “Goods” | Section 2A‑103(1)(h). |
| “Lease” | Section 2A‑103(1)(j). |
| “Merchant” | Section 2‑104(1). |
| “Person” | Section 1‑201(30). |
| “Reasonable time” | Section 1‑204(1) and (2). |
| “Signed” | Section 1‑201(39). |
| “Term” | Section 1‑201(42). |
| “Writing” | Section 1‑201(46). |

SOUTH CAROLINA REPORTER’S COMMENTS

This section maintains the general position on firm offers found in the statutory source provision, Section 36‑2‑205. Pre‑UCC South Carolina common law held that only an offer supported by additional consideration bound the offeror for the stated period. See Moneyweight Scale Co. v. Gordon Mercantile Co., 102 S.C. 419, 86 S.E. 1060 (1915); Connor v. Renneker, 25 S. C. 514 (1886).

LIBRARY REFERENCES

Bailment 1 to 5.

Westlaw Key Number Searches: 50k1 to 50k5.

C.J.S. Bailments Sections 2 to 27, 31.

**SECTION 36‑2A‑206.** Offer and acceptance in formation of lease contract.

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

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

HISTORY: 2001 Act No. 67, Section 2.

OFFICIAL COMMENT

Uniform Statutory Source: Section 2‑206(1)(a) and (2).

Changes: Revised to reflect leasing practices and terminology.

Definitional Cross References:

|  |  |
| --- | --- |
|  |  |
| “Lease contract” | Section 2A‑103(1)(l). |
| “Notifies” | Section 1‑201(26). |
| “Reasonable time” | Section 1‑204(1) and (2). |

SOUTH CAROLINA REPORTER’S COMMENTS

This section, which applies the provisions of the statutory source ( Section 36‑2‑206) to leases, is consistent with the general South Carolina common law on acceptance of offers to contract. See, e.g., In re Morgan v. Honeycutt, 277 S.C. 150, 283 S.E.2d 444 (1981) (“conduct which manifests assent to the offeror is acceptance”); Fender & Latham, Inc. v. First Union National Bank of South Carolina, 316 S.C. 48, 446 S.E.2d 448 (Ct. App. 1994) ( where there was no enforceable contract between the parties because Fender & Latham did not comply with the unambiguous express conditions required by the offer.); Rowland v. Pruitt, 123 S.C. 244, 116 S.E. 456 (1922) (holding that the mailing of a letter which accepted an order for goods finalized the formation of a contract at the time the letter was mailed).

The provisions of subsection (2) do not necessarily change the common law of South Carolina but they do impose a time limitation on the offeree’s choice between acceptance and rejection of the offer. See Section 36‑2‑206(2) and South Carolina Reporter’s Comments; H.A. Sack Co. v. Forest Beach Public Service District, 272 S.C. 256, 250 S.E.2d 340 (1978) (where the offeror was allowed to revoke his offer due to the offeree’s untimely notification of acceptance). This case also states that “silence ordinarily does not constitute an acceptance,” and would, thus, not be a reasonable medium of acceptance under subsection (1). Id. at ‑‑, 341.

This section deletes a provision from the source provision, Section 36‑2‑206, which allows a seller to treat an order to buy goods for prompt delivery as an invitation to accept by either return promise or by shipment. Leases of goods are rarely, if ever, formed by shipment of the goods; therefore, that provision was omitted in Article 2A. William H. Lawrence and John H. Minan, Law of Personal Property Leasing, 63.02(3)(b)(iii) at 3‑9 (1993).

LIBRARY REFERENCES

Bailment 1 to 5.

Westlaw Key Number Searches: 50k1 to 50k5.

C.J.S. Bailments Sections 2 to 27, 31.

**SECTION 36‑2A‑207.** Repealed by 2014 Act No. 213, Section 46, eff October 1, 2014.

Editor’s Note

Former Section 36‑2A‑207 was titled Course of performance or practical construction and was derived from 2001 Act No. 67, Section 2.

**SECTION 36‑2A‑208.** Modification, rescission and waiver.

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

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

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

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

HISTORY: 2001 Act No. 67, Section 2.

OFFICIAL COMMENT

Uniform Statutory Source: Section 2‑209.

Changes: Revised to reflect leasing practices and terminology, except that the provisions of subsection 2‑209(3) were omitted.

Purposes: Section 2‑209(3) provides that “the requirements of the statute of frauds section of this Article (Section 2‑201) must be satisfied if the contract as modified is within its provisions.” This provision was not incorporated as it is unfair to allow an oral modification to make the entire lease contract unenforceable, e.g. if the modification takes it a few dollars over the dollar limit. At the same time, the problem could not be solved by providing that the lease contract would still be enforceable in its pre‑modification state (if it then satisfied the statute of frauds) since in some cases that might be worse than no enforcement at all. Resolution of the issue is left to the courts based on the facts of each case.

Cross References: Sections 2‑201 and 2‑209.

Definitional Cross References:

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|  |  |
| “Agreement” | Section 1‑201(3). |
| “Between merchants” | Section 2‑104(3). |
| “Lease agreement” | Section 2A‑103(1)(k). |
| “Lease contract” | Section 2A‑103(1)(l). |
| “Merchant” | Section 2‑104(1). |
| “Notification” | Section 1‑201(26). |
| “Party” | Section 1‑201(29). |
| “Signed” | Section 1‑201(39). |
| “Term” | Section 1‑201(42). |
| “Writing” | Section 1‑201(46). |

SOUTH CAROLINA REPORTER’S COMMENTS

Traditional common law required new consideration for an enforceable modification of a contract. The pre‑existing duty rule barred the enforcement of a modification which increased the obligations of one party without a corresponding change in the duties of the other, in the absence of any additional consideration. See Rabon v. State Finance Corp., 283 S.C. 183, 26 S.E.2d 501 (1943); T.H. Colcock & Co. v. Louisville C.&C. Ry. Co., 1 Strob 329 (1847). Article 2A follows the lead of the source provision in Article 2 by abrogating this rule as it applies to lease contracts. The purpose of the abrogation is stated in the Official Comment to Section 36‑2‑309: “This section seeks to protect and make effective all necessary and desirable modifications of...contracts without regard to the technicalities which at present hamper such adjustments.” The Code’s general requirement of good faith applies to the modification of lease contracts as it does to sales contracts in order to prevent abuses of this relaxation of the common law rule. See Section 36‑2‑209, Cmt.2 and the South Carolina Reporter’s Comments; see also William H. Lawrence and John H. Minan, Law of Personal Property Leasing, 63.04(2) at 3‑15 (1993).

Subsection (2) changes the general common law rule permitting oral modification of a written contract, when supported by additional consideration, even where the contract explicitly states that modification may be effected only in writing. See South Carolina National Bank v. Silks, 367 S.E.2d 421 (S.C. App. 1988) and Fass v. South Atlantic Life Ins. Co., 105 S.C. 107, 89 S.E. 558 (1916). Subsection (2) allows the parties to a lease contract to require that modifications or rescissions be in writing.

Subsection (3) provides that even though an attempted modification or rescission fails to meet the requirements of subsection (2), the attempt could nevertheless operate as a waiver. To illustrate the interplay between these two provisions, assume that the contract contains a clause that prohibits oral modifications but the lessee nevertheless requests an oral modification of the rental price terms and subsequently behaves in accordance with this modification. If the lessor does not object but accepts payment on the new terms, the lessee might successfully argue waiver of the contract’s written requirement, even though the modification, standing alone, would be unenforceable. This subsection is consistent with Florence Printing Co. v. Parnell, 178 S.C. 119, 182 S.E. 313 (1934), holding that where a party relied upon an oral extension of time, the contractual deadline had been waived and the party insisting upon it was estopped.

Subsection (4) mirrors its statutory analogue, Section 36‑2‑209(5). Although there are no South Carolina cases on point, this is the rule of the Restatement, Second, of Contracts Section 84(2) (1981).

LIBRARY REFERENCES

Bailment 2, 22.

Westlaw Key Number Search: 50k2; 50k22.

C.J.S. Bailments Sections 5, 14, 16 to 18, 99 to 102.

**SECTION 36‑2A‑209.** Lessee under finance lease as beneficiary of supply contract.

(1) 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.

(2) The extension of the benefit of a supplier’s promises and of warranties to the lessee (Section 36‑2A‑209(1)) does not:

(i) modify the rights and obligations of the parties to the supply contract, whether arising from it or otherwise; or

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

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

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

HISTORY: 2001 Act No. 67, Section 2.

OFFICIAL COMMENT

Uniform Statutory Source: None.

Changes: This section is modeled on former Section 9‑318 (now codified as Sections 9‑404 through 9‑406), the Restatement (Second) of Contracts Section 302‑315 (1981), and leasing practices. See Earman Oil Co. v. Burroughs Corp., 625 F.2d 1291, 1296‑97 (5th Cir. 1980).

Purposes: 1. The function performed by the lessor in a finance lease is extremely limited. Section 2A‑103(1)(g). The lessee looks to the supplier of the goods for warranties and the like or, in some cases as to warranties, to the manufacturer if a warranty made by that person is passed on. That expectation is reflected in subsection (1), which is self‑executing. As a matter of policy, the operation of this provision may not be excluded, modified or limited; however, an exclusion, modification, or limitation of any term of the supply contract or warranty, including any with respect to rights and remedies, and any defense or claim such as a statute of limitations, effective against the lessor as the acquiring party under the supply contract, is also effective against the lessee as the beneficiary designated under this provision. For example, the supplier is not precluded from excluding or modifying an express or implied warranty under a supply contract. Sections 2‑312(2) and 2‑316, or Section 2A‑214. Further, the supplier is not precluded from limiting the rights and remedies of the lessor and from liquidating damages. Sections 2‑718 and 2‑719 or Sections 2A‑503 and 2A‑504. If the supply contract excludes or modifies warranties, limits remedies , or liquidates damages with respect to the lessor, such provisions are enforceable against the lessee as beneficiary. Thus, only selective discrimination against the beneficiaries designated under this section is precluded, i.e., exclusion of the supplier’s liability to the lessee with respect to warranties made to the lessor. This section does not affect the development of other law with respect to products liability.

2. Enforcement of this benefit is by action. Sections 2A‑103(4) and 1‑106(2).

3. The benefit extended by these provisions is not without a price, as this Article also provides in the case of a finance lease that is not a consumer lease that the lessee’s promises to the lessor under the lease contract become irrevocable and independent upon the lessee’s acceptance of the goods. Section 2A‑407.

4. Subsection (2) limits the effect of subsection (1) on the supplier and the lessor by preserving, notwithstanding the transfer of the benefits of the supply contract to the lessee, all of the supplier’s and the lessor’s rights and obligations with respect to each other and others; it further absolves the lessee of any duties with respect to the supply contract that might have been inferred from the extension of the benefits thereof.

5. Subsections (2) and (3) also deal with difficult issues related to modification or rescission of the supply contract. Subsection (2) states a rule that determines the impact of the statutory extension of benefit contained in subsection (1) upon the relationship of the parties to the supply contract and, in a limited respect, upon the lessee. This statutory extension of benefit, like that contained in Sections 2A‑216 and 2‑318, is not a modification of the supply contract by the parties. Thus, subsection ( 3) states the rules that apply to a modification or rescission of the supply contract by the parties. Subsection (3) provides that a modification or rescission is not effective between the supplier and the lessee if, before the modification or rescission occurs, the supplier received notice that the lessee has entered into the finance lease. On the other hand, if the modification or rescission is effective, then to the extent of the modification or rescission of the benefit or warranty, the lessor by statutory dictate assumes an obligation to provide to the lessee that which the lessee would otherwise lose. For example, assume a reduction in an express warranty from four years to one year. No prejudice to the lessee may occur if the goods perform as agreed. If, however, there is a breach of the express warranty after one year and before four years pass, the lessor is liable. A remedy for any prejudice to the lessee because of the bifurcation of the lessee’s recourse resulting from the action of the supplier and the lessor is left to resolution by the courts based on the facts of each case.

6. Subsection (4) makes it clear that the rights granted to the lessee by this section do not displace any rights the lessee otherwise may have against the supplier.

Cross References: Sections 2A‑103(1)(g), 2A‑407, 9‑404, 9‑405 and 9‑406.

Definitional Cross References:

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|  |  |
| “Action” | Section 1‑201(1). |
| “Finance lease” | Section 2A‑103(1)(g). |
| “Leasehold interest” | Section 2A‑103(1)(m). |
| “Lessee” | Section 2A‑103(1)(n). |
| “Lessor” | Section 2A‑103(1)(p). |
| “Notice” | Section 1‑201(25). |
| “Party” | Section 1‑201(29). |
| “Rights” | Section 1‑201(36). |
| “Supplier” | Section 2A‑103(1)(x). |
| “Supply contract” | Section 2A‑103(1)(y). |
| “Term” | Section 1‑201(42). |

SOUTH CAROLINA REPORTER’S COMMENTS

This section, although dealing with a type of transaction that has not been the subject of specific provisions in South Carolina law, makes no essential changes in the results that would have been reached under the common law and Section 36‑9‑318, which codified the common law rights of an assignee when defenses have arisen or modification has occurred between the parties to the underlying contract. This section recognizes that a lessee under a finance lease is the intended beneficiary of the supplier’s promises and all warranties to the lessor, but that the lessee has no obligations under the supply contract. In drawing on both Section 36‑9‑318 and the provisions of Restatement (Second) of Contracts Section 302‑315 (1981), this section seemingly incorporates two separate theories for purposes of overcoming the lack of privity: the Article 9 provision on assignment and the Restatement provisions on the third party beneficiary theory. See Note, Finance Lease, Hell or High Water Clause, and Third Party Beneficiary Theory in Article 2A of the Uniform Commercial Code, 77 Cornell L. Rev. 318 (1992), suggesting that this section relies primarily on third party beneficiary theory under the Restatement (Second) of Contracts, rather than the assignment theory under Section 9‑318. This section follows the common law rule, and rejects the inconsistent provision in Section 36‑9‑318(2) that makes any good faith, commercially reasonable modification effective against a non‑consenting assignee. Once the supplier has been notified that the finance lease has been entered into, modification of the supply contract by the lessor and supplier does not affect the rights of the non‑consenting lessee; The effect is that of a self‑executing assignment of warranties. Prior to that notification to the supplier, the lessee’s rights against the supplier may be modified by agreement of the supplier and lessor, but the lessor assumes the obligations from which the supplier has been released.

LIBRARY REFERENCES

Bailment 21.

Westlaw Key Number Search: 50k21.

C.J.S. Bailments Sections 93 to 98.

**SECTION 36‑2A‑210.** Express warranties.

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

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

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

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

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

HISTORY: 2001 Act No. 67, Section 2.

OFFICIAL COMMENT

Uniform Statutory Source: Section 2‑313.

Changes: Revised to reflect leasing practices and terminology.

Purposes: All of the express and implied warranties of the Article on Sales (Article 2) are included in this Article, revised to reflect the differences between a sale of goods and a lease of goods. Sections 2A‑210 through 2A‑216. The lease of goods is sufficiently similar to the sale of goods to justify this decision. Hawkland, The Impact of the Uniform Commercial Code on Equipment Leasing, 1972 Ill. L.F. 446, 459‑60. Many state and federal courts have reached the same conclusion.

Value of the goods, as used in subsection (2), includes rental value.

Cross References: Article 2, esp. Section 2‑313, and Sections 2A‑210 through 2A‑216.

Definitional Cross References:

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|  |  |
| “Conforming” | Section 2A‑103(1)(d). |
| “Goods” | Section 2A‑103(1)(h). |
| “Lessee” | Section 2A‑103(1)(n). |
| “Lessor” | Section 2A‑103(1)(p). |
| “Value” | Section 1‑201(44). |

SOUTH CAROLINA REPORTER’S COMMENTS

This section makes no change in existing South Carolina law. See generally C. Ray Miles Construction Co. v. Weaver, 296 S.C. 466, 373 S.E.2d 905 (Ct. App. 1988), in which the court held that the common law warranties that applied to leases of personal property were the implied warranties of quality and of fitness for a purpose known to the lessor, as well as any express warranties included by the lessor and lessee in the lease contract.

LIBRARY REFERENCES

Bailment 9.

Westlaw Key Number Search: 50k9.

C.J.S. Bailments Sections 37 to 45.

**SECTION 36‑2A‑211.** Warranties against interference and against infringement; lessee ‘ s obligation against infringement.

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

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

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

HISTORY: 2001 Act No. 67, Section 2.

OFFICIAL COMMENT

Uniform Statutory Source: Section 2‑312.

Changes: This section is modeled on the provisions of Section 2‑312, with modifications to reflect the limited interest transferred by a lease contract and the total interest transferred by a sale. Section 2‑312(2), which is omitted here, is incorporated in Section 2A‑214. The warranty of quiet possession was abolished with respect to sales of goods. Section 2‑312 Official Comment 1. Section 2A‑211(1) reinstates the warranty of quiet possession with respect to leases. Inherent in the nature of the limited interest transferred by the lease—the right to possession and use of the goods—is the need of the lessee for protection greater than that afforded to the buyer. Since the scope of the protection is limited to claims or interests that arose from acts or omissions of the lessor, the lessor will be in position to evaluate the potential cost, certainly a far better position than that enjoyed by the lessee. Further, to the extent the market will allow, the lessor can attempt to pass on the anticipated additional cost to the lessee in the guise of higher rent.

Purposes: General language was chosen for subsection (1) that expresses the essence of the lessee’s expectation: with an exception for infringement and the like, no person holding a claim or interest that arose from an act or omission of the lessor will be able to interfere with the lessee’s use and enjoyment of the goods for the lease term. Subsection (2), like other similar provisions in later sections, excludes the finance lessor from extending this warranty; with few exceptions (Sections 2A‑210 and 2A‑211(1)), the lessee under a finance lease is to look to the supplier for warranties and the like or, in some cases as to warranties, to the manufacturer if a warranty made by that person is passed on. Subsections (2) and (3) are derived from Section 2‑312(3). These subsections, as well as the analogue, should be construed so that applicable principles of law and equity supplement their provisions. Sections 2A‑103(4) and 1‑103.

Cross References: Sections 2‑312, 2‑312(1), 2‑312(2), 2‑312 Official Comment 1, 2A‑210, 2A‑211(1) and 2A‑214.

Definitional Cross References:

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|  |  |
| “Delivery” | Section 1‑201(14). |
| “Finance lease” | Section 2A‑103(1)(g). |
| “Goods” | Section 2A‑103(1)(h). |
| “Lease” | Section 2A‑103(1)(j). |
| “Lease contract” | Section 2A‑103(1)(l). |
| “Leasehold interest” | Section 2A‑103(1)(m). |
| “Lessee” | Section 2A‑103(1)(n). |
| “Lessor” | Section 2A‑103(1)(p). |
| “Merchant” | Section 2‑104(1). |
| “Person” | Section 1‑201(30). |
| “Supplier” | Section 2A‑103(1)(x). |

SOUTH CAROLINA REPORTER’S COMMENTS

This section is similar to Section 36‑2‑312 except that it provides for an implied warranty of quiet possession in a lease of personal property instead of the warranty of title that is created by a sale. It is uncertain whether the warranty of quiet possession previously applied to leases in South Carolina, although the adoption of the Uniform Commercial Code, Section 36‑2‑312, in South Carolina eliminated it as a separate warranty in sales of goods.

LIBRARY REFERENCES

Bailment 9.

Westlaw Key Number Search: 50k9.

C.J.S. Bailments Sections 37 to 45.

**SECTION 36‑2A‑212.** Implied warranty of merchantability.

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

(2) Goods to be merchantable must at least:

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

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

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

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

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

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

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

HISTORY: 2001 Act No. 67, Section 2.

OFFICIAL COMMENT

Uniform Statutory Source: Section 2‑314.

Changes: Revised to reflect leasing practices and terminology. E.g., Glenn Dick Equip. Co. v. Galey Constr., Inc., 97 Idaho 216, 225, 541 P.2d 1184, 1193 (1975) (implied warranty of merchantability (Article 2) extends to lease transactions).

Definitional Cross References:

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| “Conforming” | Section 2A‑103(1)(d). |
| “Course of dealing” | Section 1‑205. |
| “Finance lease” | Section 2A‑103(1)(g). |
| “Fungible” | Section 1‑201(17). |
| “Goods” | Section 2A‑103(1)(h). |
| “Lease agreement” | Section 2A‑103(1)(k). |
| “Lease contract” | Section 2A‑103(1)(l). |
| “Lessor” | Section 2A‑103(1)(p). |
| “Merchant” | Section 2‑104(1). |
| “Usage of trade” | Section 1‑205. |

SOUTH CAROLINA REPORTER’S COMMENTS

This section makes no substantive changes in South Carolina law. For an excellent discussion on the history of the implied warranties of “quality” or “soundness” (the “common law precursor to the implied warranty of merchantability provided by the Uniform Commercial Code”) and “fitness for a purpose known to the lessor” in South Carolina and their application to personal property leases, see C. Ray Miles Construction Co. v. Weaver, 296 S.C. 466, 373 S.E.2d 905 (Ct. App. 1988).

Although implied warranties have most frequently been found in contracts for sale, at least one early case specifically recognized the applicability of these warranties to contracts for the lease of personal property. See Colcock v. Goode, 14 S.C.L. (3 McCord) 513 (1826). For an earlier discussion of the common law warranty of soundness, see Timrod v. Shoolbred, 1 S.C.L. (1 Bay) 324 (1793) (“This warranty extends to all faults, known and unknown to the seller; and although, in general, it principally relates to title and qualifications, and not to longevity, yet, in some cases, it ought to be construed to extend to the latter.” Id. at 326 (emphasis in original)).

The issue of the merchantability of the leased goods is a question properly determinable by the trier of fact. Seaside Resorts, Inc. v. Club Car, Inc., 308 S.C. 47, 416 S.E.2d 655 (Ct. App. 1992). Where the ordinary and intended purpose of the product is also the particular purpose for which the product is leased, the warranties of merchantability and of fitness for a particular purpose “merge and are cumulative, such that a plaintiff may proceed upon either theory.” Soaper v. Hope Industries, Inc., 309 S.C. 438, 424 S.E.2d 493 (1992).

LIBRARY REFERENCES

Bailment 9.

Westlaw Key Number Search: 50k9.

C.J.S. Bailments Sections 37 to 45.

**SECTION 36‑2A‑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.

HISTORY: 2001 Act No. 67, Section 2.

OFFICIAL COMMENT

Uniform Statutory Source: Section 2‑315.

Changes: Revised to reflect leasing practices and terminology. E.g., All‑States Leasing Co. v. Bass, 96 Idaho 873, 879, 538 P.2d 1177, 1183 ( 1975) (implied warranty of fitness for a particular purpose (Article 2) extends to lease transactions).

Definitional Cross References:

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|  |  |
| “Finance lease” | Section 2A‑103(1)(g). |
| “Goods” | Section 2A‑103(1)(h). |
| “Knows” | Section 1‑201(25). |
| “Lease contract” | Section 2A‑103(1)(l). |
| “Lessee” | Section 2A‑103(1)(n). |
| “Lessor” | Section 2A‑103(1)(p). |

SOUTH CAROLINA REPORTER’S COMMENTS

The common law of South Carolina has long implied in a contract of sale a warranty of fitness for a purpose known to the vendor. See Walker, Evans & Cogswell Co. v. Ayer, 80 S.C. 292, 61 S.E. 557 (1908). Subsequent cases fleshed out this warranty. See Liquid Carbonic Co. v. Coclin, 161 S.C. 40, 159 S.E. 461, 463 (1931) (“In the absence of an express warranty or a nonwarranty clause, the law will imply a warranty that the article sold is fit and suitable for the purpose for which it is bought and for which a sound price is paid.”) See also Reliance Varnish Co. v. Mullins Lumber Co., 213 S.C. 84, 97, 48 S.E.2d 653, 659 (1948) (“There was an implied warranty that the materials sold were reasonably adapted to the purpose for which they were, with the knowledge of the (seller), purchased by (the buyer).”). Where the particular purpose for which the product is leased is also the ordinary purpose for the product, the warranties of merchantability and of fitness for a particular purpose “merge and are cumulative, such that a plaintiff may proceed upon either theory.” Soaper v. Hope Industries, Inc., 309 S.C. 438, 424 S.E.2d 493 (1992).

LIBRARY REFERENCES

Bailment 9.

Westlaw Key Number Search: 50k9.

C.J.S. Bailments Sections 37 to 45.

**SECTION 36‑2A‑214.** Exclusion or modification of warranties.

(1) If the agreement creates an express warranty, words disclaiming it are inoperative.

(2) Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it, the language must mention “merchantability’, be in writing, and be conspicuous. Subject to subsection (3) , to exclude or modify any implied warranty of fitness, the exclusion must be in writing and be conspicuous. Language to exclude all implied warranties of fitness is sufficient if it is in writing, is conspicuous, and states, for example, “There is no warranty that the goods will be fit for a particular purpose’.

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

(a) unless the circumstances indicate otherwise, all implied warranties are excluded by specific language that in common understanding calls the lessee’s attention to the exclusion of warranties and makes plain that there is no implied warranty, if in writing and conspicuous;

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

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

(4) To exclude or modify a warranty against interference or against infringement (Section 2A‑211) or any part of it, the language must be specific, be in 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.

HISTORY: 2001 Act No. 67, Section 2.

OFFICIAL COMMENT

Uniform Statutory Source: Sections 2‑316 and 2‑312(2).

Changes: Subsection (2) requires that a disclaimer of the warranty of merchantability be conspicuous and in writing as is the case for a disclaimer of the warranty of fitness; this is contrary to the rule stated in Section 2‑316(2) with respect to the disclaimer of the warranty of merchantability. This section also provides that to exclude or modify the implied warranty of merchantability, fitness or against interference or infringement the language must be in writing and conspicuous. There are, however, exceptions to the rule. E.g., course of dealing, course of performance, or usage of trade may exclude or modify an implied warranty. Section 2A‑214(3)(c). The analogue of Section 2‑312(2) has been moved to subsection (4) of this section for a more unified treatment of disclaimers; there is no policy with respect to leases of goods that would justify continuing certain distinctions found in the Article on Sales (Article 2) regarding the treatment of the disclaimer of various warranties. Compare Sections 2‑312(2) and 2‑316(2). Finally, the example of a disclaimer of the implied warranty of fitness stated in subsection (2) differs from the analogue stated in Section 2‑316(2); this example should promote a better understanding of the effect of the disclaimer.

Purposes: These changes were made to reflect leasing practices. E.g., FMC Finance Corp. v. Murphree, 632 F.2d 413, 418 (5th Cir. 1980) ( disclaimer of implied warranty under lease transactions must be conspicuous and in writing). The omission of the provisions of Section 2‑316(4) was not substantive. Sections 2A‑503 and 2A‑504.

Cross References:

ARTICLE 2, esp. Sections 2‑312(2) and 2‑316, and Sections 2A‑503 and 2A‑504.

Definitional Cross References:

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| “Conspicuous” | Section 1‑201(10). |
| “Course of dealing” | Section 1‑205. |
| “Fault” | Section 2A‑103(1)(f). |
| “Goods” | Section 2A‑103(1)(h). |
| “Knows” | Section 1‑201(25). |
| “Lease” | Section 2A‑103(1)(j). |
| “Lease contract” | Section 2A‑103(1)(l). |
| “Lessee” | Section 2A‑103(1)(n). |
| “Person” | Section 1‑201(30). |
| “Usage of trade” | Section 1‑205. |
| “Writing” | Section 1‑201(46). |

SOUTH CAROLINA REPORTER’S COMMENTS

This section is not a uniform enactment of the official version of 2A‑214, but instead was modified to parallel the non‑uniform variations of S. C. Code Ann. Section 36‑2‑316. The language of the official version of 2A‑214(1) is substantially similar to the language of the official (1962) version of its statutory analogue, UCC Section 2‑316(1). However, upon adoption in South Carolina that language was modified to use the language of the 1954 draft of the UCC: “If the agreement creates an express warranty words disclaiming it are inoperative.” S.C. Code Ann. Section 36‑2‑316(1). Subsection (1) of this provision contains identical language, conforming South Carolina’s enactment of Article 2A to its version of Article 2.

Similarly, subsection (3)(a) of the official version differs from its analogue as adopted in South Carolina, S.C. Code Ann. Section 36‑2‑316(3)(a), which does not contain the specific references to “as is” or “with all faults” that are found in UCC Section 2‑316(3)( a). These references have similarly been deleted from the South Carolina enactment of Section 36‑2A‑214(3)(a).

The remaining subsections of 2A‑214 make little change in South Carolina law but merely group together the various provisions of Sections 2‑316 and 2‑312(2), and extend those provisions to lease agreements.

LIBRARY REFERENCES

Bailment 9.

Westlaw Key Number Search: 50k9.

C.J.S. Bailments Sections 37 to 45.

**SECTION 36‑2A‑215.** Cumulation and conflict of warranties express or implied.

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

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

(b) A sample from an existing bulk displaces inconsistent general language of description.

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

HISTORY: 2001 Act No. 67, Section 2.

OFFICIAL COMMENT

Uniform Statutory Source: Section 2‑317.

Definitional Cross References:

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| --- | --- |
|  |  |
| “Party” | Section 1‑201(29). |

SOUTH CAROLINA REPORTER’S COMMENTS

Although there are no reported South Carolina cases on cumulation and conflict of express and implied warranties in leases of personal property, this section, like its statutory source, Section 36‑2‑317, is in accord with the approach of South Carolina courts when confronted with such issues generally and thus this section appears to make no change in South Carolina law, but merely extends the provisions of Section 36‑2‑317 to lease transactions. See generally South Carolina Reporter’s Comments to S.C. Code Ann. Section 36‑2‑317.

LIBRARY REFERENCES

Bailment 9.

Westlaw Key Number Search: 50k9.

C.J.S. Bailments Sections 37 to 45.

**SECTION 36‑2A‑216.** Third‑party beneficiaries of express and implied warranties.

A warranty to or for the benefit of a lessee under this chapter, whether express or implied, extends to any natural person who may reasonably be expected to use, consume, or be affected by the goods and who is injured in person by breach of the warranty. This section does not displace principles of law and equity that extend a warranty to or for the benefit of a lessee to other persons. The operation of this section may not be excluded, modified, or limited, but an exclusion, modification, or limitation of the warranty, including any with respect to rights and remedies, effective against the lessee is also effective against the beneficiary designated under this section.

HISTORY: 2001 Act No. 67, Section 2.

OFFICIAL COMMENT

Uniform Statutory Source: Section 2‑318.

Changes: The provisions of Section 2‑318 have been included in this section, modified in two respects: first, to reflect leasing practice, including the special practices of the lessor under a finance lease; second, to reflect and thus codify elements of the Official Comment to Section 2‑318 with respect to the effect of disclaimers and limitations of remedies against third parties.

Purposes: This section is based on later additions to Section 2‑318 and is more favorable to the injured person.

The last sentence does not preclude the lessor from excluding or modifying an express or implied warranty under a lease. Section 2A‑214. Further, that sentence does not preclude the lessor from limiting the rights and remedies of the lessee and from liquidating damages. Sections 2A‑503 and 2A‑504. If the lease excludes or modifies warranties, limits remedies for breach, or liquidates damages with respect to the lessee, such provisions are enforceable against the beneficiaries designated under this section. However, this last sentence forbids selective discrimination against the beneficiaries designated under this section, i.e., exclusion of the lessor’s liability to the beneficiaries with respect to warranties made by the lessor to the lessee.

Other law, including the Article on Sales (Article 2), may apply in determining the extent to which a warranty to or for the benefit of the lessor extends to the lessee and third parties. This is in part a function of whether the lessor has bought or leased the goods.

This Article does not purport to change the development of the relationship of the common law, with respect to products liability, including strict liability in tort (as restated in Restatement (Second) of Torts, 402A (1965)), to the provisions of this Act. Compare Cline v. Prowler Indus. of Maryland, 418 A.2d 968 (Del. 1980) and Hawkins Constr. Co. v. Matthews Co., 190 Neb. 546, 209 N.W.2d 643 (1973) with Dippel v. Sciano, 37 Wis. 2d 443, 155 N.W.2d 55 (1967).

Cross References: Article 2, esp. Section 2‑318, and Sections 2A‑214, 2A‑503 and 2A‑504.

Definitional Cross References:

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| --- | --- |
|  |  |
| “Goods” | Section 2A‑103(1)(h). |
| “Lessee” | Section 2A‑103(1)(n). |
| “Person” | Section 1‑201(30). |
| “Remedy” | Section 1‑201(34). |
| “Rights” | Section 1‑201(36). |

SOUTH CAROLINA REPORTER’S COMMENTS

The Commissioners on Uniform State Laws provided three alternative versions of this section, as had been done for the analogous provision in Article 2, Section 2‑318. In enacting the Uniform Commercial Code, the South Carolina General Assembly chose the middle ground, Alternative B, for Section 36‑2‑318 but modified it to provide liability for injury to property of a natural person in addition to personal injury. Subsequently, in JKT Co. v. Hardwick, 274 S.C. 413, 265 S.E.2d 510 (1980), the Supreme Court held that the statutory protection of natural persons in Section 36‑2‑318 did not inhibit the developing case law abolishing the requirement of privity in South Carolina:

South Carolina is in the vanguard in permitting a plaintiff to recover economic loss from a seller with whom he did not deal and who made no express warranties to him. . . . We can perceive no valid reason why we should erect an artificial line distinguishing between consumer plaintiffs and corporate plaintiffs on the issue of privity. It would be patently unfair to allow a manufacturer of a defective product to escape liability via privity when the plaintiff is an individual, so it is unfair to disallow recovery when a corporation brings suit. There is no justifiable reason why an innocent corporate consumer should be denied recovery when a manufacturer places an defective article into commerce. The same rule should apply to corporate transactions as to consumer purchases.

This section adopts Alternative C of the Official Text, because that version most closely parallels South Carolina sales law after JKT Company. Thus South Carolina sales and lease law provide similar rights for third parties injured by sold or leased goods. In addition, if the goods were leased under a finance lease, the third person who has been injured, in person or property, may be able to claim under the supplier’s warranties using Section 36‑2‑318 rather than Section 36‑2A‑216.

LIBRARY REFERENCES

Bailment 9, 21.

Westlaw Key Number Search: 50k9; 50k21.

C.J.S. Bailments Sections 37 to 45, 93 to 98.

**SECTION 36‑2A‑217.** Identification.

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

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

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

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

HISTORY: 2001 Act No. 67, Section 2.

OFFICIAL COMMENT

Uniform Statutory Source: Section 2‑501.

Changes: This section, together with Section 2A‑218, is derived from the provisions of Section 2‑501, with changes to reflect lease terminology; however, this section omits as irrelevant to leasing practice the treatment of special property.

Purposes: With respect to subsection (b) there is a certain amount of ambiguity in the reference to when goods are designated, e.g., when the lessor is both selling and leasing goods to the same lessee/buyer and has marked goods for delivery but has not distinguished between those related to the lease contract and those related to the sales contract. As in Section 2‑501(1)(b), this issue has been left to be resolved by the courts, case by case.

Cross References: Sections 2‑501 and 2A‑218.

Definitional Cross References:

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|  |  |
| “Agreement” | Section 1‑201(3). |
| “Goods” | Section 2A‑103(1)(h). |
| “Lease” | Section 2A‑103(1)(j). |
| “Lease contract” | Section 2A‑103(1)(l). |
| “Lessor” | Section 2A‑103(1)(p). |
| “Party” | Section 1‑201(29). |

SOUTH CAROLINA REPORTER’S COMMENTS

This section makes no change in existing South Carolina law, but merely adapts the analogous rule in Article 2 to lease transactions within the scope of this Article.

LIBRARY REFERENCES

Bailment 4.

Westlaw Key Number Search: 50k4.

C.J.S. Bailments Section 20.

**SECTION 36‑2A‑218.** Insurance and proceeds.

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

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

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

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

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

HISTORY: 2001 Act No. 67, Section 2.

OFFICIAL COMMENT

Uniform Statutory Source: Section 2‑501.

Changes: This section, together with Section 2A‑217, is derived from the provisions of Section 2‑501, with changes and additions to reflect leasing practices and terminology.

Purposes: Subsection (2) states a rule allowing substitution of goods by the lessor under certain circumstances, until default or insolvency of the lessor, or until notification to the lessee that identification is final. Subsection (3) states a rule regarding the lessor’s insurable interest that, by virtue of the difference between a sale and a lease, necessarily is different from the rule stated in Section 2‑501(2) regarding the seller’s insurable interest. For this purpose the option to buy shall be deemed to have been exercised by the lessee when the resulting sale is closed, not when the lessee gives notice to the lessor. Further, subsection (5) is new and reflects the common practice of shifting the responsibility and cost of insuring the goods between the parties to the lease transaction.

Cross References: Sections 2‑501, 2‑501(2) and 2A‑217.

Definitional Cross References:

|  |  |
| --- | --- |
|  |  |
| “Agreement” | Section 1‑201(3). |
| “Buying” | Section 2A‑103(1)(a). |
| “Conforming” | Section 2A‑103(1)(d). |
| “Goods” | Section 2A‑103(1)(h). |
| “Insolvent” | Section 1‑201(23). |
| “Lease contract” | Section 2A‑103(1)(l). |
| “Lessee” | Section 2A‑103(1)(n). |
| “Lessor” | Section 2A‑103(1)(p). |
| “Notification” | Section 1‑201(26). |
| “Party” | Section 1‑201(29). |

SOUTH CAROLINA REPORTER’S COMMENTS

Although there are no South Carolina cases directly on point, this section closely tracks the language of its statutory analogue and should make no significant change in South Carolina law. Subsection (5), however, has no statutory source; it is new to the UCC. As the Official Comment to this section indicates, its rule is seen by the drafters of this Article as a mere codification of currently existing transactional practice.

Similar results were reached at common law before the adoption of the Uniform Commercial Code. With respect to subsection (1), see John Frazer & Co. v. Hilliard, 2 Strob 309 (1848). With respect to subsection (3) (the retention by the lessor of an insurable interest), see Geiger v. Ashley, 185 S.C. 71, 193 S.E. 192 (1937), where a mortgagee was held to retain an insurable interest in the property which was separate from the mortgagor’s insurable interest.

LIBRARY REFERENCES

Bailment 7, 14.

Insurance 2136, 3443.

Westlaw Key Number Search: 50k7; 50k14; 217k2136; 217k3443.

C.J.S. Bailments Sections 28 to 29, 31 to 33, 56 to 68.

C.J.S. Insurance Sections 414 to 416, 1393, 1396.

**SECTION 36‑2A‑219.** Risk of loss.

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

(2) Subject to the provisions of this chapter on the effect of default on risk of loss (Section 36‑2A‑220), if risk of loss is to pass to the lessee and the time of passage is not stated, the following rules apply:

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

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

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

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

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

HISTORY: 2001 Act No. 67, Section 2.

OFFICIAL COMMENT

Uniform Statutory Source: Section 2‑509(1) through (3).

Changes: Subsection (1) is new. The introduction to subsection (2) is new, but subparagraph (a) incorporates the provisions of Section 2‑509(1); subparagraph (b) incorporates the provisions of Section 2‑509(2) only in part, reflecting current practice in lease transactions.

Purposes: Subsection (1) states rules related to retention or passage of risk of loss consistent with current practice in lease transactions. The provisions of subsection (4) of Section 2‑509 are not incorporated as they are not necessary. This section does not deal with responsibility for loss caused by the wrongful act of either the lessor or the lessee.

Cross References: Sections 2‑509(1), 2‑509(2) and 2‑509(4).

Definitional Cross References:

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| --- | --- |
|  |  |
| “Delivery” | Section 1‑201(14). |
| “Finance lease” | Section 2A‑103(1)(g). |
| “Goods” | Section 2A‑103(1)(h). |
| “Lease contract” | Section 2A‑103(1)(l). |
| “Lessee” | Section 2A‑103(1)(n). |
| “Lessor” | Section 2A‑103(1)(p). |
| “Merchant” | Section 2‑104(1). |
| “Receipt” | Section 2‑103(1)(c). |
| “Rights” | Section 1‑201(36). |
| “Supplier” | Section 2A‑103(1)(x). |

SOUTH CAROLINA REPORTER’S COMMENTS

There are no South Carolina cases on point. This section adapts and extends the rule of the statutory source, Section 36‑2‑509, to lease transactions.

LIBRARY REFERENCES

Bailment 14.

Westlaw Key Number Search: 50k14.

C.J.S. Bailments Sections 32 to 33, 56 to 68.

**SECTION 36‑2A‑220.** Effect of default on risk of loss.

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

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

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

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

HISTORY: 2001 Act No. 67, Section 2.

OFFICIAL COMMENT

Uniform Statutory Source: Section 2‑510.

Changes: Revised to reflect leasing practices and terminology. The rule in Section (1)(b) does not allow the lessee under a finance lease to treat the risk of loss as having remained with the supplier from the beginning. This is appropriate given the limited circumstances under which the lessee under a finance lease is allowed to revoke acceptance. Section 2A‑517 and Section 2A‑516 Official Comment.

Definitional Cross References:

|  |  |
| --- | --- |
|  |  |
| “Conforming” | Section 2A‑103(1)(d). |
| “Delivery” | Section 1‑201(14). |
| “Finance lease” | Section 2A‑103(1)(g). |
| “Goods” | Section 2A‑103(1)(h). |
| “Lease contract” | Section 2A‑103(1)(l). |
| “Lessee” | Section 2A‑103(1)(n). |
| “Lessor” | Section 2A‑103(1)(p). |
| “Reasonable time” | Section 1‑204(1) and (2). |
| “Rights” | Section 1‑201(36). |
| “Supplier” | Section 2A‑103(1)(x). |

SOUTH CAROLINA REPORTER’S COMMENTS

There are no South Carolina cases dealing with the effect of default by a party to a lease transaction on the allocation of the risk of loss. This section merely extends the rule of the statutory source, Section 36‑2‑510, to lease transactions.

LIBRARY REFERENCES

Bailment 14.

Westlaw Key Number Search: 50k14.

C.J.S. Bailments Sections 32 to 33, 56 to 68.

**SECTION 36‑2A‑221.** Casualty to identified goods.

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

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

(b) if the loss is partial or the goods have so deteriorated as to no longer conform to the lease contract, the lessee may nevertheless demand inspection and at his 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.

HISTORY: 2001 Act No. 67, Section 2.

OFFICIAL COMMENT

Uniform Statutory Source: Section 2‑613.

Changes: Revised to reflect leasing practices and terminology.

Purposes: Due to the vagaries of determining the amount of due allowance (Section 2‑613(b)), no attempt was made in subsection (b) to treat a problem unique to lease contracts and installment sales contracts: determining how to recapture the allowance, e.g., application to the first or last rent payments or allocation, pro rata, to all rent payments.

Cross References: Section 2‑613.

Definitional Cross References:

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| --- | --- |
|  |  |
| “Conforming” | Section 2A‑103(1)(d). |
| “Consumer lease” | Section 2A‑103(1)(e). |
| “Delivery” | Section 1‑201(14). |
| “Fault” | Section 2A‑103(1)(f). |
| “Finance lease” | Section 2A‑103(1)(g). |
| “Goods” | Section 2A‑103(1)(h). |
| “Lease” | Section 2A‑103(1)(j). |
| “Lease agreement” | Section 2A‑103(1)(k). |
| “Lease contract” | Section 2A‑103(1)(l). |
| “Lessee” | Section 2A‑103(1)(n). |
| “Lessor” | Section 2A‑103(1)(p). |
| “Rights” | Section 1‑201(36). |
| “Supplier” | Section 2A‑103(1)(x). |

SOUTH CAROLINA REPORTER’S COMMENTS

This section extends the rule of Section 36‑2‑613 to lease transactions. The determination of due allowance is likely to require case‑by‑case analysis, as suggested by the Official Comment to this section.

LIBRARY REFERENCES

Bailment 14.

Westlaw Key Number Search: 50k14.

C.J.S. Bailments Sections 32 to 33, 56 to 68.

Part 3

Effect of Lease Contract

**SECTION 36‑2A‑301.** Enforceability of lease contract.

Except as otherwise provided in this chapter, 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.

HISTORY: 2001 Act No. 67, Section 2.

OFFICIAL COMMENT

Uniform Statutory Source: Former Section 9‑201 (now codified as Section 9‑201).

Changes: The first sentence of former Section 9‑201 was incorporated, modified to reflect leasing terminology. The second sentence of former Section 9‑201 was eliminated as not relevant to leasing practices.

Purposes: 1. This section establishes a general rule regarding the validity and enforceability of a lease contract. The lease contract is effective and enforceable between the parties and against third parties. Exceptions to this general rule arise where there is a specific rule to the contrary in this Article. Enforceability is, thus, dependent upon the lease contract meeting the requirements of the Statute of Frauds provisions of Section 2A‑201. Enforceability is also a function of the lease contract conforming to the principles of construction and interpretation contained in the Article on General Provisions (Article 1). Section 2A‑103(4).

2. The effectiveness or enforceability of the lease contract is not dependent upon the lease contract or any financing statement or the like being filed or recorded; however, the priority of the interest of a lessor of fixtures with respect to the interests of certain third parties in such fixtures is subject to the provisions of the Article on Secured Transactions (Article 9). Section 2A‑309. Prior to the adoption of this Article filing or recording was not required with respect to leases, only leases intended as security. The definition of security interest, as amended concurrently with the adoption of this Article, more clearly delineates leases and leases intended as security and thus signals the need to file. Section 1‑201(37). Those lessors who are concerned about whether the transaction creates a lease or a security interest will continue to file a protective financing statement. Section 9‑505. Coogan, Leasing and the Uniform Commercial Code, in Equipment Leasing‑Leveraged Leasing 681, 744‑46 (2d ed. 1980).

Cross References: Article 1, especially Section 1‑201(37), and Sections 2‑104(1), 2A‑103(1)(j), 2A‑103(1)(l), 2A‑103(1)(n), 2A‑103(1)(o) and 2A‑103(1)(w), 2A‑103(3), 2A‑103(4), 2A‑201, 2A‑301 through 2A‑303, 2A‑303(2), 2A‑303(5), 2A‑304 through 2A‑307, 2A‑307(1), 2A‑307(2)(a), 2A‑308 through 2A‑311, 2A‑508, 2A‑511(4), 2A‑523, Article 9, especially Sections 9‑201 and 9‑505.

Definitional Cross References:

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| --- | --- |
|  |  |
| “Creditor” | Section 1‑201(12). |
| “Goods” | Section 2A‑103(1)(h). |
| “Lease contract” | Section 2A‑103(1)(l). |
| “Party” | Section 1‑201(29). |
| “Purchaser” | Section 1‑201(33). |
| “Term” | Section 1‑201(42). |

SOUTH CAROLINA REPORTER’S COMMENTS

Section 2A‑301 is patterned after South Carolina Code Section 36‑9‑201, dealing with the effectiveness of a security interest. Unlike security interests under Article 9, however, leases are not subject to any filing or perfection requirements under Article 2A. (The filing requirement under South Carolina Code Section 27‑23‑80, that leases of personal property had to be filed of record to be valid against subsequent creditors, was repealed when the 1988 amendments to the UCC were enacted. Act 494 of 1988.) A lease that also creates a security interest under Article 9 is subject to the filing requirements of that Article. South Carolina Code Section 36‑9‑408 allows a lessor to file a financing statement for the lease without the fact of filing being considered in determining whether the lease creates a security interest under Article 9.

LIBRARY REFERENCES

Bailment 3, 21.

Westlaw Key Number Search: 50k3; 50k21.

C.J.S. Bailments Sections 4, 19, 21 to 22, 25 to 27, 93 to 98.

**SECTION 36‑2A‑302.** Title to and possession of goods.

Except as otherwise provided in this chapter, 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.

HISTORY: 2001 Act No. 67, Section 2.

OFFICIAL COMMENT

Uniform Statutory Source: Former Section 9‑202 (now codified as Section 9‑202).

Changes: Former Section 9‑202 was modified to reflect leasing terminology and to clarify the law of leases with respect to fraudulent conveyances or transfers.

Purposes: The separation of ownership and possession of goods between the lessor and the lessee (or a third party) has created problems under certain fraudulent conveyance statutes. See, e.g., In re Ludlum Enters., 510 F.2d 996 (5th Cir. 1975); Suburbia Fed. Sav. & Loan Ass’n v. Bel‑Air Conditioning Co., 385 So. 2d 1151 (Fla. 1980). This section provides, among other things, that separation of ownership and possession per se does not affect the enforceability of the lease contract. Sections 2A‑301 and 2A‑308.

Cross References: Sections 2A‑301, 2A‑308 and 9‑202.

Definitional Cross References:

|  |  |
| --- | --- |
|  |  |
| “Goods” | Section 2A‑103(1)(h). |
| “Lessee” | Section 2A‑103(1)(n). |
| “Lessor” | Section 2A‑103(1)(p). |

SOUTH CAROLINA REPORTER’S COMMENTS

With adoption of South Carolina Code Ann. Section 36‑9‑202, the statutory analogue to this section, South Carolina put to rest a long controversy about who holds title in a sale transaction when a chattel mortgage is given. The early decisions in South Carolina held that the mortgagee acquired legal title upon execution of the mortgage, prior to any default, enabling the mortgagee to maintain an action for recovery against a purchaser of the mortgaged property, while the later decisions indicated that title passed to the mortgagee only when the condition was breached. Compare Levi v. Legg & Bell, 23 S.C. 282 (1855), with Martin v. Jenkins, 51 S.C. 42, 27 S.E. 947 ( 1897). In addition, the mortgagee had a right to possession unless circumstances indicated that such was not the intention of the parties. Hill v. Winnsboro Granite Corp., 112 SC 243, 99 S.E. 836 (1919).

Just as Section 36‑9‑202 made the location of title as between the secured party and the debtor irrelevant to parties’ rights in secured transactions, so this section makes the location of title (so long as it is not with the lessee) and the location of possession irrelevant to the enforceability of a lease. Possession or the absence of possession is not of itself determinative of fraud. In some instances, this treatment may modify the result otherwise directed under South Carolina’s adoption of the Statute of Elizabeth, contained in Section 27‑23‑10 .

Section 2A‑308 specifically governs the rights of creditors of lessors who have retained possession after leasing the goods and the rights of creditors of lessees who have retained possession after selling the goods to a lessor in a sale‑leaseback transaction.

LIBRARY REFERENCES

Bailment 6 to 8.

Westlaw Key Number Searches: 50k6 to 50k8.

C.J.S. Bailments Sections 28 to 31.

**SECTION 36‑2A‑303.** Alienability of party ‘ s interest under lease contract or of lessor ‘ s residual interest in goods; delegation of performance; transfer of rights.

(1) As used in this section, “creation of a security interest’ includes the sale of a lease contract that is subject to Article 9, Secured Transactions, by reason of Section 36‑9‑102(1)(b).

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

(3) A provision in a lease agreement which (i) prohibits 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 (ii) 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 (i) the lessor’s interest under the lease contract or (ii) 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 or risk imposed on, the lessee within the purview of subsection (5) unless, and then only to the extent that, there is an actual delegation of a material performance of the lessor.

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

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

(a) if a transfer is made which is made an event of default under a lease agreement, the party to the lease contract not making the transfer, unless that party waives the default or otherwise agrees, has the rights and remedies described in Section 36‑2A‑501(2);

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

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

(7) 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.

(8) 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.

HISTORY: 2001 Act No. 67, Section 2.

OFFICIAL COMMENT

Uniform Statutory Source: Section 2‑210; former Section 9‑311 (now codified as Section 9‑401).

Changes: The provisions of Sections 2‑210 and former Section 9‑311 were incorporated in this section, with substantial modifications to reflect leasing terminology and practice and to harmonize the principles of the respective provisions, i.e. limitations on delegation of performance on the one hand and alienability of rights on the other. In addition, unlike Section 2‑210 which deals only with voluntary transfers, this section deals with involuntary as well as voluntary transfers. Moreover, the principle of former Section 9‑318(4) (now codified as Section 9‑406) denying effectiveness to contractual terms prohibiting assignments of receivables due and to become due also is implemented.

Purposes: 1. Subsection (2) states a rule, consistent with Section 9‑311, that voluntary and involuntary transfers of an interest of a party under the lease contract or of the lessor’s residual interest, including by way of the creation or enforcement of a security interest, are effective, notwithstanding a provision in the lease agreement prohibiting the transfer or making the transfer an event of default. Although the transfers are effective, the provision in the lease agreement is nevertheless enforceable, but only as provided in subsection (5). Under subsection (5) the prejudiced party is limited to the remedies on “default under the lease contract” in this Article and, except as limited by this Article, as provided in the lease agreement, if the transfer has been made an event of default. Section 2A‑501(2). Usually, there will be a specific provision to this effect or a general provision making a breach of a covenant an event of default. In those cases where the transfer is prohibited, but not made an event of default, the prejudiced party may recover damages; or, if the damage remedy would be ineffective adequately to protect that party, the court can order cancellation of the lease contract or enjoin the transfer. This rule that such provisions generally are enforceable is subject to subsections (3) and (4), which make such provisions unenforceable in certain instances.

2. The first such instance is described in subsection (3). A provision in a lease agreement which prohibits the creation or enforcement of a security interest, including sales of lease contracts subject to Article 9 (Sections 9‑102(1)(b) and 9‑104(f)), or makes it an event of default is generally not enforceable, reflecting the policy of Section 9‑318(4). However, that policy gives way to the doctrine stated in Section 2‑210(2), which gives one party to a contract the right to protect itself against an actual delegation (but not just a provision under which delegation might later occur) of a material performance by the other party. Accordingly, such a provision in a lease agreement is enforceable when the transfer delegates a material performance. Generally, as expressly provided in subsection (6), a transfer for security is not a delegation of duties. However, inasmuch as the creation of a security interest includes the sale of a lease contract, if there are then unperformed duties on the part of the lessor/seller, there could be a delegation of duties in the sale, and, if such a delegation actually takes place and is of a material performance, a provision in a lease agreement prohibiting it or making it an event of default would be enforceable, giving rise to the rights and remedies stated in subsection (5). The statute does not define “material.” The parties may set standards to determine its meaning. The term is intended to exclude delegations of matters such as accounting to a professional accountant and the performance of, as opposed to the responsibility for, maintenance duties to a person in the maintenance service industry.

3. For similar reasons, the lessor is entitled to protect its residual interest in the goods by prohibiting anyone but the lessee from possessing or using them. Accordingly, under subsection (3) if there is an actual transfer by the lessee of its right of possession or use of the goods in violation of a provision in the lease agreement, such a provision likewise is enforceable, giving rise to the rights and remedies stated in subsection (5). A transfer of the lessee’s right of possession or use of the goods resulting from the enforcement of a security interest granted by the lessee in its leasehold interest is a “transfer by the lessee” under this subsection.

4. Finally, subsection (3) protects against a claim that the creation or enforcement of a security interest in the lessor’s interest under the lease contract or in the residual interest is 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 lessee so as to give rise to the rights and remedies stated in subsection (5), unless the transfer involves an actual delegation of a material performance of the lessor.

5. While it is not likely that a transfer by the lessor of its right to payment under the lease contract would impair at a future time the ability of the lessee to obtain the performance due the lessee under the lease contract from the lessor, if under the circumstances reasonable grounds for insecurity as to receiving that performance arise, the lessee may employ the provision of this Article for demanding adequate assurance of due performance and has the remedy provided in that circumstance. Section 2A‑401.

6. Sections 9‑206 and 9‑318(1) through (3) also are relevant. Section 9‑206 sanctions an agreement by a lessee not to assert certain types of claims or defenses against the lessor’s assignee. Section 9‑318(1) through ( 3) deal with, among other things, the other party’s rights against the assignee where Section 9‑206(1) does not apply. Since the definition of contract under Section 1‑201(11) includes a lease agreement, the definition of account debtor under Section 9‑105(1)(a) includes a lessee of goods. As a result, Section 9‑206 applies to lease agreements, and there is no need to restate those sections in this Article. The reference to “defenses or claims arising out of a sale” in Section 9‑318(1) should be interpreted broadly to include defenses or claims arising out of a lease inasmuch as that section codifies the common law rule with respect to contracts, including lease contracts.

7. Subsection (4) is based upon Section 2‑210(2) and Section 9‑318(4). It makes unenforceable a prohibition against transfers of certain rights to payment or a provision making the transfer an event of default. It also provides that such transfers do not materially impair the prospect of obtaining return performance by, materially change the duty of, or materially increase the burden or risk imposed on, the other party to the lease contract so as to give rise to the rights and remedies stated in subsection (5). Accordingly, a transfer of a right to payment cannot be prohibited or made an event of default, or be one that materially impairs performance, changes duties or increases risk, if the right is already due or will become due without further performance being required by the party to receive payment. Thus, a lessor can transfer the right to future payments under the lease contract, including by way of a grant of a security interest, and the transfer will not give rise to the rights and remedies stated in subsection (5) if the lessor has no remaining performance under the lease contract. The mere fact that the lessor is obligated to allow the lessee to remain in possession and to use the goods as long as the lessee is not in default does not mean that there is “remaining performance” on the part of the lessor. Likewise, the fact that the lessor has potential liability under a “non‑operating” lease contract for breaches of warranty does not mean that there is “remaining performance.” In contrast, the lessor would have “remaining performance” under a lease contract requiring the lessor to regularly maintain and service the goods or to provide “upgrades” of the equipment on a periodic basis in order to avoid obsolescence. The basic distinction is between a mere potential duty to respond which is not “remaining performance,” and an affirmative duty to render stipulated performance. Although the distinction may be difficult to draw in some cases, it is instructive to focus on the difference between “operating” and “non‑ operating” leases as generally understood in the marketplace. Even if there is “remaining performance” under a lease contract, a transfer for security of a right to payment that is made an event of default or that is in violation of a prohibition against transfer does not give rise to the rights and remedies under subsection (5) if it does not constitute an actual delegation of a material performance under subsection (3).

8. The application of either the rule of subsection (3) or the rule of subsection (4) to the grant by the lessor of a security interest in the lessor’s right to future payment under the lease contract may produce the same result. Both subsections generally protect security transfers by the lessor in particular because the creation by the lessor of a security interest or the enforcement of that interest generally will not prejudice the lessee’s rights if it does not result in a delegation of the lessor’s duties. To the contrary, the receipt of loan proceeds or relief from the enforcement of an antecedent debt normally should enhance the lessor’s ability to perform its duties under the lease contract. Nevertheless, there are circumstances where relief might be justified. For example, if ownership of the goods is transferred pursuant to enforcement of a security interest to a party whose ownership would prevent the lessee from continuing to possess the goods, relief might be warranted. See 49 U.S.C. Section 1401(a) and (b) which places limitations on the operation of aircraft in the United States based on the citizenship or corporate qualification of the registrant.

9. Relief on the ground of material prejudice when the lease agreement does not prohibit the transfer or make it an event of default should be afforded only in extreme circumstances, considering the fact that the party asserting material prejudice did not insist upon a provision in the lease agreement that would protect against such a transfer.

10. Subsection (5) implements the rule of subsection (2). Subsection (2) provides that, even though a transfer is effective, a provision in the lease agreement prohibiting it or making it an event of default may be enforceable as provided in subsection (5). See Brummond v. First National Bank of Clovis, 656 P.2d 884, 35 U.C.C. Rep. Serv. (Callaghan) 1311 (N. Mex. 1983), stating the analogous rule for Section 9‑311. If the transfer prohibited by the lease agreement is made an event of default, then, under subsection 5(a), unless the default is waived or there is an agreement otherwise, the aggrieved party has the rights and remedies referred to in Section 2A‑501(2), viz. those in this Article and, except as limited in the Article, those provided in the lease agreement. In the unlikely circumstance that the lease agreement prohibits the transfer without making a violation of the prohibition an event of default or, even if there is no prohibition against the transfer, and the transfer is one that materially impairs performance, changes duties, or increases risk (for example, a sublease or assignment to a party using the goods improperly or for an illegal purpose), then subsection 5(b) is applicable. In that circumstance, unless the party aggrieved by the transfer has otherwise agreed in the lease contract, such as by assenting to a particular transfer or to transfers in general, or agrees in some other manner, the aggrieved party has the right to recover damages from the transferor and a court may, in appropriate circumstances, grant other relief, such as cancellation of the lease contract or an injunction against the transfer.

11. If a transfer gives rise to the rights and remedies provided in subsection (5), the transferee as an alternative may propose, and the other party may accept, adequate cure or compensation for past defaults and adequate assurance of future due performance under the lease contract. Subsection (5) does not preclude any other relief that may be available to a party to the lease contract aggrieved by a transfer subject to an enforceable prohibition, such as an action for interference with contractual relations.

12. Subsection (8) requires that a provision in a consumer lease prohibiting a transfer, or making it an event of default, must be specific, written and conspicuous. See Section 1‑201(10). This assists in protecting a consumer lessee against surprise assertions of default.

13. Subsection (6) is taken almost verbatim from the provisions of Section 2‑210(4). The subsection states a rule of construction that distinguishes a commercial assignment, which substitutes the assignee for the assignor as to rights and duties, and an assignment for security or financing assignment, which substitutes the assignee for the assignor only as to rights. Note that the assignment for security or financing assignment is a subset of all security interests. Security interest is defined to include “any interest of a buyer of ... chattel paper”. Section 1‑201(37). Chattel paper is defined to include a lease. Section 9‑105(1)(b). Thus, a buyer of leases is the holder of a security interest in the leases. That conclusion should not influence this issue, as the policy is quite different. Whether a buyer of leases is the holder of a commercial assignment, or an assignment for security or financing assignment should be determined by the language of the assignment or the circumstances of the assignment.

Cross References: Sections 1‑201(11), 1‑201(37), 2‑210, 2A‑401, 9‑102(a)(11), 9‑109(a)(3), 9‑406, and 9‑407.

Definitional Cross References:

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|  |  |
| “Agreed” and “Agreement” | Section 1‑201(3). |
| “Conspicuous” | Section 1‑201(10). |
| “Goods” | Section 2A‑103(1)(h). |
| “Lease” | Section 2A‑103(1)(j). |
| “Lease contract” | Section 2A‑103(1)(l). |
| “Lessee” | Section 2A‑103(1)(n). |
| “Lessor” | Section 2A‑103(1)(p). |
| “Lessor’s residual interest” | Section 2A‑103(1)(q). |
| “Notice” | Section 1‑201(25). |
| “Party” | Section 1‑201(29). |
| “Person” | Section 1‑201(30). |
| “Reasonable time” | Section 1‑204(1) and (2). |
| “Rights” | Section 1‑201(36). |
| “Term” | Section 1‑201(42). |
| “Writing” | Section 1‑201(46). |

SOUTH CAROLINA REPORTER’S COMMENTS

This provision (Subsection (2)) extends to leases the principle of South Carolina Code Ann. Section 36‑9‑311, that in all security transactions the debtor has an interest which can be conveyed or reached by creditors, regardless of attempted restriction in the security agreement. Under Subsection (2), voluntary or involuntary transfers of interests under a lease may be effective, notwithstanding a provision in the lease that makes them an event of default.

Subsection (4), which is based on Section 36‑9‑210(2) and Section 36‑9‑318(4), invalidates restrictions against transfers of certain rights to payment. In South Carolina, the common law rule was developed in the case law of sales, recognizing the validity of these assignments. See Troublefield v. Heyward 111 S.C. 293, 97 S.E. 767 (1919).

Subsection (6) is almost exactly the same as its analogue, Section 36‑9‑210. The adoption of Section 36‑9‑210 in South Carolina merely codified the common law.

The provisions of this section on default are subject to the limitations of South Carolina Code Section 37‑5‑109 regulating default in consumer credit transactions, including consumer leases. To the extent of any conflict, Section 2A‑104 provides that the consumer protection provisions of Title 37 prevail.

CROSS REFERENCES

Filing of financing statements, see Sections 36‑9‑501 et seq.

Secured transactions, discharge of account debtors, see Section 36‑9‑406.

LIBRARY REFERENCES

Bailment 3, 21 to 34.

Westlaw Key Number Search: 50k3; 50k21 to 50k34.

C.J.S. Bailments Sections 4, 19, 21 to 22, 25 to 27, 86 to 119.

**SECTION 36‑2A‑304.** Subsequent lease of goods by lessor.

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

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

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

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

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

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

(3) A subsequent lessee from the lessor of goods that is subject to an existing lease contract and is 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.

HISTORY: 2001 Act No. 67, Section 2.

OFFICIAL COMMENT

Uniform Statutory Source: Section 2‑403.

Changes: While Section 2‑403 was used as a model for this section, the provisions of Section 2‑403 were significantly revised to reflect leasing practices and to integrate this Article with certificate of title statutes.

Purposes: 1. This section must be read in conjunction with, as it is subject to, the provisions of Section 2A‑303, which govern voluntary and involuntary transfers of rights and duties under a lease contract, including the lessor’s residual interest in the goods.

2. This section must also be read in conjunction with Section 2‑403. This section and Section 2A‑305 are derived from Section 2‑403, which states a unified policy on good faith purchases of goods. Given the scope of the definition of purchaser (Section 1‑201(33)), a person who bought goods to lease as well as a person who bought goods subject to an existing lease from a lessor will take pursuant to Section 2‑403. Further, a person who leases such goods from the person who bought them should also be protected under Section 2‑403, first because the lessee’s rights are derivative and second because the definition of purchaser should be interpreted to include one who takes by lease; no negative implication should be drawn from the inclusion of lease in the definition of purchase in this Article. Section 2A‑103(1)(v).

3. There are hypotheticals that relate to an entrustee’s unauthorized lease of entrusted goods to a third party that are outside the provisions of Sections 2‑403, 2A‑304 and 2A‑305. Consider a sale of goods by M, a merchant, to B, a buyer. After paying for the goods B allows M to retain possession of the goods as B is short of storage. Before B calls for the goods M leases the goods to L, a lessee. This transaction is not governed by Section 2‑403(2) as L is not a buyer in the ordinary course of business. Section 1‑201(9). Further, this transaction is not governed by Section 2A‑304(2) as B is not an existing lessee. Finally, this transaction is not governed by Section 2A‑305(2) as B is not M’s lessor. Section 2A‑307(2) resolves the potential dispute between B, M and L. By virtue of B’s entrustment of the goods to M and M’s lease of the goods to L, B has a cause of action against M under the common law. Sections 2A‑103(4) and 1‑103. See, e.g., Restatement (Second) of Torts Sections 222A‑243. Thus, B is a creditor of M. Sections 2A‑103(4) and 1‑201(12). Section 2A‑307(2) provides that B, as M’s creditor, takes subject to M’s lease to L. Thus, if L does not default under the lease, L’s enjoyment and possession of the goods should be undisturbed. However, B is not without recourse. B’s action should result in a judgment against M providing, among other things, a turnover of all proceeds arising from M’s lease to L, as well as a transfer of all of M’s right, title and interest as lessor under M’s lease to L, including M’s residual interest in the goods. Section 2A‑103(1)(q).

4. Subsection (1) states a rule with respect to the leasehold interest obtained by a subsequent lessee from a lessor of goods under an existing lease contract. The interest will include such leasehold interest as the lessor has in the goods as well as the leasehold interest that the lessor had the power to transfer. Thus, the subsequent lessee obtains unimpaired all rights acquired under the law of agency, apparent agency, ownership or other estoppel, whether based upon statutory provisions or upon case law principles. Sections 2A‑103(4) and 1‑103. In general, the subsequent lessee takes subject to the existing lease contract, including the existing lessee’s rights thereunder. Furthermore, the subsequent lease contract is, of course, limited by its own terms, and the subsequent lessee takes only to the extent of the leasehold interest transferred thereunder.

5. Subsection (1) further provides that a lessor with voidable title has power to transfer a good leasehold interest to a good faith subsequent lessee for value. In addition, subsections (1)(a) through (d) provide specifically for the protection of the good faith subsequent lessee for value in a number of specific situations which have been troublesome under prior law.

6. The position of an existing lessee who entrusts leased goods to its lessor is not distinguishable from the position of other entrusters. Thus, subsection (2) provides that the subsequent lessee in the ordinary course of business takes free of the existing lease contract between the lessor entrustee and the lessee entruster, if the lessor is a merchant dealing in goods of that kind. Further, the subsequent lessee obtains all of the lessor entrustee’s and the lessee entruster’s rights to the goods, but only to the extent of the leasehold interest transferred by the lessor entrustee. Thus, the lessor entrustee retains the residual interest in the goods. Section 2A‑103(1)(q). However, entrustment by the existing lessee must have occurred before the interest of the subsequent lessee became enforceable against the lessor. Entrusting is defined in Section 2‑403(3) and that definition applies here. Section 2A‑103(3).

7. Subsection (3) states a rule with respect to a transfer of goods from a lessor to a subsequent lessee where the goods are subject to an existing lease and covered by a certificate of title. The subsequent lessee’s rights are no greater than those provided by this section and the applicable certificate of title statute, including any applicable case law construing such statute. Where the relationship between the certificate of title statute and Section 2‑403, the statutory analogue to this section, has been construed by a court, that construction is incorporated here. Sections 2A‑103(4) and 1‑102(1) and (2). The better rule is that the certificate of title statutes are in harmony with Section 2‑403 and thus would be in harmony with this section. E.g., Atwood Chevrolet‑Olds v. Aberdeen Mun. School Dist., 431 So.2d 926, 928 (Miss. 1983); Godfrey v. Gilsdorf, 476 P.2d 3, 6, 86 Nev. 714, 718 (1970); Martin v. Nager, 192 N.J. Super. 189, 197‑98, 469 A.2d 519, 523 (Super. Ct. Ch. Div. 1983). Where the certificate of title statute is silent on this issue of transfer, this section will control.

Cross References: Sections 1‑102, 1‑103, 1‑201(33), 2‑403, 2A‑103(1)(v), 2A‑103(3), 2A‑103(4), 2A‑303 and 2A‑305.

Definitional Cross References:

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|  |  |
| “Agreed” | Section 1‑201(3). |
| “Delivery” | Section 1‑201(14). |
| “Entrusting” | Section 2‑403(3). |
| “Good faith” | Sections 1‑201(19) and 2‑103(1)(b). |
| “Goods” | Section 2A‑103(1)(h). |
| “Lease” | Section 2A‑103(1)(j). |
| “Lease contract” | Section 2A‑103(1)(l). |
| “Leasehold interest” | Section 2A‑103(1)(m). |
| “Lessee” | Section 2A‑103(1)(n). |
| “Lessee in the ordinary course of business” | Section 2A‑103(1)(o). |
| “Lessor” | Section 2A‑103(1)(p). |
| “Merchant” | Section 2‑104(1). |
| “Purchase” | Section 2A‑103(1)(v). |
| “Rights” | Section 1‑201(36). |
| “Value” | Section 1‑201(44). |

SOUTH CAROLINA REPORTER’S COMMENTS

This provision is substantially similar to its statutory analogue, South Carolina Code Ann. Section 36‑2‑403, which deals with the rights of good faith purchasers to acquire an interest in goods greater than their transferors had.

Subsection (1) basically codifies the common law principle that a lessee acquires all of the interest of his lessor. In addition, South Carolina courts recognize the common law concept of a “voidable title,” which is utilized in Subsection (1); a voidable title, unlike a void title, ripens into an indefeasible title in the hands of a bona fide purchaser for value. See Marvin v. Connelly, 272 S.C. 562, 252 S.E. 2d 568 (1979).

In general, the common law analysis turns upon whether the original owner assented to the transfer. For example, if the goods were stolen from the original owner, a thief could not pass title even to a bona fide purchaser for value. See Sun Ins. Office v. Foil, 187 S.C. 183, 197 S.E. 683 (1938). If, on the other hand, the owner intended to transfer ownership, but transferred voidable title which was passed to the good faith purchaser for value, the owner’s claim to the goods would be cut off.

Subsection (2) is also substantially similar to its analogue. Subsection (2) governs the position of an existing lessee who entrusts the leased goods to its lessor. Subsection (2) is consistent with the South Carolina common law position. See Russell Willis, Inc. v. Page, 213 S.C. 156, 48 S.E.2d 627 (1948) (sale of goods).

CROSS REFERENCES

Document of title to goods defeated in certain cases, see Section 36‑7‑503.

Lien of warehouse, see Section 36‑7‑209.

LIBRARY REFERENCES

Bailment 7, 21.

Westlaw Key Number Search: 50k7; 50k21.

C.J.S. Bailments Sections 28 to 29, 31, 93 to 98.

**SECTION 36‑2A‑305.** Sale or sublease of goods by lessee.

(1) Subject to the provisions of Section 36‑2A‑303, a buyer or sublessee from the lessee of goods under an existing lease contract obtains, to the extent of the interest transferred, the leasehold interest in the goods that the lessee had or had power to transfer, and except as provided in subsection (2) and Section 36‑2A‑511(4), takes subject to the existing lease contract. A lessee with a voidable leasehold interest has power to transfer a good leasehold interest to a good faith buyer for value or a good faith sublessee for value, but only to the extent set forth in the preceding sentence. When goods have been delivered under a transaction of lease the lessee has that power even though:

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

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

(c) the deLivery was procured through fraud punishable as larcenous under the criminal law.

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

(3) A buyer or sublessee from the lessee of goods that is subject to an existing lease contract and is 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.

HISTORY: 2001 Act No. 67, Section 2.

OFFICIAL COMMENT

Uniform Statutory Source: Section 2‑403.

Changes: While Section 2‑403 was used as a model for this section, the provisions of Section 2‑403 were significantly revised to reflect leasing practice and to integrate this Article with certificate of title statutes.

Purposes: This section, a companion to Section 2A‑304, states the rule with respect to the leasehold interest obtained by a buyer or sublessee from a lessee of goods under an existing lease contract. Cf. Section 2A‑304Official Comment. Note that this provision is consistent with existing case law, which prohibits the bailee’s transfer of title to a good faith purchaser for value under Section 2‑403(1). Rohweder v. Aberdeen Product. Credit Ass’n, 765 F.2d 109 (8th Cir. 1985).

Subsection (2) is also consistent with existing case law. American Standard Credit, Inc. v. National Cement Co., 643 F.2d 248, 269‑70 (5th Cir. 1981); but cf. Exxon Co., U.S.A. v. TLW Computer Indus., 37 U.C.C. Rep. Serv. (Callaghan) 1052, 1057‑58 (D. Mass. 1983). Unlike Section 2A‑304(2), this subsection does not contain any requirement with respect to the time that the goods were entrusted to the merchant. In Section 2A‑304(2) the competition is between two customers of the merchant lessor; the time of entrusting was added as a criterion to create additional protection to the customer who was first in time: the existing lessee. In subsection (2) the equities between the competing interests were viewed as balanced.

There appears to be some overlap between Section 2‑403(2) and Section 2A‑305(2) with respect to a buyer in the ordinary course of business. However, an examination of this Article’s definition of buyer in the ordinary course of business (Section 2A‑103(1)(a)) makes clear that this reference was necessary to treat entrusting in the context of a lease.

Subsection (3) states a rule of construction with respect to a transfer of goods from a lessee to a buyer or sublessee, where the goods are subject to an existing lease and covered by a certificate of title. Cf. Section 2A‑304 Official Comment.

Cross References: Sections 2‑403, 2A‑103(1)(a), 2A‑304 and 2A‑305(2).

Definitional Cross References:

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|  |  |
| “Buyer” | Section 2‑103(1)(a). |
| “Buyer in the ordinary course of business” | Section 2A‑103(1)(a). |
| “Delivery” | Section 1‑201(14). |
| “Entrusting” | Section 2‑403(3). |
| “Good faith” | Sections 1‑201(19) and 2‑103(1)(b). |
| “Goods” | Section 2A‑103(1)(h). |
| “Lease” | Section 2A‑103(1)(j). |
| “Lease contract” | Section 2A‑103(1)(l). |
| “Leasehold interest” | Section 2A‑103(1)(m). |
| “Lessee” | Section 2A‑103(1)(n). |
| “Lessee in the ordinary course of business” | Section 2A‑103(1)(o). |
| “Lessor” | Section 2A‑103(1)(p). |
| “Merchant” | Section 2‑104(1). |
| “Rights” | Section 1‑201(36). |
| “Sale” | Section 2‑106(1). |
| “Sublease” | Section 2A‑103(1)(w). |
| “Value” | Section 1‑201(44). |

SOUTH CAROLINA REPORTER’S COMMENTS

This provision for the subsequent sale or sublease of goods by a lessee closely parallels the provision in Section 2A‑304 regarding subsequent sale or sublease of goods by a lessor. In short, this provision provides that the buyer or sublessee obtains, to the extent transferred, the lessee’s leasehold interest in the goods.

Subleases of motor vehicles are specifically regulated by Chapter 13 of Title 37. Although that Chapter is located in the Consumer Protection Code, the transactions it regulates are not only those with consumers. Nonetheless, the provisions of Chapter 13 should prevail over anything inconsistent in this section, under Section 2A‑104(2).

CROSS REFERENCES

Document of title to goods defeated in certain cases, see Section 36‑7‑503.

Lien of warehouse, see Section 36‑7‑209.

LIBRARY REFERENCES

Bailment 7, 21.

Westlaw Key Number Search: 50k7; 50k21.

C.J.S. Bailments Sections 28 to 29, 31, 93 to 98.

**SECTION 36‑2A‑306.** Priority of certain liens arising by operation of law.

If a person in the ordinary course of his 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 it provides otherwise.

HISTORY: 2001 Act No. 67, Section 2.

OFFICIAL COMMENT

Uniform Statutory Source: Former Section 9‑310 (now codified as Section 9‑333).

Changes: The approach reflected in the provisions of former Section 9‑310 was included, but revised to conform to leasing terminology and to expand the exception to the special priority granted to protected liens to cover liens created by rule of law as well as those created by statute.

Purposes: This section should be interpreted to allow a qualified lessor or a qualified lessee to be the competing lienholder if the statute or rule of law so provides. The reference to statute includes applicable regulations and cases; these sources must be reviewed in resolving a priority dispute under this section.

Cross References: Section 9‑333.

Definitional Cross References:

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|  |  |
| “Goods” | Section 2A‑103(1)(h). |
| “Lease Contract” | Section 2A‑103(1)(l). |
| “Lessee” | Section 2A‑103(1)(n). |
| “Lessor” | Section 2A‑103(1)(p). |
| “Lien” | Section 2A‑103(1)(r). |
| “Person” | Section 1‑201(30). |

SOUTH CAROLINA REPORTER’S COMMENTS

This section covers all forms of non consensual liens, such as the common mechanics lien. The exception was logically expanded beyond coverage in the statutory analogue, found at South Carolina Code Ann. Section 36‑9‑310, to encompass liens created by rule of law when the rule of law does not permit this special priority.

This section reverses the priority found in Nesbitt Auto Co. v. Whitlock, 113 S.C. 519, 101 S.E. 822 (1920), which held that under the recording act a prior recorded purchase money mortgage had priority over a lien of a repairman.

LIBRARY REFERENCES

Bailment 21.

Westlaw Key Number Search: 50k21.

C.J.S. Bailments Sections 93 to 98.

**SECTION 36‑2A‑307.** Priority of liens arising by attachment or levy on, security interests in, and other claims to goods.

(1) Except as otherwise provided in Section 36‑2A‑306, a creditor of a lessee takes subject to the lease contract.

(2) Except as otherwise provided in subsections (3) and (4) and in Sections 36‑2A‑306 and 36‑2A‑308, a creditor of a lessor takes subject to the lease contract unless:

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

(b) 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

(c) the creditor holds a security interest in the goods which was perfected (Section 36‑9‑303) before the lease contract became enforceable.

(3) 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 36‑9‑303) and the lessee knows of its existence.

(4) 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 forty‑five 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 forty‑five‑day period.

HISTORY: 2001 Act No. 67, Section 2.

OFFICIAL COMMENT

Uniform Statutory Source: None for subsection (1). The remainder of the Section was derived from former Sections 9‑301 (now codified as Section 9‑317), and 9‑307(1) and (3) (now codified as Sections 9‑320(a) and 9‑323), respectively, and was substantially rewritten in conjunction with the 1998 revisions of Article 9.

Changes: The provisions of former Sections 9‑301 and 9‑307(1) and (3) were incorporated, and modified to reflect leasing terminology and the basic concepts reflected in this Article.

1998 Changes: Many of the substantive provisions of this Section were moved to Article 9 in conjunction with the 1998 revisions of Article 9.

Purposes: 1. Subsection (1) states a general rule of priority that a creditor of the lessee takes subject to the lease contract. The term lessee (Section 2A‑103(1)(n)) includes sublessee. Therefore, this subsection not only covers disputes between the prime lessor and a creditor of the prime lessee but also disputes between the prime lessor, or the sublessor, and a creditor of the sublessee. Section 2A‑301 Official Comment 3(g). Further, by using the term creditor (Section 1‑201(12)), this subsection will cover disputes with a general creditor, a secured creditor, a lien creditor and any representative of creditors. Section 2A‑103(4).

2. Subsection (2) states a general rule of priority that a creditor of a lessor takes subject to the lease contract. Note the discussion above with regard to the scope of these rules. Section 2A‑301 Official Comment 3(g). Thus, the section will not only cover disputes between the prime lessee and a creditor of the prime lessor but also disputes between the prime lessee, or the sublessee, and a creditor of the sublessor.

3. To take priority over the lease contract, and the interests derived therefrom, the creditor must come within one of three exceptions stated within the rule. First, subsection (2)(a) provides that where the creditor holds a lien (Section 2A‑103(1)(r)) that attached before the lease contract became enforceable (Section 2A‑301), the creditor does not take subject to the lease. Second, subsection (2)(b) provides that when the creditor holds a security interest (Section 1‑201(37)) , whether or not perfected, the creditor has priority over a lessee who did not give value (Section 1‑201(44)) and receive delivery of the goods without knowledge (Section 1‑201(25)) of the security interest. As to other lessees, under subsection (2)(c) a secured creditor holding a perfected security interest before the time the lease contract became enforceable (Section 2A‑301) does not take subject to the lease. With respect to this provision, the lessee in these circumstances is treated like a buyer so that perfection of a purchase money security interest does not relate back (Section 9‑301).

4. The rules of this section operate in favor of whichever party to the lease contract may enforce it, even if one party perhaps may not, e.g., under Section 2A‑201(1)(b).

5. The rules stated in subsections (2)(b) and (c), and the rule in subsection (3), are best understood by reviewing a hypothetical. Assume that a merchant engaged in the business of selling and leasing musical instruments obtained possession of a truck load of musical instruments on deferred payment terms from a supplier of musical instruments on January 6. To secure payment of such credit the merchant granted the supplier a security interest in the instruments; the security interest was perfected by filing on January 15. The merchant, as lessor, entered into a lease to an individual of one of the musical instruments supplied by the supplier; the lease became enforceable on January 10. Under subsection (2)(b) the lessee will prevail (assuming the lessee qualifies thereunder) unless subsection (c) provides otherwise. Under the rule stated in subsection (2)(c) a priority dispute between the supplier, as the lessor’s secured creditor, and the lessee would be determined by ascertaining on January 10 (the day the lease became enforceable) the validity and perfected status of the security interest in the musical instrument and the enforceability of the lease contract by the lessee. Nothing more appearing, under the rule stated in subsection (2)(c), the supplier’s security interest in the musical instrument would not have priority over the lease contract. Moreover, subsection (2) states that its rules are subject to the rules of subsections (3) and (4). Under this hypothetical the lessee should qualify as a “lessee in the ordinary course of business”. Section 2A‑103(1)(o). Subsection (3) also makes clear that the lessee in the ordinary course of business will win even if he or she knows of the existence of the supplier’s security interest.

6. Subsections (3) and (4), which are modeled on the provisions of Section 9‑307(1) and (3), respectively, state two exceptions to the priority rule stated in subsection (2) with respect to a creditor who holds a security interest. The lessee in the ordinary course of business will be treated in the same fashion as the buyer in the ordinary course of business, given a priority dispute with a secured creditor over goods subject to a lease contract.

Cross References: Sections 1‑201(12), 1‑201(25), 1‑201(37), 1‑201(44), 2A‑103(1)(n), 2A‑103(1)(o), 2A‑103(1)(r), 2A‑103(4), 2A‑201(1)(b), 2A‑301 Official Comment 3(g), Article 9, especially Sections 9‑317, 9‑321 and 9‑323.

Definitional Cross References:

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|  |  |
| “Creditor” | Section 1‑201(12). |
| “Goods” | Section 2A‑103(1)(h). |
| “Knowledge” and “Knows” | Section 1‑201(25). |
| “Lease” | Section 2A‑103(1)(j). |
| “Lease contract” | Section 2A‑103(1)(l). |
| “Leasehold interest” | Section 2A‑103(1)(m). |
| “Lessee” | Section 2A‑103(1)(n). |
| “Lessee in the ordinary course of business” | Section 2A‑103(1)(o). |
| “Lessor” | Section 2A‑103(1)(p). |
| “Lien” | Section 2A‑103(1)(r). |
| “Party” | Section 1‑201(29). |
| “Pursuant to commitment” | Section 2A‑103(3). |
| “Security interest” | Section 1‑201(37). |

SOUTH CAROLINA REPORTER’S COMMENTS

This section is a compilation of the concepts codified in Sections 36‑9‑301 and 36‑9‑307. Subsection (3) is substantially similar to its analogue, Section 36‑9‑307. This provision is patterned after the Article 9 exception that makes even a perfected secured party subordinate to the buyer in the ordinary course of business. For South Carolina cases regarding this provision in the sales context , see Clanton Auto Sales v. Young, 239 S.C. 250, 122 S.E.2d 640 (1961) and Russell Willis, Inc. v. Page, 213 S.C. 156, 48 S.E.2d 627 (1948). Under subsection (3) a lessee in the ordinary course of business takes the leasehold interest free of any security interest the lessor has created in the goods, even if the lessee knows of that interest.

With regard to a lease not in the ordinary course of business, subsection (4) provides a limited exception to the general rule of subsections (1) & (2) that the lessee is not subject to subsequent encumbrances by the lessor. Under subsection (4) until the secured party learns of the lease or the lease has been enforceable for 45 days, future advances or a commitment to make future advances burden the lessee’s interest. Once the secured party learns of the lease or 45 days have passed, the leasehold interest takes priority over further voluntary advances. This provision parallels the official text of UCC Section 9‑307(3). However, South Carolina Code Section 36‑9‑307(3) is completely different, protecting the secured creditor rather than the subsequent purchaser. See the South Carolina Reporter’s Notes to Section 36‑9‑307 explaining the policy decision that was made in 1988 to reject the uniform language. In South Carolina a lessee has greater protection under this provision than does a purchaser under Section 36‑9‑307.

LIBRARY REFERENCES

Bailment 21.

Secured Transactions 138 to 147.

Westlaw Key Number Search: 50k21.

Westlaw Key Number Searches: 349Ak138 to 349Ak147.

C.J.S. Bailments Sections 93 to 98.

C.J.S. Secured Transactions Sections 10, 68, 72, 88, 90 to 91, 93 to 108, 118.

**SECTION 36‑2A‑308.** Special rights of creditors.

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

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

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

HISTORY: 2001 Act No. 67, Section 2.

OFFICIAL COMMENT

Uniform Statutory Source: Section 2‑402(2) and (3)(b).

Changes: Rephrased and new material added to conform to leasing terminology and practice.

Purposes: Subsection (1) states a general rule of avoidance where the lessor has retained possession of goods if such retention is fraudulent under any statute or rule of law. However, the subsection creates an exception under certain circumstances for retention of possession of goods for a commercially reasonable time after the lease contract becomes enforceable.

Subsection (2) also preserves the possibility of an attack on the lease by creditors of the lessor if the lease was made in satisfaction of or as security for a pre‑existing claim, and would constitute a fraudulent transfer or voidable preference under other law.

Finally, subsection (3) states a new rule with respect to sale‑leaseback transactions, i.e., transactions where the seller sells goods to a buyer but possession of the goods is retained by the seller pursuant to a lease contract between the buyer as lessor and the seller as lessee. Notwithstanding any statute or rule of law that would treat such retention as fraud, whether per se, prima facie, or otherwise, the retention is not fraudulent if the buyer bought for value (Section 1‑201(44)) and in good faith (Sections 1‑201(19) and 2‑103(1)(b)). Section 2A‑103(3) and (4). This provision overrides Section 2‑402(2) to the extent it would otherwise apply to a sale‑leaseback transaction.

Cross References: Sections 1‑201(19), 1‑201(44), 2‑402(2) and 2A‑103(4).

Definitional Cross References:

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|  |  |
| “Buyer” | Section 2‑103(1)(a). |
| “Contract” | Section 1‑201(11). |
| “Creditor” | Section 1‑201(12). |
| “Good faith” | Sections 1‑201(19) and 2‑103(1)(b). |
| “Goods” | Section 2A‑103(1)(h). |
| “Lease contract” | Section 2A‑103(1)(l). |
| “Lessee” | Section 2A‑103(1)(n). |
| “Lessor” | Section 2A‑103(1)(p). |
| “Money” | Section 1‑201(24). |
| “Reasonable time” | Section 1‑204(1) and (2). |
| “Rights” | Section 1‑201(36). |
| “Sale” | Section 2‑106(1). |
| “Seller” | Section 2‑103(1)(d). |
| “Value” | Section 1‑201(44). |

SOUTH CAROLINA REPORTER’S COMMENTS

Subsections (1) and (2) of 2A‑308 are substantially similar to their statutory analogue, Section 36‑2‑402 of the South Carolina Code.

Subsection (1) is a modified version of Section 36‑2‑402(2), which recognizes that different states have developed different presumptions of fraud from the retention of possession by the seller of goods. Under South Carolina common law, retention of possession by the seller creates a presumption of fraud which can be rebutted by showing that it was for a bona fide purpose. Smith v. Henry, 18 S.C.L. (2 Bail.) 118, 122 (1831).

Subsection (2) is also similar to its statutory analogue, Section 36‑2‑402(3). In the context of sales, Section 36‑2‑402(3) made clear that the rights of a seller’s creditors to set aside a sale based on voidable preferences or fraudulent conveyances were not disturbed by the adoption of Article 2. The Article 2A provision extends this rule to the leasing context.

Subsection (3) expressly eliminates the presumption of fraud in a bona fide sale‑leaseback where the sale is for value, although the seller/lessee retains possession of the goods. In such transactions, this provision will prevail over any contrary interpretation of the Statute of Elizabeth, contained in Section 27‑23‑10. This is true even though leases are no longer required to be filed of record to be valid against subsequent creditors. See Section 9(a)(1) of Act 494 of 1988, repealing South Carolina Code Section 27‑23‑80. However, lessors may continue to file “precautionary” UCC financing statements, expressly authorized by Section 36‑9‑408. See Official Comment 2 to Section 36‑2A‑301.

CROSS REFERENCES

Rights acquired in the absence of due negotiation, effect of diversion, seller’s stoppage of delivery, see Section 36‑7‑504.

LIBRARY REFERENCES

Bailment 21.

Westlaw Key Number Search: 50k21.

C.J.S. Bailments Sections 93 to 98.

**SECTION 36‑2A‑309.** Lessor ‘ s and lessee ‘ s rights when goods become fixtures.

(1) In this section:

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

(b) a “fixture filing” is the filing, in the office where a mortgage on the real estate would be filed or recorded, of a financing statement covering goods that are or are to become fixtures and conforming to the requirements of Section 36‑9‑402(5);

(c) a lease is a “purchase money lease” unless the lessee has possession or use of the goods or the right to possession or use of the goods before the lease agreement is enforceable;

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

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

(2) Under this 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.

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

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

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

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

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

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

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

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

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

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

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

(8) If the interest of a lessor of fixtures, including the lessor’s residual interest, has priority over all conflicting interests of all owners and encumbrancers of the real estate, the lessor or the lessee may (i) on default, expiration, termination, or cancellation of the lease agreement but subject to the lease agreement and this chapter, or (ii) 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.

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

HISTORY: 2001 Act No. 67, Section 2.

OFFICIAL COMMENT

Uniform Statutory Source: Former Section 9‑313.

Changes: Revised to reflect leasing terminology and to add new material.

Purposes: 1. While former Section 9‑313 (now codified as sections 9‑334 and 9‑604) provided a model for this section, certain provisions were substantially revised.

2. Section 2A‑309(1)(c), which is new, defines purchase money lease to exclude leases where the lessee had possession or use of the goods or the right thereof before the lease agreement became enforceable. This term is used in subsection (4)(a) as one of the conditions that must be satisfied to obtain priority over the conflicting interest of an encumbrancer or owner of the real estate.

3. Section 2A‑309(4), which states one of several priority rules found in this section, deletes reference to office machines and the like (former Section 9‑313(4)(c) (now codified as Section 9‑334(e)(2)(A)) as well as certain liens (former Section 9‑313(4)(d)(now codified as Section 9‑334(e)(3)). However, these items are included in subsection (5), another priority rule that is more permissive than the rule found in subsection (4) as it applies whether or not the interest of the lessor is perfected. In addition, subsection (5)(a) expands the scope of the provisions of former Section 9‑313(4)(c) (now codified as Section 9‑334(e)(2)(A)) to include readily removable equipment not primarily used or leased for use in the operation of real estate; the qualifier is intended to exclude from the expanded rule equipment integral to the operation of real estate, e.g., heating and air conditioning equipment.

4. The rule stated in subsection (7) is more liberal than the rule stated in former Section 9‑313(7) (now codified in Section 9‑334(c)) in that issues of priority not otherwise resolved in this subsection are left for resolution by the priority rules governing conflicting interests in real estate, as opposed to the former Section 9‑313(7) (now codified in Section 9‑334(c)) automatic subordination of the security interest in fixtures. Note that, for the purpose of this section, where the interest of an encumbrancer or owner of the real estate is paramount to the interest of the lessor, the latter term includes the residual interest of the lessor.

5. The rule stated in subsection (8) is more liberal than the rule stated in former Section 9‑313(8) (now codified as Section 9‑604) in that the right of removal is extended to both the lessor and the lessee and the occasion for removal includes expiration, termination or cancellation of the lease agreement, and enforcement of rights and remedies under this Article, as well as default. The new language also provides that upon removal the goods are free and clear of conflicting interests of owners and encumbrancers of the real estate.

6. Finally, subsection (9) provides a mechanism for the lessor of fixtures to perfect its interest by filing a financing statement under the provisions of the Article on Secured Transactions (Article 9), even though the lease agreement does not create a security interest. Section 1‑201(37). The relevant provisions of Article 9 must be interpreted permissively to give effect to this mechanism as it implicitly expands the scope of Article 9 so that its filing provisions apply to transactions that create a lease of fixtures, even though the lease agreement does not create a security interest. This mechanism is similar to that provided in Section 2‑326(3)(c) for the seller of goods on consignment, even though the consignment is not “intended as security”. Section 1‑201(37). Given the lack of litigation with respect to the mechanism created for consignment sales, this new mechanism should prove effective.

Cross References: Sections 1‑201(37), 2A‑309(1)(c), 2A‑309(4), Article 9, especially Sections 9‑334, 9‑604 and 9‑505.

Definitional Cross References:

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| “Agreed” | Section 1‑201(3). |
| “Cancellation” | Section 2A‑103(1)(b). |
| “Conforming” | Section 2A‑103(1)(d). |
| “Consumer lease” | Section 2A‑103(1)(e). |
| “Goods” | Section 2A‑103(1)(h). |
| “Lease” | Section 2A‑103(1)(j). |
| “Lease agreement” | Section 2A‑103(1)(k). |
| “Lease contract” | Section 2A‑103(1)(l). |
| “Lessee” | Section 2A‑103(1)(n). |
| “Lessor” | Section 2A‑103(1)(p). |
| “Lien” | Section 2A‑103(1)(r). |
| “Mortgage” | Section 9‑102(a)(55). |
| “Party” | Section 1‑201(29). |
| “Person” | Section 1‑201(30). |
| “Reasonable time” | Section 1‑204(1) and (2). |
| “Remedy” | Section 1‑201(34). |
| “Rights” | Section 1‑201(36). |
| “Security interest” | Section 1‑201(37). |
| “Termination” | Section 2A‑103(1)(z). |
| “Value” | Section 1‑201(44). |
| “Writing” | Section 1‑201(46). |

SOUTH CAROLINA REPORTER’S COMMENTS

Section 2A‑309 governs the rights of both lessors and lessees when goods become fixtures. Article 2A recognizes the traditional definition of fixtures, which recognizes the definition most widely used in real estate law.

In order to achieve priority over competing realty interests, lessors are required by Subsection (9) to make a fixture filing. The fixture filing must recite that it is to be filed in the real estate records and include a description of the real estate.

Subsection (4)(b) governs the dilemma when competing claims in goods that constitute fixtures arise between lessors and encumbrancers or owners of the real property to which the fixtures are attached. Article 2A follows the traditional rule: first in time, first in right. Subsection 4(a), however, provides an exception in the case of a purchase money interest. The exception allows a lessor who enters into a purchase money lease to attain priority over the competing real estate interests even if the lessor makes a fixture filing after the real estate claimant has filed. The lessor, however, must take advantage of the grace period by making the fixture filing before the goods have been fixtures for ten days. Under Subsection (7) , the lessor who does not make a proper filing will lose to a competing interest of an owner or encumbrancer of real estate. There are several exceptions to this rule, all of which are found within Subsection (5). In general, although these provisions are substantially similar to their sister Article 9 provision, they are broader.

LIBRARY REFERENCES

Fixtures 1 to 18.

Secured Transactions 85.

Westlaw Key Number Search: 177k1 to 177k18; 349Ak85.

C.J.S. Fixtures Sections 1 to 2, 4 to 8, 23, 29 to 31, 33, 38 to 40, 43.

C.J.S. Secured Transactions Section 54.

**SECTION 36‑2A‑310.** Lessor ‘ s and lessee ‘ s rights when goods become accessions.

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

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

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

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

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

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

(5) When under subsections (2) or (3) and (4) a lessor or a lessee of accessions holds an interest that is superior to all interests in the whole, the lessor or the lessee may (a) on default, expiration, termination, or cancellation of the lease contract by the other party but subject to the provisions of the lease contract and this chapter, or (b) if necessary to enforce his other rights and remedies under this chapter, remove the goods from the whole, free and clear of all interests in the whole, but he 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.

HISTORY: 2001 Act No. 67, Section 2.

OFFICIAL COMMENT

Uniform Statutory Source: Former Section 9‑314 (now codified as Section 9‑335).

Changes: Revised to reflect leasing terminology and to add new material.

Purposes: Subsection (1) defines “accessions.” Subsection (2) adds leasing terminology to the priority rule that applies when the lease is entered into before the goods become accessions. Subsection (3) adds leasing terminology to the priority rule that applies when the lease is entered into on or after the goods become accessions.

Subsection (4) creates two exceptions to the priority rules stated in subsections (2) and (3).

Finally, subsection (5) is modeled on the provisions of former Section 9‑314(4) (now codified as Sections 9‑335(d) and (e)) with respect to removal of accessions, restated to reflect the parallel changes in Section 2A‑309(8).

Neither this section nor Section 9‑335 governs where the accession to the goods is not subject to the interest of a lessor or a lessee under a lease contract and is not subject to the interest of a secured party under a security agreement. This issue is to be resolved by the courts, case by case.

Cross References: Sections 2A‑309(8), 9‑102(a)(1), 9‑335.

Definitional Cross References:

|  |  |
| --- | --- |
|  |  |
| “Agreed” | Section 1‑201(3). |
| “Buyer in the ordinary course of business” | Section 2A‑103(1)(a). |
| “Cancellation” | Section 2A‑103(1)(b). |
| “Creditor” | Section 1‑201(12). |
| “Goods” | Section 2A‑103(1)(h). |
| “Holder” | Section 1‑201(20). |
| “Knowledge” | Section 1‑201(25). |
| “Lease” | Section 2A‑103(1)(j). |
| “Lease contract” | Section 2A‑103(1)(l). |
| “Lessee” | Section 2A‑103(1)(n). |
| “Lessee in the ordinary course of business” | Section 2A‑103(1)(o). |
| “Lessor” | Section 2A‑103(1)(p). |
| “Party” | Section 1‑201(29). |
| “Person” | Section 1‑201(30). |
| “Remedy” | Section 1‑201(34). |
| “Rights” | Section 1‑201(36). |
| “Security interest” | Section 1‑201(37). |
| “Termination” | Section 2A‑103(1)(z). |
| “Value” | Section 1‑201(44). |
| “Writing” | Section 1‑201(46). |

SOUTH CAROLINA REPORTER’S COMMENTS

Subsections (1) and (2) of this provision reflect the provisions of its statutory analogue, Section 36‑9‑314 of the South Carolina Code. Section 2A‑310 defines “accession” and states the priority rule that applies when a lease is entered into before the goods became accessions, just as its sister provision does. A typical fact situation that arises in sales is described in Goodrich Silvertown v. Rogers, 189 S.C. 91, 200 S.E. 91 (1938), which involved a priority contest between a recorded chattel mortgage on a car and a subsequent conditional sale vendor of tires placed on the car. The South Carolina Supreme Court held for the holder of the security interest in the tires. This result was undisturbed by the adoption of Section 36‑9‑314(1). Under Section 2A‑310 the same result would obtain for accessions of leased goods.

With regard to the rights of a creditor under this section, it is important to note that South Carolina Code Section 36‑9‑301(2) provides that a purchase money security interest perfected by filing within ten days of transfer of possession relates back to the time of possession and takes priority over lien creditor rights arising between delivery and filing.

LIBRARY REFERENCES

Accession 2.

Westlaw Key Number Search: 7k2.

C.J.S. Accession Sections 9 to 12.

**SECTION 36‑2A‑311.** Priority subject to subordination.

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

HISTORY: 2001 Act No. 67, Section 2.

OFFICIAL COMMENT

Uniform Statutory Source: Former Section 9‑316 (now codified as section 9‑339).

Purposes: The several preceding sections deal with questions of priority. This section is inserted to make it entirely clear that a person entitled to priority may effectively agree to subordinate the claim. Only the person entitled to priority may make such an agreement: the rights of such a person cannot be adversely affected by an agreement to which that person is not a party.

Cross References: Sections 1‑102 and 2A‑304 through 2A‑310.

Definitional Cross References:

|  |  |
| --- | --- |
|  |  |
| “Agreement” | Section 1‑201(3). |
| “Person” | Section 1‑201(30). |

SOUTH CAROLINA REPORTER’S COMMENTS

This section mirrors its analogue, Section 36‑9‑316, and makes clear that persons who are entitled to priority may subordinate their claims.

LIBRARY REFERENCES

Bailment 21.

Westlaw Key Number Search: 50k21.

C.J.S. Bailments Sections 93 to 98.

Part 4

Performance of Lease Contract: Repudiated, Substituted and Excused

**SECTION 36‑2A‑401.** Insecurity: adequate assurance of performance.

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

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

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

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

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

HISTORY: 2001 Act No. 67, Section 2.

OFFICIAL COMMENT

Uniform Statutory Source: Section 2‑609.

Changes: Revised to reflect leasing practices and terminology. Note that in the analogue to subsection (3) (Section 2‑609(4)), the adjective “justified” modifies demand. The adjective was deleted here as unnecessary, implying no substantive change.

Definitional Cross References:

|  |  |
| --- | --- |
|  |  |
| “Aggrieved party” | Section 1‑201(2). |
| “Agreed” | Section 1‑201(3). |
| “Between merchants” | Section 2‑104(3). |
| “Conforming” | Section 2A‑103(1)(d). |
| “Delivery” | Section 1‑201(14). |
| “Lease contract” | Section 2A‑103(1)(l). |
| “Party” | Section 1‑201(29). |
| “Reasonable time” | Section 1‑204(1) and (2). |
| “Receipt” | Section 2‑103(1)(c). |
| “Rights” | Section 1‑201(36). |
| “Writing” | Section 1‑201(46). |

SOUTH CAROLINA REPORTER’S COMMENTS

This section is virtually the same as its analogue, Section 36‑2‑609 of the South Carolina Code, which modified the common law by expanding the doctrine of anticipatory repudiation. Under the common law, a party had no right to request reassurance, and any request could be ignored with impunity. McCloskey v. Minweld Steel Co., 220 F.2d 101 (3d Cir. 1955). T&S Brass and Bronze Works, Inc. v. Pic‑Air, Inc., 790 F.2d 1098 (4th Cir. 1986) provides a good example of insecurity under South Carolina law. That case involved an installment sale. Because forty percent of the goods in the first installment were defective, the buyer demanded assurance that the goods in the remaining installments would meet the contractual specifications. The court held the seller’s failure to provide the requested assurance of quality to be a repudiation. This section provides the same result in a lease.

LIBRARY REFERENCES

Bailment 22.

Westlaw Key Number Search: 50k22.

C.J.S. Bailments Sections 99 to 102.

**SECTION 36‑2A‑402.** Anticipatory repudiation.

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

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

(b) make demand pursuant to Section 36‑2A‑401 and await assurance of future performance adequate under the circumstances of the particular case; or

(c) resort to any right or remedy upon default under the lease contract or this 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 36‑2A‑524).

HISTORY: 2001 Act No. 67, Section 2.

OFFICIAL COMMENT

Uniform Statutory Source: Section 2‑610.

Changes: Revised to reflect leasing practices and terminology.

Definitional Cross References:

|  |  |
| --- | --- |
|  |  |
| “Aggrieved party” | Section 1‑201(2). |
| “Goods” | Section 2A‑103(1)(h). |
| “Lease contract” | Section 2A‑103(1)(l). |
| “Lessor” | Section 2A‑103(1)(p). |
| “Notifies” | Section 1‑201(26). |
| “Party” | Section 1‑201(29). |
| “Reasonable time” | Section 1‑204(1) and (2). |
| “Remedy” | Section 1‑201(34). |
| “Rights” | Section 1‑201(36). |
| “Value” | Section 1‑201(44). |

SOUTH CAROLINA REPORTER’S COMMENTS

This section merely codifies the common law of anticipatory repudiation. See E. Allan Farnsworth, Farnsworth on Contracts, Section 8.22 (2nd ed. 1990).

LIBRARY REFERENCES

Bailment 22.

Westlaw Key Number Search: 50k22.

C.J.S. Bailments Sections 99 to 102.

**SECTION 36‑2A‑403.** Retraction of anticipatory repudiation.

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

(2) Retraction may be by any method that clearly indicates to the aggrieved party that the repudiating party intends to perform under the lease contract and includes any assurance demanded under Section 36‑2A‑401.

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

HISTORY: 2001 Act No. 67, Section 2.

OFFICIAL COMMENT

Uniform Statutory Source: Section 2‑611.

Changes: Revised to reflect leasing practices and terminology. Note that in the analogue to subsection (2) (Section 2‑611(2)) the adjective “justifiably” modifies demanded. The adjective was deleted here (as it was in Section 2A‑401) as unnecessary, implying no substantive change.

Definitional Cross References:

|  |  |
| --- | --- |
|  |  |
| “Aggrieved party” | Section 1‑201(2). |
| “Cancellation” | Section 2A‑103(1)(b). |
| “Lease contract” | Section 2A‑103(1)(l). |
| “Party” | Section 1‑201(29). |
| “Rights” | Section 1‑201(36). |

SOUTH CAROLINA REPORTER’S COMMENTS

Section 2A‑403 restates the common law rules on retraction of a repudiation. See E. Allan Farnsworth, Farnsworth on Contracts, Section 8.22 (2nd ed. 1990).

LIBRARY REFERENCES

Bailment 22.

Westlaw Key Number Search: 50k22.

C.J.S. Bailments Sections 99 to 102.

**SECTION 36‑2A‑404.** Substituted performance.

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

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

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

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

HISTORY: 2001 Act No. 67, Section 2.

OFFICIAL COMMENT

Uniform Statutory Source: Section 2‑614.

Changes: Revised to reflect leasing practices and terminology.

Definitional Cross References:

|  |  |
| --- | --- |
|  |  |
| “Agreed” | Section 1‑201(3). |
| “Delivery” | Section 1‑201(14). |
| “Fault” | Section 2A‑103(1)(f). |
| “Lessee” | Section 2A‑103(1)(n). |
| “Lessor” | Section 2A‑103(1)(p). |
| “Supplier” | Section 2A‑103(1)(x). |

SOUTH CAROLINA REPORTER’S COMMENTS

Section 2A‑404 is designed to save a transaction where failure or impracticability arise in regard to matters such as shipping, carriage, or manner of payment. There are no South Carolina cases on point. This section adopts the rule of Section 36‑2‑614 to leasing transactions.

LIBRARY REFERENCES

Bailment 22.

Westlaw Key Number Search: 50k22.

C.J.S. Bailments Sections 99 to 102.

**SECTION 36‑2A‑405.** Excused performance.

Subject to Section 36‑2A‑404 on substituted performance, the following rules apply:

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

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

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

HISTORY: 2001 Act No. 67, Section 2.

OFFICIAL COMMENT

Uniform Statutory Source: Section 2‑615.

Changes: Revised to reflect leasing practices and terminology.

Definitional Cross References:

|  |  |
| --- | --- |
|  |  |
| “Agreed” | Section 1‑201(3). |
| “Contract” | Section 1‑201(11). |
| “Delivery” | Section 1‑201(14). |
| “Finance lease” | Section 2A‑103(1)(g). |
| “Good faith” | Sections 1‑201(19) and 2‑103(1)(b). |
| “Knows” | Section 1‑201(25). |
| “Lease” | Section 2A‑103(1)(j). |
| “Lease contract” | Section 2A‑103(1)(l). |
| “Lessee” | Section 2A‑103(1)(n). |
| “Lessor” | Section 2A‑103(1)(p). |
| “Notifies” | Section 1‑201(26). |
| “Sale” | Section 2‑106(1). |
| “Seasonably” | Section 1‑204(3). |
| “Supplier” | Section 2A‑103(1)(x). |

SOUTH CAROLINA REPORTER’S COMMENTS

This section expands the rule of Section 36‑2‑615 to the law of leases; however, although this marks the express adoption of impracticability in place of the traditional common law of impossibility, it is doubtful that this makes any change in the current common law of contracts. See E. Allan Farnsworth, Farnsworth on Contracts, Section 9.6 (2nd ed. 1990).

South Carolina law appears unchanged by this section, even though those decisions use the term “impossibility” as opposed to impracticability due to hardship or added expense. See, e.g., Hammassopoulo v. Hammassopoulo, 134 S.C. 54, 131 S.E. 319 (1925).

Section 405(b) requires that any allocation of goods under this section due to a shortage caused by force majeure be done in a fair, reasonable, non‑discriminatory manner.

The occurrence of generally accepted business risks does not excuse performance under this rule. The comments to Section 36‑2‑615 illustrate what type of events give rise to the excuse.

LIBRARY REFERENCES

Bailment 22.

Westlaw Key Number Search: 50k22.

C.J.S. Bailments Sections 99 to 102.

**SECTION 36‑2A‑406.** Procedure on excused performance.

(1) If the lessee receives notification of a material or indefinite delay or an allocation justified under Section 36‑2A‑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 36‑2A‑510):

(a) terminate the lease contract (Section 36‑2A‑505(2)); or

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

(2) If, after receipt of a notification from the lessor under Section 36‑2A‑405, the lessee fails so to modify the lease agreement within a reasonable time not exceeding thirty days, the lease contract lapses with respect to any deliveries affected.

HISTORY: 2001 Act No. 67, Section 2.

OFFICIAL COMMENT

Uniform Statutory Source: Section 2‑616(1) and (2).

Changes: Revised to reflect leasing practices and terminology. Note that subsection 1(a) allows the lessee under a lease, including a finance lease, the right to terminate the lease for excused performance (Sections 2A‑404 and 2A‑405). However, subsection 1(b), which allows the lessee the right to modify the lease for excused performance, excludes a finance lease that is not a consumer lease. This exclusion is compelled by the same policy that led to codification of provisions with respect to irrevocable promises. Section 2A‑407.

Definitional Cross References:

|  |  |
| --- | --- |
|  |  |
| “Consumer lease” | Section 2A‑103(1)(e). |
| “Delivery” | Section 1‑201(14). |
| “Finance lease” | Section 2A‑103(1)(g). |
| “Goods” | Section 2A‑103(1)(h). |
| “Installment lease contract” | Section 2A‑103(1)(i). |
| “Lease agreement” | Section 2A‑103(1)(k). |
| “Lease contract” | Section 2A‑103(1)(l). |
| “Lessee” | Section 2A‑103(1)(n). |
| “Lessor” | Section 2A‑103(1)(p). |
| “Notice” | Section 1‑201(25). |
| “Reasonable time” | Section 1‑204(1) and (2). |
| “Receipt” | Section 2‑103(1)(c). |
| “Rights” | Section 1‑201(36). |
| “Termination” | Section 2A‑103(1)(z). |
| “Value” | Section 1‑201(44). |
| “Written” | Section 1‑201(46). |

SOUTH CAROLINA REPORTER’S COMMENTS

Section 2A‑406 expands the law of Section 36‑2‑616 to the leasing context. Section 36‑2‑616 codified the common law doctrine that a buyer had the option of either terminating a sales contract or modifying it if he received notification from the seller of a material delay or allocation.

The 30‑day provision in subsection (2) puts an outer limit on a “ reasonable time.” Such limits are commonplace throughout the Uniform Commercial Code. See Section 36‑2‑616 cmt. 5. The lessee only has such a reasonable time to accept the proposed modification before the lease lapses.

LIBRARY REFERENCES

Bailment 22.

Westlaw Key Number Search: 50k22.

C.J.S. Bailments Sections 99 to 102.

**SECTION 36‑2A‑407.** Irrevocable promises: finance leases.

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

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

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

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

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

HISTORY: 2001 Act No. 67, Section 2.

OFFICIAL COMMENT

Uniform Statutory Source: None.

Purposes: 1. This section extends the benefits of the classic “hell or high water” clause to a finance lease that is not a consumer lease. This section is self‑executing; no special provision need be added to the contract. This section makes covenants in a finance lease irrevocable and independent due to the function of the finance lessor in a three party relationship: the lessee is looking to the supplier to perform the essential covenants and warranties. Section 2A‑209. Thus, upon the lessee’ s acceptance of the goods the lessee’s promises to the lessor under the lease contract become irrevocable and independent. The provisions of this section remain subject to the obligation of good faith (Sections 2A‑103(4) and 1‑203) , and the lessee’s revocation of acceptance (Section 2A‑517).

2. The section requires the lessee to perform even if the lessor’s performance after the lessee’s acceptance is not in accordance with the lease contract; the lessee may, however, have and pursue a cause of action against the lessor, e.g., breach of certain limited warranties (Sections 2A‑210 and 2A‑211(1)). This is appropriate because the benefit of the supplier’s promises and warranties to the lessor under the supply contract and, in some cases, the warranty of a manufacturer who is not the supplier, is extended to the lessee under the finance lease. Section 2A‑209. Despite this balance, this section excludes a finance lease that is a consumer lease. That a consumer be obligated to pay notwithstanding defective goods or the like is a principle that is not tenable under case law (Unico v. Owen, 50 N.J. 101, 232 A.2d 405 (1967)), state statute (Unif. Consumer Credit Code Section 3.403‑.405, 7A U.L.A. 126‑31 (1974), or federal statute (15 U.S.C. Section 1666i (1982)).

3. The relationship of the three parties to a transaction that qualifies as a finance lease is best demonstrated by a hypothetical. A, the potential lessor, has been contacted by B, the potential lessee, to discuss the lease of an expensive line of equipment that B has recently placed an order for with C, the manufacturer of such goods. The negotiation is completed and A, as lessor, and B, as lessee, sign a lease of the line of equipment for a 60‑month term. B, as buyer, assigns the purchase order with C to A. If this transaction creates a lease (Section 2A‑103(1)(j)), this transaction should qualify as a finance lease. Section 2A‑103(1)(g).

4. The line of equipment is delivered by C to B’s place of business. After installation by C and testing by B, B accepts the goods by signing a certificate of delivery and acceptance, a copy of which is sent by B to A and C. One year later the line of equipment malfunctions and B falls behind in its manufacturing schedule.

5. Under this Article, because the lease is a finance lease, no warranty of fitness or merchantability is extended by A to B. Sections 2A‑212(1) and 2A‑213. Absent an express provision in the lease agreement, application of Section 2A‑210 or Section 2A‑211(1), or application of the principles of law and equity, including the law with respect to fraud, duress, or the like ( Sections 2A‑103(4) and 1‑103), B has no claim against A. B’s obligation to pay rent to A continues as the obligation became irrevocable and independent when B accepted the line of equipment (Section 2A‑407(1)). B has no right of set‑off with respect to any part of the rent still due under the lease. Section 2A‑508(6). However, B may have another remedy. Despite the lack of privity between B and C (the purchase order with C having been assigned by B to A), B may have a claim against C. Section 2A‑209(1).

6. This section does not address whether a “hell or high water” clause, i.e., a clause that is to the effect of this section, is enforceable if included in a finance lease that is a consumer lease or a lease that is not a finance lease. That issue will continue to be determined by the facts of each case and other law which this section does not affect. Sections 2A‑104, 2A‑103(4), 9‑403 and 9‑404. However, with respect to finance leases that are not consumer leases courts have enforced “hell or high water” clauses. In re O.P.M. Leasing Servs., 21 Bankr. 993, 1006 (Bankr. S.D.N.Y. 1982).

7. Subsection (2) further provides that a promise that has become irrevocable and independent under subsection (1) is enforceable not only between the parties but also against third parties. Thus, the finance lease can be transferred or assigned without disturbing enforceability. Further, subsection (2) also provides that the promise cannot, among other things, be canceled or terminated without the consent of the lessor.

Cross References: Sections 1‑103, 1‑203, 2A‑103(1)(g), 2A‑103(1)(j), 2A‑103(4), 2A‑104, 2A‑209, 2A‑209(1), 2A‑210, 2A‑211(1), 2A‑212(1), 2A‑213, 2A‑517(1)(b), 9‑403 and 9‑404.

Definitional Cross References:

|  |  |
| --- | --- |
|  |  |
| “Cancellation” | Section 2A‑103(1)(b). |
| “Consumer lease” | Section 2A‑103(1)(e). |
| “Finance lease” | Section 2A‑103(1)(g). |
| “Goods” | Section 2A‑103(1)(h). |
| “Lease contract” | Section 2A‑103(1)(l). |
| “Lessee” | Section 2A‑103(1)(n). |
| “Party” | Section 1‑201(29). |
| “Termination” | Section 2A‑103(1)(z). |

SOUTH CAROLINA REPORTER’S COMMENTS

This provision is new to the Uniform Commercial Code: Article 2 has no corresponding section. It is a codification of the “hell or high water” clause commonly included in finances leases to protect their assignability, essentially creating a status similar to a holder in due course. The lessee must continue to make payments under the lease after accepting the goods, regardless of subsequent events. The finance lessee’s rights lie against the supplier. See Section 2A‑209(1).

LIBRARY REFERENCES

Bailment 22.

Westlaw Key Number Search: 50k22.

C.J.S. Bailments Sections 99 to 102.

Part 5

Default

A. In General

**SECTION 36‑2A‑501.** Default: procedure.

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

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

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

(4) Except as otherwise provided in Section 36‑1‑305(a) or this chapter or the lease agreement, the rights and remedies referred to in subsections (2) and (3) are cumulative.

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

HISTORY: 2001 Act No. 67, Section 2; 2014 Act No. 213 (S.343), Section 18, eff October 1, 2014.

OFFICIAL COMMENT

Uniform Statutory Source: Former Section 9‑501 (now codified as Sections 9‑601 through 9‑604).

Changes: Substantially revised.

Purposes: 1. Subsection (1) is new and represents a departure from the Article on Secured Transactions (Article 9) as the subsection makes clear that whether a party to the lease agreement is in default is determined by this Article as well as the agreement. Sections 2A‑508 and 2A‑523. It further departs from Article 9 in recognizing the potential default of either party, a function of the bilateral nature of the obligations between the parties to the lease contract.

2. Subsection (2) is a version of the first sentence of Section 9‑601(a), revised to reflect leasing terminology.

3. Subsection (3), an expansive version of the second sentence of Section 9‑601(a), lists the procedures that may be followed by the party seeking enforcement; in effect, the scope of the procedures listed in subsection (3) is consistent with the scope of the procedures available to the foreclosing secured party.

4. Subsection (4) establishes that the parties’ rights and remedies are cumulative. DeKoven, Leases of Equipment: Puritan Leasing Company v. August, A Dangerous Decision, 12 U.S.F. L. Rev. 257, 276‑80 (1978). Cumulation, and largely unrestricted selection, of remedies is allowed in furtherance of the general policy of the Commercial Code, stated in Section 1‑106, that remedies be liberally administered to put the aggrieved party in as good a position as if the other party had fully performed. Therefore, cumulation of, or selection among, remedies is available to the extent necessary to put the aggrieved party in as good a position as it would have been in had there been full performance. However, cumulation of, or selection among, remedies is not available to the extent that the cumulation or selection would put the aggrieved party in a better position than it would have been in had there been full performance by the other party.

5. Section 9‑602, which, among other things, states that certain rules, to the extent they give rights to the debtor and impose duties on the secured party, may not be waived or varied, was not incorporated in this Article. Given the significance of freedom of contract in the development of the common law as it applies to bailments for hire and the lessee’s lack of an equity of redemption, there was no reason to impose that restraint.

Cross References: Sections 1‑106, 2A‑508, 2A‑523, Article 9, especially Sections 9‑601 and 9‑602.

Definitional Cross References:

|  |  |
| --- | --- |
|  |  |
| “Goods” | Section 2A‑103(1)(h). |
| “Lease agreement” | Section 2A‑103(1)(k). |
| “Lease contract” | Section 2A‑103(1)(l). |
| “Lessee” | Section 2A‑103(1)(n). |
| “Lessor” | Section 2A‑103(1)(p). |
| “Party” | Section 1‑201(29). |
| “Remedy” | Section 1‑201(34). |
| “Rights” | Section 1‑201(36). |

SOUTH CAROLINA REPORTER’S COMMENTS

Though there is no South Carolina lease law on this point, prior South Carolina allows cumulative remedies. Both contract law and Article 2 attempt to put the aggrieved party in as good of position as he would have been had the contract been fulfilled. There is nothing in South Carolina law to indicate that we would not follow Puritan Leasing v. August, 16 Cal. 3d 451, 128 Cal. Rptr. 175, 546 P.2d 679 (1975) (referred to in the Official Comment). South Carolina permits the aggrieved party to exercise different remedies for different types of property, even where all of the collateral is personalty. Stokes v Liverpool & London & Globe Ins. Co., 130 S.C. 521, 126 S.E. 649 (1924). Unlike the Article 2 provision, this section specifically provides for self‑help.

Editor’s Note

2014 Act No. 213, Section 51, provides as follows:

“SECTION 51. This act becomes effective on October 1, 2014. It applies to transactions entered into and events occurring after that date.”

Effect of Amendment

2014 Act No. 213, Section 18, in subsection (4), substituted “36‑1‑305(a)” for “36‑1‑106(1)”.

LIBRARY REFERENCES

Bailment 22.

Westlaw Key Number Search: 50k22.

C.J.S. Bailments Sections 99 to 102.

**SECTION 36‑2A‑502.** Notice after default.

Except as otherwise provided in 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.

HISTORY: 2001 Act No. 67, Section 2.

OFFICIAL COMMENT

Uniform Statutory Source: None.

Purposes: This section makes clear that absent agreement to the contrary or provision in this Article to the contrary, e.g., Section 2A‑516( 3)(a), the party in default is not entitled to notice of default or enforcement. While a review of Part 5 of Article 9 leads to the same conclusion with respect to giving notice of default to the debtor, it is never stated. Although Article 9 requires notice of disposition and strict foreclosure, the different scheme of lessors’ and lessees’ rights and remedies developed under the common law, and codified by this Article, generally does not require notice of enforcement; furthermore, such notice is not mandated by due process requirements. However, certain sections of this Article do require notice. E.g., Section 2A‑517(4).

Cross References: Sections 2A‑516(3)(a), 2A‑517(4), and Article 9, esp. Part 5.

Definitional Cross References:

|  |  |
| --- | --- |
|  |  |
| “Lease agreement” | Section 2A‑103(1)(k). |
| “Lease contract” | Section 2A‑103(1)(l). |
| “Lessee” | Section 2A‑103(1)(n). |
| “Lessor” | Section 2A‑103(1)(p). |
| “Notice” | Section 1‑201(25). |
| “Party” | Section 1‑201(29). |

SOUTH CAROLINA REPORTER’S COMMENTS

Although there is no South Carolina lease law on point, there is nothing to indicate that South Carolina would require notice of default or enforcement except where required by other sections of Article 2A or by Title 37 for consumer leases. The notice requirement of Section 37‑5‑110, of course, takes precedence over the provisions of Article 2A. Section 2A‑104(2).

LIBRARY REFERENCES

Bailment 22 to 26.

Westlaw Key Number Searches: 50k22 to 50k26.

C.J.S. Bailments Sections 86 to 92, 99 to 105.

**SECTION 36‑2A‑503.** Modification or impairment of rights and remedies.

(1) 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 in this chapter and may limit or alter the measure of damages recoverable under this chapter.

(2) 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 of its essential purpose, or provision for an exclusive remedy is unconscionable, a remedy may be had as provided in this chapter.

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

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

HISTORY: 2001 Act No. 67, Section 2.

OFFICIAL COMMENT

Uniform Statutory Source: Sections 2‑719 and 2‑701.

Changes: Rewritten to reflect lease terminology and to clarify the relationship between this section and Section 2A‑504.

Purposes: 1. A significant purpose of this Part is to provide rights and remedies for those parties to a lease who fail to provide them by agreement or whose rights and remedies fail of their essential purpose or are unenforceable. However, it is important to note that this implies no restriction on freedom to contract. Sections 2A‑103(4) and 1‑102(3). Thus, subsection (1), a revised version of the provisions of Section 2‑719(1), allows the parties to the lease agreement freedom to provide for rights and remedies in addition to or in substitution for those provided in this Article and to alter or limit the measure of damages recoverable under this Article. Except to the extent otherwise provided in this Article (e.g., Sections 2A‑105, 106 and 108(1) and (2)), this Part shall be construed neither to restrict the parties’ ability to provide for rights and remedies or to limit or alter the measure of damages by agreement, nor to imply disapproval of rights and remedy schemes other than those set forth in this Part.

2. Subsection (2) makes explicit with respect to this Article what is implicit in Section 2‑719 with respect to the Article on Sales (Article 2) : if an exclusive remedy is held to be unconscionable, remedies under this Article are available. Section 2‑719 Official Comment 1.

3. Subsection (3), a revision of Section 2‑719(3), makes clear that consequential damages may also be liquidated. Section 2A‑504(1).

4. Subsection (4) is a revision of the provisions of Section 2‑701. This subsection leaves the treatment of default with respect to obligations or promises collateral or ancillary to the lease contract to other law. Sections 2A‑103(4) and 1‑103. An example of such an obligation would be that of the lessor to the secured creditor which has provided the funds to leverage the lessor’s lease transaction; an example of such a promise would be that of the lessee, as seller, to the lessor, as buyer, in a sale‑ leaseback transaction.

Cross References: Sections 1‑102(3), 1‑103, Article 2, especially Sections 2‑701, 2‑719, 2‑719(1), 2‑719(3), 2‑719 Official Comment 1, and Sections 2A‑103(4), 2A‑105, 2A‑106, 2A‑108(1), 2A‑108(2), and 2A‑504.

Definitional Cross References:

|  |  |
| --- | --- |
|  |  |
| “Agreed” | Section 1‑201(3). |
| “Consumer goods” | Section 9‑102(a)(23). |
| “Lease agreement” | Section 2A‑103(1)(k). |
| “Lease contract” | Section 2A‑103(1)(l). |
| “Lessee” | Section 2A‑103(1)(n). |
| “Lessor” | Section 2A‑103(1)(p). |
| “Person” | Section 1‑201(30). |
| “Remedy” | Section 1‑201(34). |
| “Rights” | Section 1‑201(36). |

SOUTH CAROLINA REPORTER’S COMMENTS

This section helps ensure that the parties will have adequate remedies for breach of a lease. Though there is no South Carolina lease law on point, prior South Carolina law indicates a policy decision to avoid unfair limitations of liability. See Deiter v. Frick Co., 169 S.C. 480, 169 S.E. 297 (1932) (where the contract term limiting seller’s liability to furnishing duplicate parts did not save the seller from consequential damages).

LIBRARY REFERENCES

Bailment 24 to 34.

Damages 78(6).

Westlaw Key Number Search: 50k24 to 50k34; 115k78(6).

C.J.S. Bailments Sections 103 to 119.

C.J.S. Damages Section 113.

**SECTION 36‑2A‑504.** Liquidation of damages.

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

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

(3) If the lessor justifiably withholds or stops delivery of goods because of the lessee’s default or insolvency (Section 36‑2A‑525 or 36‑2A‑526), the lessee is entitled to restitution of any amount by which the sum of his payments exceeds:

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

(b) in the absence of those terms, twenty 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 five hundred dollars.

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

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

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

HISTORY: 2001 Act No. 67, Section 2.

OFFICIAL COMMENT

Uniform Statutory Source: Sections 2‑718(1), (2), (3) and 2‑719(2).

Changes: Substantially rewritten.

Purposes: Many leasing transactions are predicated on the parties’ ability to agree to an appropriate amount of damages or formula for damages in the event of default or other act or omission. The rule with respect to sales of goods (Section 2‑718) may not be sufficiently flexible to accommodate this practice. Thus, consistent with the common law emphasis upon freedom to contract with respect to bailments for hire, this section has created a revised rule that allows greater flexibility with respect to leases of goods.

Subsection (1), a significantly modified version of the provisions of Section 2‑718(1), provides for liquidation of damages in the lease agreement at an amount or by a formula. Section 2‑718(1) does not by its express terms include liquidation by a formula; this change was compelled by modern leasing practice. Subsection (1), in a further expansion of Section 2‑718(1), provides for liquidation of damages for default as well as any other act or omission.

A liquidated damages formula that is common in leasing practice provides that the sum of lease payments past due, accelerated future lease payments, and the lessor’s estimated residual interest, less the net proceeds of disposition (whether by sale or re‑lease) of the leased goods is the lessor’s damages. Tax indemnities, costs, interest and attorney’s fees are also added to determine the lessor’s damages. Another common liquidated damages formula utilizes a periodic depreciation allocation as a credit to the aforesaid amount in mitigation of a lessor’s damages. A third formula provides for a fixed number of periodic payments as a means of liquidating damages. Stipulated loss or stipulated damage schedules are also common. Whether these formulae are enforceable will be determined in the context of each case by applying a standard of reasonableness in light of the harm anticipated when the formula was agreed to. Whether the inclusion of these formulae will affect the classification of the transaction as a lease or a security interest is to be determined by the facts of each case. Section 1‑201(37). E.g., In re Noack, 44 Bankr. 172, 174‑75 (Bankr. E.D. Wis. 1984).

This section does not incorporate two other tests that under sales law determine enforceability of liquidated damages, i.e., difficulties of proof of loss and inconvenience or nonfeasibility of otherwise obtaining an adequate remedy. The ability to liquidate damages is critical to modern leasing practice; given the parties’ freedom to contract at common law, the policy behind retaining these two additional requirements here was thought to be outweighed. Further, given the expansion of subsection (1) to enable the parties to liquidate the amount payable with respect to an indemnity for loss or diminution of anticipated tax benefits resulted in another change: the last sentence of Section 2‑718(1), providing that a term fixing unreasonably large liquidated damages is void as a penalty, was also not incorporated. The impact of local, state and federal tax laws on a leasing transaction can result in an amount payable with respect to the tax indemnity many times greater than the original purchase price of the goods. By deleting the reference to unreasonably large liquidated damages the parties are free to negotiate a formula, restrained by the rule of reasonableness in this section. These changes should invite the parties to liquidate damages. Peters, Remedies for Breach of Contracts Relating to the Sale of Goods Under the Uniform Commercial Code: A Roadmap for Article Two, 73 Yale L.J. 199, 278 (1963).

Subsection (2), a revised version of Section 2‑719(2), provides that if the liquidated damages provision is not enforceable or fails of its essential purpose, remedy may be had as provided in this Article.

Subsection (3)(b) of this section differs from subsection (2)(b) of Section 2‑718; in the absence of a valid liquidated damages amount or formula the lessor is permitted to retain 20 percent of the present value of the total rent payable under the lease. The alternative limitation of $500 contained in Section 2‑718 is deleted as unrealistically low with respect to a lease other than a consumer lease.

Cross References: Sections 1‑201(37), 2‑718, 2‑718(1), 2‑718(2)(b) and 2‑719(2).

Definitional Cross References:

|  |  |
| --- | --- |
|  |  |
| “Consumer lease” | Section 2A‑103(1)(e). |
| “Delivery” | Section 1‑201(14). |
| “Goods” | Section 2A‑103(1)(h). |
| “Insolvent” | Section 1‑201(23). |
| “Lease agreement” | Section 2A‑103(1)(k). |
| “Lease contract” | Section 2A‑103(1)(l). |
| “Lessee” | Section 2A‑103(1)(n). |
| “Lessor” | Section 2A‑103(1)(p). |
| “Lessor’s residual interest” | Section 2A‑103(1)(q). |
| “Party” | Section 1‑201(29). |
| “Present value” | Section 2A‑103(1)(u). |
| “Remedy” | Section 1‑201(34). |
| “Rights” | Section 1‑201(36). |
| “Term” | Section 1‑201(42). |
| “Value” | Section 1‑201(44). |

SOUTH CAROLINA REPORTER’S COMMENT

The general rule of subsection (1) is in accord with the basic common law treatment of liquidated damages. Though there is no South Carolina lease law on point, the common law rule is indicated by the courts’ refusal to enforce an agreement when the amount stated exceeds any reasonable expectation of compensation, and is, thus, penal in nature. See 3 Williston, Sales, Section 599L (rev. ed. 1948). In William & Co. v. Vance & Moseley, 9 S.C. 344 (1877), a clause in a contract for the sale of cotton calling for liquidated damages of $2.00 per bale was held to be valid liquidated damages. However, the court held in Murray & Co. v. Ouzts, 117 S.C. 388, 109 S.E. 122 (1921), that a clause in the contract calling for reimbursement of all expenses and 20 per cent of the purchase price to be paid in the event of breach was a penalty and unenforceable. These decisions hinged on the correlation between the amount called for in the liquidated damages clause and the actual damages sustained, rather than on the amount of damages that could have been reasonably expected at the time the contract was made.

LIBRARY REFERENCES

Damages 74 to 86.

Westlaw Key Number Searches: 115k74 to 115k86.

C.J.S. Damages Sections 101 to 111, 113 to 115.

**SECTION 36‑2A‑505.** Cancellation and termination and effect of cancellation, termination, rescission, or fraud on rights and remedies.

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

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

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

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

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

HISTORY: 2001 Act No. 67, Section 2.

OFFICIAL COMMENT

Uniform Statutory Source: Sections 2‑106(3) and (4), 2‑720 and 2‑721.

Changes: Revised to reflect leasing practices and terminology.

Definitional Cross References:

|  |  |
| --- | --- |
|  |  |
| “Cancellation” | Section 2A‑103(1)(b). |
| “Goods” | Section 2A‑103(1)(h). |
| “Lease contract” | Section 2A‑103(1)(l). |
| “Party” | Section 1‑201(29). |
| “Remedy” | Section 1‑201(34). |
| “Rights” | Section 1‑201(36). |
| “Termination” | Section 2A‑103(1)(z). |

SOUTH CAROLINA REPORTER’S COMMENT

Though there is no South Carolina lease law on point, prior South Carolina law was changed by Article 2 which preserves the usual remedies for breach, unless it is clearly the parties’ intent to waive them. This section follows its Article 2 analogue and also makes it clear that remedies for a fraudulent breach are as liberal as for a non‑fraudulent breach. See Aaron v. Hampton Motors, Inc., 240 S.C. 26, 124 S.E.2d 585 (1962); Culbreath v. Investor’s Syndicate, 203 S.C. 213, 26 S.E.2d 809 (1943).

LIBRARY REFERENCES

Bailment 22, 24 to 34.

Westlaw Key Number Search: 50k22; 50k24 to 50k34.

C.J.S. Bailments Sections 99 to 119.

**SECTION 36‑2A‑506.** Statute of limitations.

(1) 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 reduce the period of limitation to not less than one year.

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

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

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

HISTORY: 2001 Act No. 67, Section 2.

OFFICIAL COMMENT

Uniform Statutory Source: Section 2‑725.

Changes: Substantially rewritten.

Purposes: Subsection (1) does not incorporate the limitation found in Section 2‑725(1) prohibiting the parties from extending the period of limitation. Breach of warranty and indemnity claims often arise in a lease transaction; with the passage of time such claims often diminish or are eliminated. To encourage the parties to commence litigation under these circumstances makes little sense.

Subsection (2) states two rules for determining when a cause of action accrues. With respect to default, the rule of Section 2‑725(2) is not incorporated in favor of a more liberal rule of the later of the date when the default occurs or when the act or omission on which it is based is or should have been discovered. With respect to indemnity, a similarly liberal rule is adopted.

Cross References: Sections 2‑725(1) and 2‑725(2).

Definitional Cross References:

|  |  |
| --- | --- |
|  |  |
| “Action” | Section 1‑201(1). |
| “Aggrieved party” | Section 1‑201(2). |
| “Lease contract” | Section 2A‑103(1)(l). |
| “Party” | Section 1‑201(29). |
| “Remedy” | Section 1‑201(34). |
| “Termination” | Section 2A‑103(1)(z). |

SOUTH CAROLINA REPORTER’S COMMENT

Although there is no South Carolina lease law on point, this Article takes lease contracts out of the generally applicable statute of limitations for contract actions, as Article 2 does for sales. See Atlas Food Systems and Services, Inc. v. Crane National Vendors Div. of Unidynamics Corp., 319 S.C. 556, 462 S.E.2d 858 (1995) (holding that a sale of goods is governed by the six‑year Article 2 statute of frauds, Section 36‑2‑725, not the general three‑year statute of frauds in Section 15‑3‑530).

Like Article 2, this section contains a provision permitting the parties to reduce this period should they desire.

South Carolina provides a six‑year statute of frauds for sales of goods rather than the four‑year uniform provision found in both Article 2 and Article 2A of the UCC. This provision enacts the official language of the UCC provision and thus provides a four‑year statute of limitations for leases rather than the six years provided for sales in South Carolina.

LIBRARY REFERENCES

Bailment 28.

Limitation of Actions 46(6), 95(9).

Westlaw Key Number Search: 50k28; 241k46(6); 241k95(9).

C.J.S. Bailments Section 107.

C.J.S. Limitations of Actions Sections 131 to 132, 134 to 135, 137, 142, 146.

**SECTION 36‑2A‑507.** Proof of market rent: time and place.

(1) Damages based on market rent (Section 36‑2A‑519 or 36‑2A‑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 36‑2A‑519 and 36‑2A‑528.

(2) If evidence of rent for the use of the goods concerned for a lease term identical to the remaining lease term of the original lease agreement and prevailing at the times or places described in this 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.

(3) 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 he has given the other party notice the court finds sufficient to prevent unfair surprise.

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

HISTORY: 2001 Act No. 67, Section 2.

OFFICIAL COMMENT

Uniform Statutory Source: Sections 2‑723 and 2‑724.

Changes: Revised to reflect leasing practices and terminology. Sections 2A‑519 and 2A‑528 specify the times as of which market rent is to be determined.

Definitional Cross References:

|  |  |
| --- | --- |
|  |  |
| “Goods” | Section 2A‑103(1)(h). |
| “Lease” | Section 2A‑103(1)(j). |
| “Lease agreement” | Section 2A‑103(1)(k). |
| “Notice” | Section 1‑201(25). |
| “Party” | Section 1‑201(29). |
| “Reasonable time” | Section 1‑204(1) and (2). |
| “Usage of trade” | Section 1‑205. |
| “Value” | Section 1‑201(44). |

SOUTH CAROLINA REPORTER’S COMMENT

Although there is no South Carolina lease law on point, prior South Carolina law seems to be consistent with this section. See Union Bleaching & Finishing Co. v. Barker Fuel Co., 124 S.C. 458, 117 S.E. 735 (1923) (in buyer’s action for seller’s failure to deliver coal, market price at most available markets was a proper basis for damages because there was no market price available at time and place where contract called for delivery); Clinton Oil & Mfg. Co. v. Carpenter, 113 S.C. 10, 101 S.E. 47 (1919) (market price was measured at nearest market place to point of delivery plus cost of shipment to delivery point).

LIBRARY REFERENCES

Bailment 32.

Westlaw Key Number Search: 50k32.

C.J.S. Bailments Sections 117 to 119.

B. Default by Lessor

**SECTION 36‑2A‑508.** Lessee ‘ s remedies.

(1) If a lessor fails to deliver the goods in conformity to the lease contract (Section 36‑2A‑509) or repudiates the lease contract (Section 36‑2A‑402), or a lessee rightfully rejects the goods (Section 36‑2A‑509) or justifiably revokes acceptance of the goods (Section 36‑2A‑517), then with respect to any goods involved, and with respect to all of the goods if under an installment lease contract the value of the whole lease contract is substantially impaired (Section 36‑2A‑510), the lessor is in default under the lease contract and the lessee may:

(a) cancel the lease contract (Section 36‑2A‑505(1));

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

(c) cover and recover damages as to all goods affected whether or not they have been identified to the lease contract (Sections 36‑2A‑518 and 36‑2A‑520), or recover damages for nondelivery (Sections 36‑2A‑519 and 36‑2A‑520);

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

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

(a) if the goods have been identified, recover them (Section 36‑2A‑522); or

(b) in a proper case, obtain specific performance or replevy the goods (Section 36‑2A‑521).

(3) If a lessor is otherwise in default under a lease contract, the lessee may exercise the rights and pursue the remedies provided in the lease contract, which may include a right to cancel the lease, and in Section 36‑2A‑519(3).

(4) If a lessor has breached a warranty, whether express or implied, the lessee may recover damages (Section 36‑2A‑519(4)).

(5) On rightful rejection or justifiable revocation of acceptance, a lessee has a security interest in goods in the lessee’s possession or control for any rent and security that has been paid and any expenses reasonably incurred in their inspection, receipt, transportation, and care and custody and may hold those goods and dispose of them in good faith and in a commercially reasonable manner, subject to Section 36‑2A‑527(5).

(6) Subject to the provisions of Section 36‑2A‑407, a lessee, on notifying the lessor of the lessee’s intention to do so, may deduct all or any part of the damages resulting from any default under the lease contract from any part of the rent still due under the same lease contract.

HISTORY: 2001 Act No. 67, Section 2.

OFFICIAL COMMENT

Uniform Statutory Source: Sections 2‑711 and 2‑717.

Changes: Substantially rewritten.

Purposes: 1. This section is an index to Sections 2A‑509 through 522 which set out the lessee’s rights and remedies after the lessor’s default. The lessor and the lessee can agree to modify the rights and remedies available under this Article; they can, among other things, provide that for defaults other than those specified in subsection (1) the lessee can exercise the rights and remedies referred to in subsection (1); and they can create a new scheme of rights and remedies triggered by the occurrence of the default. Sections 2A‑103(4) and 1‑102(3).

2. Subsection (1), a substantially rewritten version of the provisions of Section 2‑711(1), lists three cumulative remedies of the lessee where the lessor has failed to deliver conforming goods or has repudiated the contract, or the lessee has rightfully rejected or justifiably revoked. Sections 2A‑501(2) and (4). Subsection (1) also allows the lessee to exercise any contractual remedy. This Article rejects any general doctrine of election of remedy. To determine if one remedy bars another in a particular case is a function of whether the lessee has been put in as good a position as if the lessor had fully performed the lease agreement. Use of multiple remedies is barred only if the effect is to put the lessee in a better position than it would have been in had the lessor fully performed under the lease. Sections 2A‑103(4), 2A‑501(4), and 1‑106(1). Subsection (1)( b), in recognition that no bright line can be created that would operate fairly in all installment lease cases and in recognition of the fact that a lessee may be able to cancel the lease (revoke acceptance of the goods) after the goods have been in use for some period of time, does not require that all lease payments made by the lessee under the lease be returned upon cancellation. Rather, only such portion as is just of the rent and security payments made may be recovered. If a defect in the goods is discovered immediately upon tender to the lessee and the goods are rejected immediately, then the lessee should recover all payments made. If, however, for example, a 36‑month equipment lease is terminated in the 12th month because the lessor has materially breached the contract by failing to perform its maintenance obligations, it may be just to return only a small part or none of the rental payments already made.

3. Subsection (2), a version of the provisions of Section 2‑711(2) revised to reflect leasing terminology, lists two alternative remedies for the recovery of the goods by the lessee; however, each of these remedies is cumulative with respect to those listed in subsection (1).

4. Subsection (3) is new. It covers defaults which do not deprive the lessee of the goods and which are not so serious as to justify rejection or revocation of acceptance under subsection (1). It also covers defaults for which the lessee could have rejected or revoked acceptance of the goods but elects not to do so and retains the goods. In either case, a lessee which retains the goods is entitled to recover damages as stated in Section 2A‑519(3). That measure of damages 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 breach.”

5. Subsection (1)(d) and subsection (3) recognize that the lease agreement may provide rights and remedies in addition to or different from those which Article 2A provides. In particular, subsection (3) provides that the lease agreement may give the remedy of cancellation of the lease for defaults by the lessor that would not otherwise be material defaults which would justify cancellation under subsection (1). If there is a right to cancel, there is, of course, a right to reject or revoke acceptance of the goods.

6. Subsection (4) is new and merely adds to the completeness of the index by including a reference to the lessee’s recovery of damages upon the lessor’s breach of warranty; such breach may not rise to the level of a default by the lessor justifying revocation of acceptance. If the lessee properly rejects or revokes acceptance of the goods because of a breach of warranty, the rights and remedies are those provided in subsection (1) rather than those in Section 2A‑519(4).

7. Subsection (5), a revised version of the provisions of Section 2‑711(3), recognizes, on rightful rejection or justifiable revocation, the lessee’s security interest in goods in its possession and control. Former Section 9‑113 (now codified as Section 9‑110), which recognized security interests arising under the Article on Sales (Article 2), was amended with the adoption of this Article to reflect the security interests arising under this Article. Pursuant to Section 2A‑511(4), a purchaser who purchases goods from the lessee in good faith takes free of any rights of the lessor, or in the case of a finance lease the supplier. Such goods, however, must have been rightfully rejected and disposed of pursuant to Section 2A‑511 or 2A‑512. However, Section 2A‑517(5) provides that the lessee will have the same rights and duties with respect to goods where acceptance has been revoked as with respect to goods rejected. Thus, Section 2A‑511(4) will apply to the lessee’s disposition of such goods.

8. Pursuant to Section 2A‑527(5), the lessee must account to the lessor for the excess proceeds of such disposition, after satisfaction of the claim secured by the lessee’s security interest.

9. Subsection (6), a slightly revised version of the provisions of Section 2‑717, sanctions a right of set‑off by the lessee, subject to the rule of Section 2A‑407 with respect to irrevocable promises in a finance lease that is not a consumer lease, and further subject to an enforceable “hell or high water” clause in the lease agreement. Section 2A‑407 Official Comment. No attempt is made to state how the set‑off should occur; this is to be determined by the facts of each case.

10. There is no special treatment of the finance lease in this section. Absent supplemental principles of law and equity to the contrary, in the case of most finance leases, following the lessee’s acceptance of the goods the lessee will have no rights or remedies against the lessor, because the lessor’s obligations to the lessee are minimal. Sections 2A‑210 and 2A‑211(1) . Since the lessee will look to the supplier for performance, this is appropriate. Section 2A‑209.

Cross References: Sections 1‑102(3), 1‑103, 1‑106(1), Article 2, especially Sections 2‑711, 2‑717 and Sections 2A‑103(4), 2A‑209, 2A‑210, 2A‑211(1), 2A‑407, 2A‑501(2), 2A‑501(4), 2A‑509 through 2A‑522, 2A‑511(3), 2A‑517(5), 2A‑527(5) and Section 9‑110.

Definitional Cross References:

|  |  |
| --- | --- |
|  |  |
| “Conforming” | Section 2A‑103(1)(d). |
| “Delivery” | Section 1‑201(14). |
| “Good faith” | Sections 1‑201(19) and 2‑103(1)(b). |
| “Goods” | Section 2A‑103(1)(h). |
| “Installment lease contract” | Section 2A‑103(1)(i). |
| “Lease contract” | Section 2A‑103(1)(l). |
| “Lessee” | Section 2A‑103(1)(n). |
| “Lessor” | Section 2A‑103(1)(p). |
| “Notifies” | Section 1‑201(26). |
| “Receipt” | Section 2‑103(1)(c). |
| “Remedy” | Section 1‑201(34). |
| “Rights” | Section 1‑201(36). |
| “Security interest” | Section 1‑201(37). |
| “Value” | Section 1‑201(44). |

SOUTH CAROLINA REPORTER’S COMMENT

Section 2A‑508 is an index of remedies treated in greater detail in following sections. This index of remedies goes beyond its Article 2 analogue in three basic respects: 1. It recognizes the availability of remedies to cover cases in which the lessee accepts and retains the goods and either the breach by the lessor is not sufficient to justify rejection or revocation or the lessee nevertheless elects to retain the goods; the available remedies are any included in the lease agreement and damages measured by the loss that would follow in the ordinary course of events from the lessor’s default; 2. It specifically acknowledges that a lessee can recover damages if a lessor has breached an express or implied warranty; and 3. It entitles an aggrieved lessee to set off damages resulting from any default of the lessor against rent still due under the contract. William H. Lawrence and John H. Minan, Law of Personal Property Leasing, 615.01[2][ a] (1993).

CROSS REFERENCES

Secured transactions, priority of security interests in transferred collateral, see Section 36‑9‑325.

Secured transactions, scope of chapter, see Section 36‑9‑109.

Secured transactions, security interest perfected upon attachment, see Section 36‑9‑309.

Secured transactions, security interests, see Section 36‑9‑110.

LIBRARY REFERENCES

Bailment 5, 22, 24 to 34.

Westlaw Key Number Search: 50k5; 50k22; 50k24 to 50k34.

C.J.S. Bailments Sections 15, 23 to 24, 99 to 119.

**SECTION 36‑2A‑509.** Lessee ‘ s rights on improper delivery; rightful rejection.

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

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

HISTORY: 2001 Act No. 67, Section 2.

OFFICIAL COMMENT

Uniform Statutory Source: Sections 2‑601 and 2‑602(1).

Changes: Revised to reflect leasing practices and terminology.

Definitional Cross References:

|  |  |
| --- | --- |
|  |  |
| “Commercial unit” | Section 2A‑103(1)(c). |
| “Conforming” | Section 2A‑103(1)(d). |
| “Delivery” | Section 1‑201(14). |
| “Goods” | Section 2A‑103(1)(h). |
| “Installment lease contract” | Section 2A‑103(1)(i). |
| “Lease contract” | Section 2A‑103(1)(l). |
| “Lessee” | Section 2A‑103(1)(n). |
| “Lessor” | Section 2A‑103(1)(p). |
| “Notifies” | Section 1‑201(26). |
| “Reasonable time” | Section 1‑204(1) and (2). |
| “Rights” | Section 1‑201(36). |
| “Seasonably” | Section 1‑204(3). |

SOUTH CAROLINA REPORTER’S COMMENT

There is no South Carolina lease law on point. After a reasonable opportunity to inspect the goods has passed, unless a timely rejection is made, the goods are deemed accepted. This is in accord with the common law in South Carolina. Porter Bros., Inc. v. Smith, 284 S.C. 292, 325 S.E.2d 588 (Ct. App. 1985); Liquid Carbonic Co. v. Coclin, 161 S.C. 40, 159 S.E. 461 ( 1931). Notice of rejection of goods by a buyer must be in writing under Section 36‑2‑602. American Fast Print, Ltd. v. Design Prints of Hickory, 288 S.C. 46, 339 S.E.2d 516 (Ct. App. 1986). However, lessees face no such requirement.

LIBRARY REFERENCES

Bailment 5.

Westlaw Key Number Search: 50k5.

C.J.S. Bailments Sections 15, 23 to 24.

**SECTION 36‑2A‑510.** Installment lease contracts: rejection and default.

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

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

HISTORY: 2001 Act No. 67, Section 2.

OFFICIAL COMMENT

Uniform Statutory Source: Section 2‑612.

Changes: Revised to reflect leasing practices and terminology.

Definitional Cross References:

|  |  |
| --- | --- |
|  |  |
| “Action” | Section 1‑201(1) |
| “Aggrieved party” | Section 1‑201(2). |
| “Cancellation” | Section 2A‑103(1)(b). |
| “Conforming” | Section 2A‑103(1)(d). |
| “Delivery” | Section 1‑201(14). |
| “Installment lease contract” | Section 2A‑103(1)(i). |
| “Lessee” | Section 2A‑103(1)(n). |
| “Lessor” | Section 2A‑103(1)(p). |
| “Notifies” | Section 1‑201(26). |
| “Seasonably” | Section 1‑204(3). |
| “Supplier” | Section 2A‑103(1)(x). |
| “Value” | Section 1‑201(44). |

SOUTH CAROLINA REPORTER’S COMMENT

Although there is no South Carolina lease law on point, South Carolina law uses a substantial performance test in installment contract cases based on the difficulty of perfect tender of each of multiple deliveries. See South Carolina Reporter’s Comments to Section 36‑2‑612.

LIBRARY REFERENCES

Bailment 5.

Westlaw Key Number Search: 50k5.

C.J.S. Bailments Sections 15, 23 to 24.

**SECTION 36‑2A‑511.** Merchant lessee ‘ s duties as to rightfully rejected goods.

(1) Subject to any security interest of a lessee (Section 36‑2A‑508(5)), if a lessor or a supplier has no agent or place of business at the market of rejection, a merchant lessee, after rejection of goods in his possession or control, shall follow any reasonable instructions received from the lessor or the supplier with respect to the goods. In the absence of those instructions, a merchant lessee shall make reasonable efforts to sell, lease, or otherwise dispose of the goods for the lessor’s account if they threaten to decline in value speedily. Instructions are not reasonable if on demand indemnity for expenses is not forthcoming.

(2) If a merchant lessee (subsection (1)) or any other lessee (Section 36‑2A‑512) disposes of goods, he 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 ten percent of the gross proceeds.

(3) In complying with this section or Section 36‑2A‑512, the lessee is held only to good faith. Good faith conduct hereunder is neither acceptance or conversion nor the basis of an action for damages.

(4) A purchaser who purchases in good faith from a lessee pursuant to this section or Section 36‑2A‑512 takes the goods free of any rights of the lessor and the supplier even though the lessee fails to comply with one or more of the requirements of this chapter.

HISTORY: 2001 Act No. 67, Section 2.

OFFICIAL COMMENT

Uniform Statutory Source: Sections 2‑603 and 2‑706(5).

Changes: Revised to reflect leasing practices and terminology. This section, by its terms, applies to merchants as well as others. Thus, in construing the section it is important to note that under this Act the term good faith is defined differently for merchants (Section 2‑103( 1)(b)) than for others (Section 1‑201(19)). Section 2A‑103(3) and (4).

Definitional Cross References:

|  |  |
| --- | --- |
|  |  |
| “Action” | Section 1‑201(1). |
| “Good faith” | Sections 1‑201(19) and 2‑103(1)(b). |
| “Goods” | Section 2A‑103(1)(h). |
| “Lease” | Section 2A‑103(1)(j). |
| “Lessee” | Section 2A‑103(1)(n). |
| “Lessor” | Section 2A‑103(1)(p). |
| “Merchant lessee” | Section 2A‑103(1)(t). |
| “Purchaser” | Section 1‑201(33). |
| “Rights” | Section 1‑201(36). |
| “Security interest” | Section 1‑201(37). |
| “Supplier” | Section 2A‑103(1)(x). |
| “Value” | Section 1‑201(44). |

SOUTH CAROLINA REPORTER’S COMMENT

Although there are no South Carolina lease or sales cases on point, like the statutory analogue (Section 36‑2‑706(5)), subsection (4) modifies the majority view at common law which favored the original buyer. By protecting a later purchaser even against the lessor or supplier, the sale will be more attractive, increasing the resale price and decreasing the damages the lessor or supplier will have to pay. See South Carolina Reporter’s Comments to Section 36‑2‑706.

LIBRARY REFERENCES

Bailment 5, 14, 16, 19.

Westlaw Key Number Search: 50k5; 50k14; 50k16; 50k19.

C.J.S. Bailments Sections 15, 23 to 24, 32 to 33, 35 to 36, 56 to 68, 79, 89, 92.

**SECTION 36‑2A‑512.** Lessee ‘ s duties as to rightfully rejected goods.

(1) Except as otherwise provided with respect to goods that threaten to decline in value speedily (Section 36‑2A‑511) and subject to any security interest of a lessee (Section 36‑2A‑508(5)):

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

(b) if the lessor or the supplier gives no instructions within a reasonable time after notification of rejection, the lessee may store the rejected goods for the lessor’s or the supplier’s account or ship them to the lessor or the supplier or dispose of them for the lessor’s or the supplier’s account with reimbursement in the manner provided in Section 36‑2A‑511; but

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

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

HISTORY: 2001 Act No. 67, Section 2.

OFFICIAL COMMENT

Uniform Statutory Source: Sections 2‑602(2)(b) and (c) and 2‑604.

Changes: Substantially rewritten.

Purposes: The introduction to subsection (1) references goods that threaten to decline in value speedily and not perishables, the reference in Section 2‑604, the statutory analogue. This is a change in style, not substance, as the first phrase includes the second. Subparagraphs (a) and (c) are revised versions of the provisions of Section 2‑602(2)(b) and (c). Subparagraph (a) states the rule with respect to the lessee’s treatment of goods in its possession following rejection; subparagraph (b) states the rule regarding such goods if the lessor or supplier then fails to give instructions to the lessee. If the lessee performs in a fashion consistent with subparagraphs (a) and (b), subparagraph (c) exonerates the lessee.

Cross References: Sections 2‑602(2)(b), 2‑602(2)(c) and 2‑604.

Definitional Cross References:

|  |  |
| --- | --- |
|  |  |
| “Action” | Section 1‑201(1). |
| “Goods” | Section 2A‑103(1)(h). |
| “Lessee” | Section 2A‑103(1)(n). |
| “Lessor” | Section 2A‑103(1)(p). |
| “Notification” | Section 1‑201(26). |
| “Reasonable time” | Section 1‑204(1) and (2). |
| “Seasonably” | Section 1‑204(3). |
| “Security interest” | Section 1‑201(37). |
| “Supplier” | Section 2A‑103(1)(x). |
| “Value” | Section 1‑201(44). |

SOUTH CAROLINA REPORTER’S COMMENT

There is no South Carolina lease law on point; however, like the statutory analogue, Section 2‑602(2), this provision codifies the common law rule that an effective rejection of non‑conforming goods by the lessee requires affirmative action and timely notice to the lessor. See the Official Comment to Section 36‑2‑602. Otherwise the lessee is deemed to have accepted the goods.

Subsection (b), like its statutory analogue, Section 2‑604, protects the lessee’s right to reject the goods by permitting the lessee to deal with the goods as he sees fit when no instruction is forthcoming from the lessor after rejection.

LIBRARY REFERENCES

Bailment 5, 14, 16, 19.

Westlaw Key Number Search: 50k5; 50k14; 50k16; 50k19.

C.J.S. Bailments Sections 15, 23 to 24, 32 to 33, 35 to 36, 56 to 68, 79, 89, 92.

**SECTION 36‑2A‑513.** Cure by lessor of improper tender or delivery; replacement.

(1) If any tender or delivery by the lessor or the supplier is rejected because nonconforming and the time for 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 in the lease contract.

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

HISTORY: 2001 Act No. 67, Section 2.

OFFICIAL COMMENT

Uniform Statutory Source: Section 2‑508.

Changes: Revised to reflect leasing practices and terminology.

Definitional Cross References:

|  |  |
| --- | --- |
|  |  |
| “Conforming” | Section 2A‑103(1)(d). |
| “Delivery” | Section 1‑201(14). |
| “Lease contract” | Section 2A‑103(1)(l). |
| “Lessee” | Section 2A‑103(1)(n). |
| “Lessor” | Section 2A‑103(1)(p). |
| “Money” | Section 1‑201(24). |
| “Notifies” | Section 1‑201(26). |
| “Reasonable time” | Section 1‑204(1) and (2). |
| “Seasonably” | Section 1‑204(3). |
| “Supplier” | Section 2A‑103(1)(x). |

SOUTH CAROLINA REPORTER’S COMMENT

There is no South Carolina lease law on point. However, this section is similar to the statutory analogue, Section 36‑2‑508, which the South Carolina Reporter’s Comments noted was “probably not a change of existing common law since delivery of non‑conforming goods is probably not an anticipatory breach if coupled with notice of intention to perform fully within the contract time. See, Rest., Contracts, Section 319 (1932).” See also Rest. 2d, Contracts, Section 256 (1981).

LIBRARY REFERENCES

Bailment 5.

Westlaw Key Number Search: 50k5.

C.J.S. Bailments Sections 15, 23 to 24.

**SECTION 36‑2A‑514.** Waiver of lessee’s objections.

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

(a) if, stated seasonably, the lessor or the supplier could have cured it (Section 36‑2A‑513); or

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

(2) A lessee’s failure to reserve rights when paying rent or other consideration against documents precludes recovery of the payment for defects apparent in the documents.

HISTORY: 2001 Act No. 67, Section 2; 2014 Act No. 213 (S.343), Section 19, eff October 1, 2014.

OFFICIAL COMMENT

Uniform Statutory Source: Section 2‑605.

Changes: Revised to reflect leasing practices and terminology.

Purposes: The principles applicable to the commercial practice of payment against documents (subsection 2) are explained in Official Comment 4 to Section 2‑605, the statutory analogue to this section.

Cross References: Section 2‑605 Official Comment 4.

Definitional Cross References:

|  |  |
| --- | --- |
|  |  |
| “Between merchants” | Section 2‑104(3). |
| “Goods” | Section 2A‑103(1)(h). |
| “Lessee” | Section 2A‑103(1)(n). |
| “Lessor” | Section 2A‑103(1)(p). |
| “Rights” | Section 1‑201(36). |
| “Seasonably” | Section 1‑204(3). |
| “Supplier” | Section 2A‑103(1)(x). |
| “Writing” | Section 1‑201(46). |

SOUTH CAROLINA REPORTER’S COMMENT

There is no South Carolina lease law on point. However, like the statutory analogue, this section is intended to prevent sophisticated merchants from misleading lessors by failing to state any defects. Likewise, it is intended to prevent unsophisticated lessees from waiving their right to reject by not stating all the defects.

Editor’s Note

2014 Act No. 213, Section 51, provides as follows:

“SECTION 51. This act becomes effective on October 1, 2014. It applies to transactions entered into and events occurring after that date.”

Effect of Amendment

2014 Act No. 213, Section 19, in subsection (2), substituted “apparent in the documents” for “apparent on the face of the documents”.

LIBRARY REFERENCES

Bailment 5.

Westlaw Key Number Search: 50k5.

C.J.S. Bailments Sections 15, 23 to 24.

**SECTION 36‑2A‑515.** Acceptance of goods.

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

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

(b) the lessee fails to make an effective rejection of the goods (Section 36‑2A‑509(2)).

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

HISTORY: 2001 Act No. 67, Section 2.

OFFICIAL COMMENT

Uniform Statutory Source: Section 2‑606.

Changes: The provisions of Section 2‑606(1)(a) were substantially rewritten to provide that the lessee’s conduct may signify acceptance. Further, the provisions of Section 2‑606(1)(c) were not incorporated as irrelevant given the lessee’s possession and use of the leased goods.

Cross References: Sections 2‑606(1)(a) and 2‑606(1)(c).

Definitional Cross References:

|  |  |
| --- | --- |
|  |  |
| “Commercial unit” | Section 2A‑103(1)(c). |
| “Conforming” | Section 2A‑103(1)(d). |
| “Goods” | Section 2A‑103(1)(h). |
| “Lessee” | Section 2A‑103(1)(n). |
| “Lessor” | Section 2A‑103(1)(p). |
| “Supplier” | Section 2A‑103(1)(x). |

SOUTH CAROLINA REPORTER’S COMMENT

A reasonable opportunity to inspect goods is in accord with South Carolina case law on sales. See Southern Coal Co. v. Rice, 122 S.C. 484, 115 S.E. 815 (1922); Building Supply Co. v. Jones, 87 S.C. 426, 69 S.E. 881 ( 1911). However, the lease contract may stipulate what constitutes a reasonable time. Mid‑Continent Refrigerator Co. v. Dean, 256 S.C. 99, 180 S.E.2d 892 (1971) (where revocation of acceptance 30‑45 days later not allowed because the lease stated the time for inspection and notification to the lessor was 48 hours.)

Subsection (2) expresses the same policy as found under Section 36‑2‑601(c) and Section 36‑2‑606(2) that require acceptance of an entire commercial unit of goods so that there will not be an undue impairment of the value of rejected goods.

LIBRARY REFERENCES

Bailment 5.

Westlaw Key Number Search: 50k5.

C.J.S. Bailments Sections 15, 23 to 24.

**SECTION 36‑2A‑516.** Effect of acceptance of goods; notice of default; burden of establishing default after acceptance; notice of claim or litigation to person answerable over.

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

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

(3) If a tender has been accepted:

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

(b) except in the case of a consumer lease, within a reasonable time after the lessee receives notice of litigation for infringement or the like (Section 36‑2A‑211) the lessee shall notify the lessor or be barred from any remedy over for liability established by the litigation; and

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

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

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

(b) The lessor or the supplier may demand in writing that the lessee turn over control of the litigation including settlement if the claim is one for infringement or the like (Section 36‑2A‑211) or else be barred from any remedy over. If the demand states that the lessor or the supplier agrees to bear all expense and to satisfy any adverse judgment, then unless the lessee after seasonable receipt of the demand does turn over control the lessee is so barred.

(5) Subsections (3) and (4) apply to any obligation of a lessee to hold the lessor or the supplier harmless against infringement or the like (Section 36‑2A‑211).

HISTORY: 2001 Act No. 67, Section 2.

OFFICIAL COMMENT

Uniform Statutory Source: Section 2‑607.

Changes: Substantially revised.

Purposes: 1. Subsection (2) creates a special rule for finance leases, precluding revocation if acceptance is made with knowledge of nonconformity with respect to the lease agreement, as opposed to the supply agreement; this is not inequitable as the lessee has a direct claim against the supplier. Section 2A‑209(1). Revocation of acceptance of a finance lease is permitted if the lessee’s acceptance was without discovery of the nonconformity (with respect to the lease agreement, not the supply agreement) and was reasonably induced by the lessor’s assurances. Section 2A‑517(1)(b). Absent exclusion or modification, the lessor under a finance lease makes certain warranties to the lessee. Sections 2A‑210 and 2A‑211(1). Revocation of acceptance is not prohibited even after the lessee’s promise has become irrevocable and independent. Section 2A‑407 Official Comment. Where the finance lease creates a security interest, the rule may be to the contrary. General Elec. Credit Corp. of Tennessee v. Ger‑Beck Mach. Co., 806 F.2d 1207 (3rd Cir. 1986).

2. Subsection (3)(a) requires the lessee to give notice of default, within a reasonable time after the lessee discovered or should have discovered the default. In a finance lease, notice may be given either to the supplier, the lessor, or both, but remedy is barred against the party not notified. In a finance lease, the lessor is usually not liable for defects in the goods and the essential notice is to the supplier. While notice to the finance lessor will often not give any additional rights to the lessee, it would be good practice to give the notice since the finance lessor has an interest in the goods. Subsection (3)(a) does not use the term finance lease, but the definition of supplier is a person from whom a lessor buys or leases goods to be leased under a finance lease. Section 2A‑103(1)(x) . Therefore, there can be a “supplier” only in a finance lease. Subsection (4) applies similar notice rules as to lessors and suppliers if a lessee is sued for a breach of warranty or other obligation for which a lessor or supplier is answerable over.

3. Subsection (3)(b) requires the lessee to give the lessor notice of litigation for infringement or the like. There is an exception created in the case of a consumer lease. While such an exception was considered for a finance lease, it was not created because it was not necessary—the lessor in a finance lease does not give a warranty against infringement. Section 2A‑211(2). Even though not required under subsection (3)(b), the lessee who takes under a finance lease should consider giving notice of litigation for infringement or the like to the supplier, because the lessee obtains the benefit of the suppliers’ promises subject to the suppliers’ defenses or claims. Sections 2A‑209(1) and 2‑607(3)(b).

Cross References: Sections 2‑607(3)(b), 2A‑103(1)(x), 2A‑209(1), 2A‑210, 2A‑211(1), 2A‑211(2), 2A‑407 Official Comment and 2A‑517(1)(b).

Definitional Cross References:

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| --- | --- |
|  |  |
| “Action” | Section 1‑201(1). |
| “Agreement” | Section 1‑201(3). |
| “Burden of establishing” | Section 1‑201(8). |
| “Conforming” | Section 2A‑103(1)(d). |
| “Consumer lease” | Section 2A‑103(1)(e). |
| “Delivery” | Section 1‑201(14). |
| “Discover” | Section 1‑201(25). |
| “Finance lease” | Section 2A‑103(1)(g). |
| “Goods” | Section 2A‑103(1)(h). |
| “Knowledge” | Section 1‑201(25). |
| “Lease agreement” | Section 2A‑103(1)(k). |
| “Lease contract” | Section 2A‑103(1)(l). |
| “Lessee” | Section 2A‑103(1)(n). |
| “Lessor” | Section 2A‑103(1)(p). |
| “Notice” | Section 1‑201(25). |
| “Notifies” | Section 1‑201(26). |
| “Person” | Section 1‑201(30). |
| “Reasonable time” | Section 1‑204(1) and (2). |
| “Receipt” | Section 2‑103(1)(c). |
| “Remedy” | Section 1‑201(34). |
| “Seasonably” | Section 1‑204(3). |
| “Supplier” | Section 2A‑103(1)(x). |
| “Written” | Section 1‑201(46). |

SOUTH CAROLINA REPORTER’S COMMENT

Subsection (1) is in accord with South Carolina lease law. In Tri‑Continental Leasing Corp. v. Stevens, Stevens & Thomas, P.A., 287 S.C. 338, 338 S.E.2d 343 (Ct. App. 1985), the lessee was held liable for rent despite his attempted revocation of acceptance of the non‑conforming goods, 34 months after acceptance. The lessor was not required to accept lessee’s tender and was allowed to accelerate the contract.

Subsection (2) reflects the contractual provisions of finance leases, which are given effect under the South Carolina common law. See Tri‑Continental Leasing Corp. v. Stevens, Stevens & Thomas, P.A., 287 S.C. 338, 338 S.E.2d 343 (Ct. App. 1985). Although rejection of defective goods was not allowed in Mid‑Continent Refrigerator Co. v. Dean, 256 S.C. 99, 180 S.E.2d 892 (1971), because notice came too late under the express terms of the contract, it appears that the rejection or revocation of acceptance would have been allowed had it been timely, thus producing the same result as under this section and Section 2A‑517.

While revocation of acceptance is available only in limited circumstances (see Section 2A‑517), acceptance does not bar the lessee from other available remedies, provided notice is given to the appropriate party. A lessee who fails to provide the required notification is barred from recovering from the party not notified. Subsection 3(b) codifies the common law notice requirement as did the statutory analogue. See Richmond Pressed Metal Works v. Haley, 157 S.C. 426, 154 S.E. 412 (1930) (failure to make a complaint within a reasonable time after opportunity for inspection); L.D. Powell Co. v. Levy, 136 S.C. 387, 134 S.E. 415 (1926) (retention of law books for four years without objection). What is a reasonable time for notice is a question of fact. Simmons v. Ciba‑Geigy Corp., 279 S.C. 26, 302 S.E.2d 17 (1983).

Subsection 3(b) provides an exception for consumer leases, defined in Section 2A‑103(1)(e), and subsection 3(c) codifies the usual rule that the moving party has the burden of proof.

LIBRARY REFERENCES

Bailment 5, 9, 26, 31.

Westlaw Key Number Search: 50k5; 50k9; 50k26; 50k31.

C.J.S. Bailments Sections 15, 23 to 24, 37 to 45, 105, 110.

**SECTION 36‑2A‑517.** Revocation of acceptance of goods.

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

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

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

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

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

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

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

HISTORY: 2001 Act No. 67, Section 2.

OFFICIAL COMMENT

Uniform Statutory Source: Section 2‑608.

Changes: Revised to reflect leasing practices and terminology. Note that in the case of a finance lease the lessee retains a limited right to revoke acceptance. Sections 2A‑517(1)(b) and 2A‑516 Official Comment. New subsections (2) and (3) added.

Purposes: 1. The section states the situations under which the lessee may return the goods to the lessor and cancel the lease. Subsection (2) recognizes that the lessor may have continuing obligations under the lease and that a default as to those obligations may be sufficiently material to justify revocation of acceptance of the leased items and cancellation of the lease by the lessee. For example, a failure by the lessor to fulfill its obligation to maintain leased equipment or to supply other goods which are necessary for the operation of the leased equipment may justify revocation of acceptance and cancellation of the lease.

2. Subsection (3) specifically provides that the lease agreement may provide that the lessee can revoke acceptance for defaults by the lessor which in the absence of such an agreement might not be considered sufficiently serious to justify revocation. That is, the parties are free to contract on the question of what defaults are so material that the lessee can cancel the lease.

Cross References: Section 2A‑516 Official Comment.

Definitional Cross References:

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|  |  |
| “Commercial unit” | Section 2A‑103(1)(c). |
| “Conforming” | Section 2A‑103(1)(d). |
| “Discover” | Section 1‑201(25). |
| “Finance lease” | Section 2A‑103(1)(g). |
| “Goods” | Section 2A‑103(1)(h). |
| “Lessee” | Section 2A‑103(1)(n). |
| “Lessor” | Section 2A‑103(1)(p). |
| “Lot” | Section 2A‑103(1)(s). |
| “Notifies” | Section 1‑201(26). |
| “Reasonable time” | Section 1‑204(1) and (2). |
| “Rights” | Section 1‑201(36). |
| “Seasonably” | Section 1‑204(3). |
| “Value” | Section 1‑201(44). |

SOUTH CAROLINA REPORTER’S COMMENT

This section essentially tracks the rule in Article 2.

Substantial impairment is a question of fact. Burris v. Lake Wylie Marina, Inc., 285 S.C. 614, 330 S.E.2d 559 (Ct. App. 1985).

Subsection (4) does not change the existing lease law in South Carolina. See Mid‑Continent Refrigerator Co. v. Dean, 256 S.C. 99, 180 S.E.2d 892 ( 1971) (where revocation of acceptance 30‑45 days after delivery was impermissible under lease requiring inspection and notification to the lessor within 48 hours).

LIBRARY REFERENCES

Bailment 5.

Westlaw Key Number Search: 50k5.

C.J.S. Bailments Sections 15, 23 to 24.

**SECTION 36‑2A‑518.** Cover; substitute goods.

(1) After a default by a lessor under the lease contract of the type described in Section 36‑2A‑508(1), or, if agreed, after other default by the lessor, the lessee may cover by making any purchase or lease of or contract to purchase or lease goods in substitution for those due from the lessor.

(2) Except as otherwise provided with respect to damages liquidated in the lease agreement (Section 36‑2A‑504) or otherwise determined pursuant to agreement of the parties (Sections 36‑1‑302 and 36‑2A‑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 (i) the present value, as of the date of the commencement of the term of the new lease agreement, of the rent under the new lease agreement applicable to that period of the new lease term which is comparable to the then remaining term of the original lease agreement minus the present value as of the same date of the total rent for the then remaining lease term of the original lease agreement, and (ii) any incidental or consequential damages, less expenses saved in consequence of the lessor’s default.

(3) If a lessee’s cover is by lease agreement that for any reason does not qualify for treatment under subsection (2), or is by purchase or otherwise, the lessee may recover from the lessor as if the lessee had elected not to cover and Section 36‑2A‑519 governs.

HISTORY: 2001 Act No. 67, Section 2; 2014 Act No. 213 (S.343), Section 20, eff October 1, 2014.

OFFICIAL COMMENT

Uniform Statutory Source: Section 2‑712.

Changes: Substantially revised.

Purposes: 1. Subsection (1) allows the lessee to take action to fix its damages after default by the lessor. Such action may consist of the lease of goods. The decision to cover is a function of commercial judgment, not a statutory mandate replete with sanctions for failure to comply. Cf. Section 9‑625.

2. Subsection (2) states a rule for determining the amount of lessee’s damages provided that there is no agreement to the contrary. The lessee’s damages will be established using the new lease agreement as a measure if the following three criteria are met: (i) the lessee’s cover is by lease agreement, (ii) the lease agreement is substantially similar to the original lease agreement, and (iii) such cover was effected in good faith, and in a commercially reasonable manner. Thus, the lessee will be entitled to recover from the lessor the present value, as of the date of commencement of the term of the new lease agreement, of the rent under the new lease agreement applicable to that period which is comparable to the then remaining term of the original lease agreement less the present value of the rent reserved for the remaining term under the original lease, together with incidental or consequential damages less expenses saved in consequence of the lessor’s default. Consequential damages may include loss suffered by the lessee because of deprivation of the use of the goods during the period between the default and the acquisition of the goods under the new lease agreement. If the lessee’s cover does not satisfy the criteria of subsection (2), Section 2A‑519 governs.

3. Two of the three criteria to be met by the lessee are familiar, but the concept of the new lease agreement being substantially similar to the original lease agreement is not. Given the many variables facing a party who intends to lease goods and the rapidity of change in the market place, the policy decision was made not to draft with specificity. It was thought unwise to seek to establish certainty at the cost of fairness. Thus, the decision of whether the new lease agreement is substantially similar to the original will be determined case by case.

4. While the section does not draw a bright line, it is possible to describe some of the factors that should be considered in finding that a new lease agreement is substantially similar to the original. First, the goods subject to the new lease agreement should be examined. For example, in a lease of computer equipment the new lease might be for more modern equipment. However, it may be that at the time of the lessor’s breach it was not possible to obtain the same type of goods in the market place. Because the lessee’s remedy under Section 2A‑519 is intended to place the lessee in essentially the same position as if he had covered, if goods similar to those to have been delivered under the original lease are not available, then the computer equipment in this hypothetical should qualify as a commercially reasonable substitute. See Section 2‑712(1).

5. Second, the various elements of the new lease agreement should also be examined. Those elements include the presence or absence of options to purchase or release; the lessor’s representations, warranties and covenants to the lessee, as well as those to be provided by the lessee to the lessor; and the services, if any, to be provided by the lessor or by the lessee. All of these factors allocate cost and risk between the lessor and the lessee and thus affect the amount of rent to be paid. If the differences between the original lease and the new lease can be easily valued, it would be appropriate for a court to adjust the difference in rental to take account of the difference between the two leases, find that the new lease is substantially similar to the old lease, and award cover damages under this section. If, for example, the new lease requires the lessor to insure the goods in the hands of the lessee, while the original lease required the lessee to insure, the usual cost of such insurance could be deducted from the rent due under the new lease before determining the difference in rental between the two leases.

6. Having examined the goods and the agreement, the test to be applied is whether, in light of these comparisons, the new lease agreement is substantially similar to the original lease agreement. These findings should not be made with scientific precision, as they are a function of economics, nor should they be made independently with respect to the goods and each element of the agreement, as it is important that a sense of commercial judgment pervade the finding. To establish the new lease as a proper measure of damage under subsection (2), these factors, taken as a whole, must result in a finding that the new lease agreement is substantially similar to the original.

7. A new lease can be substantially similar to the original lease even though its term extends beyond the remaining term of the original lease, so long as both (a) the lease terms are commercially comparable (e.g., it is highly unlikely that a one‑month rental and a five‑year lease would reflect similar commercial realities), and (b) the court can fairly apportion a part of the rental payments under the new lease to that part of the term of the new lease which is comparable to the remaining lease term under the original lease. Also, the lease term of the new lease may be comparable to the term of the original lease even though the beginning and ending dates of the two leases are not the same. For example, a two‑month lease of agricultural equipment for the months of August and September may be comparable to a two‑ month lease running from the 15th of August to the 15th of October if in the particular location two‑month leases beginning on August 15th are basically interchangeable with two‑month leases beginning August 1st. Similarly, the term of a one‑year truck lease beginning on the 15th of January may be comparable to the term of a one‑year truck lease beginning January 2d. If the lease terms are found to be comparable, the court may base cover damages on the entire difference between the costs under the two leases.

Cross References: Sections 2‑712(1), 2A‑519 and 9‑625.

Definitional Cross References:

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|  |  |
| “Agreement” | Section 1‑201(3). |
| “Contract” | Section 1‑201(11). |
| “Good faith” | Sections 1‑201(19) and 2‑103(1)(b). |
| “Goods” | Section 2A‑103(1)(h). |
| “Lease” | Section 2A‑103(1)(j). |
| “Lease agreement” | Section 2A‑103(1)(k). |
| “Lease contract” | Section 2A‑103(l)(l). |
| “Lessee” | Section 2A‑103(1)(n). |
| “Lessor” | Section 2A‑103(1)(p). |
| “Party” | Section 1‑201(29). |
| “Present value” | Section 2A‑103(1)(u). |
| “Purchase” | Section 2A‑103(1)(v). |

SOUTH CAROLINA REPORTER’S COMMENT

This section resolves the common law conflict as to whether the buyer has a duty to cover by following the position of the Article 2 analogue that cover is optional. See the South Carolina Reporter’s Comments to Section36‑2‑712. Unless a lessee covers, he cannot measure monetary damages based on a qualifying cover transaction. See William H. Lawrence and John H. Minan, Law of Personal Property Leasing, 615.02[3] (1993). For damages in the absence of cover, see Section2A‑519.

Editor’s Note

2014 Act No. 213, Section 51, provides as follows:

“SECTION 51. This act becomes effective on October 1, 2014. It applies to transactions entered into and events occurring after that date.”

Effect of Amendment

2014 Act No. 213, Section 20, in subsection (2), substituted “36‑1‑302” for “36‑1‑102(3)”.

LIBRARY REFERENCES

Bailment 9, 32.

Westlaw Key Number Search: 50k9; 50k32.

C.J.S. Bailments Sections 37 to 45, 117 to 119.

**SECTION 36‑2A‑519.** Lessee ‘ s damages for nondelivery, repudiation, default, and breach of warranty in regard to accepted goods.

(1) Except as otherwise provided with respect to damages liquidated in the lease agreement (Section 36‑2A‑504) or otherwise determined pursuant to agreement of the parties (Sections 36‑1‑302 and 36‑2A‑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 36‑2A‑518(2), 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.

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

(3) Except as otherwise agreed, if the lessee has accepted goods and given notification (Section 36‑2A‑516(3)), 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.

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

HISTORY: 2001 Act No. 67, Section 2; 2014 Act No. 213 (S.343), Section 21, eff October 1, 2014.

OFFICIAL COMMENT

Uniform Statutory Source: Sections 2‑713 and 2‑714.

Changes: Substantially revised.

Purposes: 1. Subsection (1), a revised version of the provisions of Section 2‑713(1), states the basic rule governing the measure of lessee’s damages for non‑delivery or repudiation by the lessor or for rightful rejection or revocation of acceptance by the lessee. This measure will apply, absent agreement to the contrary, if the lessee does not cover or if the cover does not qualify under Section 2A‑518. There is no sanction for cover that does not qualify.

2. The measure of damage is the present value, as of the date of default, of the market rent for the remaining term of the lease less the present value of the original rent for the remaining term of the lease, plus incidental and consequential damages less expenses saved in consequence of the default. Note that the reference in Section 2A‑519(1) is to the date of default not to the date of an event of default. An event of default under a lease agreement becomes a default under a lease agreement only after the expiration of any relevant period of grace and compliance with any notice requirements under this Article and the lease agreement. American Bar Foundation, Commentaries on Indentures, Section 5‑1, at 216‑217 (1971). Section 2A‑501(1). This conclusion is also a function of whether, as a matter of fact or law, the event of default has been waived, suspended or cured. Sections 2A‑103(4) and 1‑103.

3. Subsection (2), a revised version of the provisions of Section 2‑713(2), states the rule with respect to determining market rent.

4. Subsection (3), a revised version of the provisions of Section 2‑714(1) and (3), states the measure of damages where goods have been accepted and acceptance is not revoked. The subsection applies both to defaults which occur at the inception of the lease and to defaults which occur subsequently, such as failure to comply with an obligation to maintain the leased goods. The measure in essence is the loss, in the ordinary course of events, flowing from the default.

5. Subsection (4), a revised version of the provisions of Section 2‑714(2), states the measure of damages for breach of warranty. The measure in essence is the present value of the difference between the value of the goods accepted and of the goods if they had been as warranted.

6. Subsections (1), (3) and (4) specifically state that the parties may by contract vary the damages rules stated in those subsections.

Cross References: Sections 2‑713(1), 2‑713(2), 2‑714 and Section 2A‑518.

Definitional Cross References:

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|  |  |
| “Conforming” | Section 2A‑103(1)(d). |
| “Delivery” | Section 1‑201(14). |
| “Goods” | Section 2A‑103(1)(h). |
| “Lease” | Section 2A‑103(1)(j). |
| “Lease agreement” | Section 2A‑103(1)(k). |
| “Lessee” | Section 2A‑103(1)(n). |
| “Lessor” | Section 2A‑103(1)(p). |
| “Notification” | Section 1‑201(26). |
| “Present value” | Section 2A‑103(1)(u). |
| “Value” | Section 1‑201(44). |

SOUTH CAROLINA REPORTER’S COMMENT

There is no South Carolina lease law on point; however, this section is consistent with its statutory analogue, Section 36‑2‑713(1). This formula attempts to protect the lessee’s benefit of the bargain if the lessee has not covered.

This section departs from its statutory analogue, Section 36‑2‑713(2), in designating the location of the marketplace for determining the differential. Values are ascertained at the time and place of acceptance. See William H. Lawrence and John H. Minan, Law of Personal Property Leasing, 615.02[9][c] (1993).

Editor’s Note

2014 Act No. 213, Section 51, provides as follows:

“SECTION 51. This act becomes effective on October 1, 2014. It applies to transactions entered into and events occurring after that date.”

Effect of Amendment

2014 Act No. 213, Section 21, in subsection (1), substituted “36‑1‑302” for “36‑1‑102(3)”.

LIBRARY REFERENCES

Bailment 5, 9, 32.

Westlaw Key Number Search: 50k5; 50k9; 50k32.

C.J.S. Bailments Sections 15, 23 to 24, 37 to 45, 117 to 119.

**SECTION 36‑2A‑520.** Lessee ‘ s incidental and consequential damages.

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

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

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

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

HISTORY: 2001 Act No. 67, Section 2.

OFFICIAL COMMENT

Uniform Statutory Source: Section 2‑715.

Changes: Revised to reflect leasing terminology and practices.

Purposes: Subsection (1), a revised version of the provisions of Section 2‑715(1), lists some examples of incidental damages resulting from a lessor’s default; the list is not exhaustive. Subsection (1) makes clear that it applies not only to rightful rejection, but also to justifiable revocation.

Subsection (2), a revised version of the provisions of Section 2‑715(2), lists some examples of consequential damages resulting from a lessor’s default; the list is not exhaustive.

Cross References: Section 2‑715.

Definitional Cross References:

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|  |  |
| “Goods” | Section 2A‑103(1)(h). |
| “Knows” | Section 1‑201(25). |
| “Lessee” | Section 2A‑103(1)(n). |
| “Lessor” | Section 2A‑103(1)(p). |
| “Person” | Section 1‑201(30). |
| “Receipt” | Section 2‑103(1)(c). |

SOUTH CAROLINA REPORTER’S COMMENT

There is no South Carolina lease law on point; however, the statutory analogue merely codified the common law. See the South Carolina Reporter’s Comments to Section 36‑2‑715.

LIBRARY REFERENCES

Bailment 32.

Westlaw Key Number Search: 50k32.

C.J.S. Bailments Sections 117 to 119.

**SECTION 36‑2A‑521.** Lessee ‘ s right to specific performance or replevin.

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

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

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

HISTORY: 2001 Act No. 67, Section 2.

OFFICIAL COMMENT

Uniform Statutory Source: Section 2‑716.

Changes: Revised to reflect leasing practices and terminology, and to expand the reference to the right of replevin in subsection (3) to include other similar rights of the lessee.

Definitional Cross References:

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| --- | --- |
|  |  |
| “Delivery” | Section 1‑201(14). |
| “Goods” | Section 2A‑103(1)(h). |
| “Lease contract” | Section 2A‑103(1)(l). |
| “Lessee” | Section 2A‑103(1)(n). |
| “Rights” | Section 1‑201(36). |
| “Term” | Section 1‑201(42). |

SOUTH CAROLINA REPORTER’S COMMENT

Although there is no South Carolina lease law on point, South Carolina courts have been reluctant to decree specific performance, granting it only when the legal remedy is inadequate. See the South Carolina Reporter’s Comments to Section36‑2‑716. Replevin, a right for the qualifying lessee, is more narrowly applied than specific performance. This section gives a right of replevin only when the goods have been identified to the contract and cover is impossible.

LIBRARY REFERENCES

Bailment 25.

Specific Performance 68, 69, 125 to 129.

Westlaw Key Number Search: 50k25; 358k68; 358k69; 358k125 to 358k129.

C.J.S. Bailments Sections 103 to 104.

**SECTION 36‑2A‑522.** Lessee ‘ s right to goods on lessor ‘ s insolvency.

(1) Subject to subsection (2) and even though the goods have not been shipped, a lessee who has paid a part or all of the rent and security for goods identified to a lease contract (Section 36‑2A‑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 ten days after receipt of the first installment of rent and security.

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

HISTORY: 2001 Act No. 67, Section 2.

OFFICIAL COMMENT

Uniform Statutory Source: Section 2‑502.

Changes: Revised to reflect leasing practices and terminology.

Definitional Cross References:

|  |  |
| --- | --- |
|  |  |
| “Conforming” | Section 2A‑103(1)(d). |
| “Goods” | Section 2A‑103(1)(h). |
| “Insolvent” | Section 1‑201(23). |
| “Lease contract” | Section 2A‑103(1)(l). |
| “Lessee” | Section 2A‑103(1)(n). |
| “Lessor” | Section 2A‑103(1)(p). |
| “Receipt” | Section 2‑103(1)(c). |
| “Rights” | Section 1‑201(36). |

SOUTH CAROLINA REPORTER’S COMMENT

Although there is no South Carolina lease law on point, this section is similar to South Carolina sales law. See Section 36‑3‑502.

Subsection (1) sets forth factors that could constitute an example of a “proper circumstance” under Section2A‑521, entitling the lessee to specific performance.

Subsection (2) is designed to prevent the lessee from taking advantage of the lessor’s erroneously identifying to the contract goods of greater value than those called for by the contract, to the detriment of the lessor’s other creditors.

LIBRARY REFERENCES

Bailment 5.

Westlaw Key Number Search: 50k5.

C.J.S. Bailments Sections 15, 23 to 24.

C. Default by Lessee

**SECTION 36‑2A‑523.** Lessor ‘ s remedies.

(1) If a lessee wrongfully rejects or revokes acceptance of goods or fails to make a payment when due or repudiates with respect to a part or the whole, then, with respect to any goods involved, and with respect to all of the goods if under an installment lease contract the value of the whole lease contract is substantially impaired (Section 36‑2A‑510), the lessee is in default under the lease contract and the lessor may:

(a) cancel the lease contract (Section 36‑2A‑505(1));

(b) proceed respecting goods not identified to the lease contract ( Section 36‑2A‑524);

(c) withhold delivery of the goods and take possession of goods previously delivered (Section 36‑2A‑525);

(d) stop delivery of the goods by any bailee (Section 36‑2A‑526);

(e) dispose of the goods and recover damages (Section 36‑2A‑527), or retain the goods and recover damages (Section 36‑2A‑528), or in a proper case recover rent (Section 36‑2A‑529);

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

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

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

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

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

HISTORY: 2001 Act No. 67, Section 2.

OFFICIAL COMMENT

Uniform Statutory Source: Section 2‑703.

Changes: Substantially revised.

Purposes: 1. Subsection (1) is an index to Sections 2A‑524 through 2A‑531 and states that the remedies provided in those sections are available for the defaults referred to in subsection (1): wrongful rejection or revocation of acceptance, failure to make a payment when due, or repudiation. In addition, remedies provided in the lease contract are available. Subsection (2) sets out a remedy if the lessor does not pursue to completion a right or actually obtain a remedy available under subsection (1), and subsection (3) sets out statutory remedies for defaults not specifically referred to in subsection (1). Subsection (3) provides that, if any default by the lessee other than those specifically referred to in subsection (1) is material, the lessor can exercise the remedies provided in subsection (1) or (2); otherwise the available remedy is as provided in subsection (3). A lessor who has brought an action seeking or has nonjudicially pursued one or more of the remedies available under subsection (1) may amend so as to claim or may nonjudicially pursue a remedy under subsection (2) unless the right or remedy first chosen has been pursued to an extent actually inconsistent with the new course of action. The intent of the provision is to reject the doctrine of election of remedies and to permit an alteration of course by the lessor unless such alteration would actually have an effect on the lessee that would be unreasonable under the circumstances. Further, the lessor may pursue remedies under both subsections (1) and (2) unless doing so would put the lessor in a better position than it would have been in had the lessee fully performed.

2. The lessor and the lessee can agree to modify the rights and remedies available under the Article; they can, among other things, provide that for defaults other than those specified in subsection (1) the lessor can exercise the rights and remedies referred to in subsection (1), whether or not the default would otherwise be held to substantially impair the value of the lease contract to the lessor; they can also create a new scheme of rights and remedies triggered by the occurrence of the default. Sections 2A‑103(4) and 1‑102(3).

3. Subsection (1), a substantially rewritten version of Section 2‑703, lists various cumulative remedies of the lessor where the lessee wrongfully rejects or revokes acceptance, fails to make a payment when due, or repudiates. Section 2A‑501(2) and (4). The subsection also allows the lessor to exercise any contractual remedy.

4. This Article rejects any general doctrine of election of remedy. Whether, in a particular case, one remedy bars another, is a function of whether lessor has been put in as good a position as if the lessee had fully performed the lease contract. Multiple remedies are barred only if the effect is to put the lessor in a better position than it would have been in had the lessee fully performed under the lease. Sections 2A‑103(4), 2A‑501(4) , and 1‑106(1).

5. Hypothetical: To better understand the application of subparagraphs (a) through (e), it is useful to review a hypothetical. Assume that A is a merchant in the business of selling and leasing new bicycles of various types. B is about to engage in the business of subleasing bicycles to summer residents of and visitors to an island resort. A, as lessor, has agreed to lease 60 bicycles to B. While there is one master lease, deliveries and terms are staggered. 20 bicycles are to be delivered by A to B’s island location on June 1; the term of the lease of these bicycles is four months. 20 bicycles are to be delivered by A to B’s island location on July 1; the term of the lease of these bicycles is three months. Finally, 20 bicycles are to be delivered by A to B’s island location on August 1; the term of the lease of these bicycles is two months. B is obligated to pay rent to A on the 15th day of each month during the term for the lease. Rent is $50 per month, per bicycle. B has no option to purchase or release and must return the bicycles to A at the end of the term, in good condition, reasonable wear and tear excepted. Since the retail price of each bicycle is $400 and bicycles used in the retail rental business have a useful economic life of 36 months, this transaction creates a lease. Sections 2A‑103(1)(j) and 1‑201(37).

6. A’s current inventory of bicycles is not large. Thus, upon signing the lease with B in February, A agreed to purchase 60 new bicycles from A’s principal manufacturer, with special instructions to drop ship the bicycles to B’s island location in accordance with the delivery schedule set forth in the lease.

7. The first shipment of 20 bicycles was received by B on May 21. B inspected the bicycles, accepted the same as conforming to the lease and signed a receipt of delivery and acceptance. However, due to poor weather that summer, business was terrible and B was unable to pay the rent due on June 15. Pursuant to the lease A sent B notice of default and proceeded to enforce his rights and remedies against B.

8. A’s counsel first advised A that under Section 2A‑510(2) and the terms of the lease B’s failure to pay was a default with respect to the whole. Thus, to minimize A’s continued exposure, A was advised to take possession of the bicycles. If A had possession of the goods A could refuse to deliver. Section 2A‑525(1). However, the facts here are different. With respect to the bicycles in B’s possession, A has the right to take possession of the bicycles, without breach of the peace. Section 2A‑525(2). If B refuses to allow A access to the bicycles, A can proceed by action, including replevin or injunctive relief.

9. With respect to the 40 bicycles that have not been delivered, this Article provides various alternatives. First, assume that 20 of the remaining 40 bicycles have been manufactured and delivered by the manufacturer to a carrier for shipment to B. Given the size of the shipment, the carrier was using a small truck for the delivery and the truck had not yet reached the island ferry when the manufacturer (at the request of A) instructed the carrier to divert the shipment to A’s place of business. A’s right to stop delivery is recognized under these circumstances. Section 2A‑526(1). Second, assume that the 20 remaining bicycles were in the process of manufacture when B defaulted. A retains the right (as between A as lessor and B as lessee) to exercise reasonable commercial judgment whether to complete manufacture or to dispose of the unfinished goods for scrap. Since A is not the manufacturer and A has a binding contract to buy the bicycles, A elected to allow the manufacturer to complete the manufacture of the bicycles, but instructed the manufacturer to deliver the completed bicycles to A’s place of business. Section 2A‑524(2).

10. Thus, so far A has elected to exercise the remedies referred to in subparagraphs (b) through (d) in subsection (1). None of these remedies bars any of the others because A’s election and enforcement merely resulted in A’s possession of the bicycles. Had B performed A would have recovered possession of the bicycles. Thus A is in the process of obtaining the benefit of his bargain. Note that A could exercise any other rights or pursue any other remedies provided in the lease contract (Section 2A‑523(1)(f)), or elect to recover his loss due to the lessee’s default under Section 2A‑523(2).

11. A’s counsel next would determine what action, if any, should be taken with respect to the goods. As stated in subparagraph (e) and as discussed fully in Section 2A‑527(1) the lessor may, but has no obligation to, dispose of the goods by a substantially similar lease (indeed, the lessor has no obligation whatsoever to dispose of the goods at all) and recover damages based on that action, but lessor will not be able to recover damages which put it in a better position than performance would have done, nor will it be able to recover damages for losses which it could have reasonably avoided. In this case, since A is in the business of leasing and selling bicycles, A will probably inventory the 60 bicycles for its retail trade.

12. A’s counsel then will determine which of the various means of ascertaining A’s damages against B are available. Subparagraph (e) catalogues each relevant section. First, under Section 2A‑527(2) the amount of A’s claim is computed by comparing the original lease between A and B with any subsequent lease of the bicycles but only if the subsequent lease is substantially similar to the original lease contract. While the section does not define this term, the Official Comment does establish some parameters. If, however, A elects to lease the bicycles to his retail trade, it is unlikely that the resulting lease will be substantially similar to the original, as leases to retail customers are considerably different from leases to wholesale customers like B. If, however, the leases were substantially similar, the damage claim is for accrued and unpaid rent to the beginning of the new lease, plus the present value as of the same date, of the rent reserved under the original lease for the balance of its term less the present value as of the same date of the rent reserved under the replacement lease for a term comparable to the balance of the term of the original lease, together with incidental damages less expenses saved in consequence of the lessee’s default.

13. If the new lease is not substantially similar or if A elects to sell the bicycles or to hold the bicycles, damages are computed under Section 2A‑528 or 2A‑529.

14. If A elects to pursue his claim under Section 2A‑528(1) the damage rule is the same as that stated in Section 2A‑527(2) except that damages are measured from default if the lessee never took possession of the goods or from the time when the lessor did or could have regained possession and that the standard of comparison is not the rent reserved under a substantially similar lease entered into by the lessor but a market rent, as defined in Section 2A‑507. Further, if the facts of this hypothetical were more elaborate A may be able to establish that the measure of damage under subsection (1) is inadequate to put him in the same position that B’s performance would have, in which case A can claim the present value of his lost profits.

15. Yet another alternative for computing A’s damage claim against B which will be available in some situations is recovery of the present value, as of entry of judgment, of the rent for the then remaining lease term under Section 2A‑529. However, this formulation is not available if the goods have been repossessed or tendered back to A. For the 20 bicycles repossessed and the remaining 40 bicycles, A will be able to recover the present value of the rent only if A is unable to dispose of them, or circumstances indicate the effort will be unavailing. If A has prevailed in an action for the rent, at any time up to collection of a judgment by A against B, A might dispose of the bicycles. In such case A’s claim for damages against B is governed by Section 2A‑527 or 2A‑528. Section 2A‑529(3). The resulting recalculation of claim should reduce the amount recoverable by A against B and the lessor is required to cause an appropriate credit to be entered against the earlier judgment. However, the nature of the post‑judgment proceedings to resolve this issue, and the sanctions for a failure to comply, if any, will be determined by other law.

16. Finally, if the lease agreement had so provided pursuant to subparagraph (f), A’s claim against B would not be determined under any of these statutory formulae, but pursuant to a liquidated damages clause. Section 2A‑504(1).

17. These various methods of computing A’s damage claim against B are alternatives subject to Section 2A‑501(4). However, the pursuit of any one of these alternatives is not a bar to, nor has it been barred by, A’s earlier action to obtain possession of the 60 bicycles. These formulae, which vary as a function of an overt or implied mitigation of damage theory, focus on allowing A a recovery of the benefit of his bargain with B. Had B performed, A would have received the rent as well as the return of the 60 bicycles at the end of the term.

18. Finally, A’s counsel should also advise A of his right to cancel the lease contract under subparagraph (a). Section 2A‑505(1). Cancellation will discharge all existing obligations but preserve A’s rights and remedies.

19. Subsection (2) recognizes that a lessor who is entitled to exercise the rights or to obtain a remedy granted by subsection (1) may choose not to do so. In such cases, the lessor can recover damages as provided in subsection (2). For example, for non‑payment of rent, the lessor may decide not to take possession of the goods and cancel the lease, but rather to merely sue for the unpaid rent as it comes due plus lost interest or other damages “determined in any reasonable manner.” Subsection (2) also negates any loss of alternative rights and remedies by reason of having invoked or commenced the exercise or pursuit of any one or more rights or remedies.

20. Subsection (3) allows the lessor access to a remedy scheme provided in this Article as well as that contained in the lease contract if the lessee is in default for reasons other than those stated in subsection (1). Note that the reference to this Article includes supplementary principles of law and equity, e.g., fraud, misrepresentation and duress. Sections 2A‑103(4) and 1‑103.

21. There is no special treatment of the finance lease in this section. Absent supplementary principles of law to the contrary, in most cases the supplier will have no rights or remedies against the defaulting lessee. Section 2A‑209(2)(ii). Given that the supplier will look to the lessor for payment, this is appropriate. However, there is a specific exception to this rule with respect to the right to identify goods to the lease contract. Section 2A‑524(2). The parties are free to create a different result in a particular case. Sections 2A‑103(4) and 1‑102(3).

Cross References: Sections 1‑102(3), 1‑103, 1‑106(1), 1‑201(37), 2‑703, 2A‑103(1)(j), 2A‑103(4), 2A‑209(2)(ii), 2A‑501(4), 2A‑504(1), 2A‑505(1), 2A‑507, 2A‑510(2), 2A‑524 through 2A‑531, 2A‑524(2), 2A‑525(1), 2A‑525(2), 2A‑526(1), 2A‑527(1), 2A‑527(2), 2A‑528(1) and 2A‑529(3).

Definitional Cross References:

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| --- | --- |
|  |  |
| “Delivery” | Section 1‑201(14). |
| “Goods” | Section 2A‑103(1)(h). |
| “Installment lease contract” | Section 2A‑103(1)(i). |
| “Lease contract” | Section 2A‑103(1)(l). |
| “Lessee” | Section 2A‑103(1)(n). |
| “Lessor” | Section 2A‑103(1)(p). |
| “Remedy” | Section 1‑201(34). |
| “Rights” | Section 1‑201(36). |
| “Value” | Section 1‑201(44). |

SOUTH CAROLINA REPORTER’S COMMENT

There is no South Carolina lease law on point. This section expands its statutory analogue to protect the lessor when the lessee failed to pay or breached a provision of the lease constituting a default.

ARTICLE 2A allows cumulative remedies. However an aggrieved party is not entitled to double recovery; that is prevented by the doctrine of election of remedies, under which the plaintiff must choose among the available relief. A defendant may invoke the doctrine at any stage of the case. Inman v. Imperial Chrysler‑Plymouth, Inc., 303 S.C. 10, 397 S.E.2d 774 (Ct. App. 1990) (allowing the defendant to require the plaintiff to make an election, even though the defendant had not invoked the doctrine until the third appeal). The trial court may also require election on its own motion. Nichols v. State Farm Mut. Auto. Ins. Co., 279 S.C. 336, 306 S.E.2d 616 (1983) . In Nichols the Supreme Court held that if the jury returns a verdict for plaintiff on multiple causes of action for the same damages, the verdict must be reformed so plaintiff only recovers once for the actual damages proven.

LIBRARY REFERENCES

Bailment 5, 22 to 34.

Westlaw Key Number Search: 50k5; 50k22 to 50k34.

C.J.S. Bailments Sections 15, 23 to 24, 86 to 92, 99 to 119.

**SECTION 36‑2A‑524.** Lessor ‘ s right to identify goods to lease contract.

(1) After default by the lessee under the lease contract of the type described in Section 36‑2A‑523(1) or Section 36‑2A‑523(3)(a) or, if agreed, after other default by the lessee, the lessor may:

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

(b) dispose of goods (Section 36‑2A‑527(1)) that demonstrably have been intended for the particular lease contract even though those goods are unfinished.

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

HISTORY: 2001 Act No. 67, Section 2.

OFFICIAL COMMENT

Uniform Statutory Source: Section 2‑704.

Changes: Revised to reflect leasing practices and terminology.

Purposes: The remedies provided by this section are available to the lessor (i) if there has been a default by the lessee which falls within Section 2A‑523(1) or 2A‑523(3)(a), or (ii) if there has been any other default for which the lease contract gives the lessor the remedies provided by this section. Under “(ii)”, the lease contract may give the lessor the remedies of identification and disposition provided by this section in various ways. For example, a lease provision might specifically refer to the remedies of identification and disposition, or it might refer to this section by number (i.e., 2A‑524), or it might do so by a more general reference such as “all rights and remedies provided by Article 2A for default by the lessee.”

Definitional Cross References:

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|  |  |
| “Aggrieved party” | Section 1‑201(2). |
| “Conforming” | Section 2A‑103(1)(d). |
| “Goods” | Section 2A‑103(1)(h). |
| “Learn” | Section 1‑201(25). |
| “Lease” | Section 2A‑103(1)(j). |
| “Lease contract” | Section 2A‑103(1)(l). |
| “Lessor” | Section 2A‑103(1)(p). |
| “Rights” | Section 1‑201(36). |
| “Supplier” | Section 2A‑103(1)(x). |
| “Value” | Section 1‑201(44). |

SOUTH CAROLINA REPORTER’S COMMENT

Identification is necessary to establish the lessor’s rights to sell or again lease the goods or to recover the price following a default by the lessee. The lessor must show performance of the contract on his part, by tender of delivery or at least an appropriation of the goods to the contract. See Smythe v. Goode, 121 S.C. 270, 113 S.E. 690 (1922).

Like the statutory analogue, subsection (2) imposes a standard of commercially reasonable judgment upon the lessor or supplier in deciding whether to complete the goods. This prevents the lessor from claims of failure to mitigate damages in a close case in which hindsight indicates it might have been better to complete the goods although it was commercially reasonable not to.

LIBRARY REFERENCES

Bailment 5, 22 to 34.

Westlaw Key Number Search: 50k5; 50k22 to 50k34.

C.J.S. Bailments Sections 15, 23 to 24, 86 to 92, 99 to 119.

**SECTION 36‑2A‑525.** Lessor ‘ s right to possession of goods.

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

(2) After a default by the lessee under the lease contract of the type described in Section 36‑2A‑523(1) or 36‑2A‑523(3)(a) or, if agreed, after other default by the lessee, the lessor has the right to take possession of the goods. If the lease contract so provides, the lessor may require the lessee to assemble the goods and make them available to the lessor at a place to be designated by the lessor which is reasonably convenient to both parties. Without removal, the lessor may render unusable any goods employed in trade or business, and may dispose of goods on the lessee’s premises (Section 36‑2A‑527).

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

HISTORY: 2001 Act No. 67, Section 2.

OFFICIAL COMMENT

Uniform Statutory Source: Sections 2‑702(1) and former 9‑503 (now codified as Section 9‑609).

Changes: Substantially revised.

Purposes: 1. Subsection (1), a revised version of the provisions of Section 2‑702(1), allows the lessor to refuse to deliver goods if the lessee is insolvent. Note that the provisions of Section 2‑702(2), granting the unpaid seller certain rights of reclamation, were not incorporated in this section. Subsection (2) made this unnecessary.

2. Subsection (2), a revised version of the provisions of former Section 9‑503 (Now codified as Section 9‑609), allows the lessor, on a Section 2A‑523(1) or 2A‑523(3)(a) default by the lessee, the right to take possession of or reclaim the goods. Also, the lessor can contract for the right to take possession of the goods for other defaults by the lessee. Therefore, since the lessee’s insolvency is an event of default in a standard lease agreement, subsection (2) is the functional equivalent of Section 2‑702(2). Further, subsection (2) sanctions the classic crate and delivery clause obligating the lessee to assemble the goods and to make them available to the lessor. Finally, the lessor may leave the goods in place, render them unusable (if they are goods employed in trade or business), and dispose of them on the lessee’s premises.

3. Subsection (3), a revised version of the provisions of former Section 9‑503 (now codified as Section 9‑609), allows the lessor to proceed under subsection (2) without judicial process, absent breach of the peace, or by action. Sections 2A‑501(3), 2A‑103(4) and 1‑201(1). In the appropriate case action includes injunctive relief. Clark Equip. Co. v. Armstrong Equip. Co., 431 F.2d 54 (5th Cir. 1970), cert. denied, 402 U.S. 909 (1971). This Section, as well as a number of other Sections in this Part, are included in the Article to codify the lessor’s common law right to protect the lessor’s reversionary interest in the goods. Section 2A‑103(1)(q). These Sections are intended to supplement and not displace principles of law and equity with respect to the protection of such interest. Sections 2A‑103(4) and 1‑103. Such principles apply in many instances, e.g., loss or damage to goods if risk of loss passes to the lessee, failure of the lessee to return goods to the lessor in the condition stipulated in the lease, and refusal of the lessee to return goods to the lessor after termination or cancellation of the lease. See also Section 2A‑532.

Cross References: Sections 1‑106(2), 2‑702(1), 2‑702(2), 2A‑103(4), 2A‑501(3), 2A‑532 and 9‑609.

Definitional Cross References:

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| --- | --- |
|  |  |
| “Action” | Section 1‑201(1). |
| “Delivery” | Section 1‑201(14). |
| “Discover” | Section 1‑201(25). |
| “Goods” | Section 2A‑103(1)(h). |
| “Insolvent” | Section 1‑201(23). |
| “Lease contract” | Section 2A‑103(1)(l). |
| “Lessee” | Section 2A‑103(1)(n). |
| “Lessor” | Section 2A‑103(1)(p). |
| “Party” | Section 1‑201(29). |
| “Rights” | Section 1‑201(36). |

SOUTH CAROLINA REPORTER’S COMMENT

Although there is no South Carolina lease law on point, this section incorporates the Article 9 right of self help without prior judicial proceedings. The common law also provided for self help without judicial proceedings, provided it could be accomplished peaceably and without breach of the peace. Castell v. Stephenson Finance Co., 244 S.C. 45, 135 S.E.2d 311 (1964); Johnson Cotton Co. v. Cannon, 242 S.C. 42, 129 S.E.2d 750 (1963). “Breach of the peace” is defined in Lyda v. Cooper, 169 S.C. 451, 169 S.E. 236 (1933); see also Jordan v. Citizens and Southern Nat. Bank of S.C., 278 S.C. 449, 298 S.E.2d 213 (1982) (breach of the peace during the getaway rather than the seizure).

Although challenged on constitutional grounds in many jurisdictions, this right has been upheld. See 30 Bus. Law. 893 (1975). The plaintiffs in many of these challenges were attempting to hold the state liable in Section 1983 actions. See generally McDuffy v. Worthmore Furniture, Inc., 380 F. Supp. 257 (E.D. Va. 1974)

LIBRARY REFERENCES

Bailment 5, 23.

Westlaw Key Number Search: 50k5; 50k23.

C.J.S. Bailments Sections 15, 23 to 24, 86 to 92.

**SECTION 36‑2A‑526.** Lessor ‘ s stoppage of delivery in transit or otherwise.

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

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

(a) receipt of the goods by the lessee;

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

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

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

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

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

HISTORY: 2001 Act No. 67, Section 2.

OFFICIAL COMMENT

Uniform Statutory Source: Section 2‑705.

Changes: Revised to reflect leasing practices and terminology.

Definitional Cross References:

|  |  |
| --- | --- |
|  |  |
| “Bill of lading” | Section 1‑201(6). |
| “Delivery” | Section 1‑201(14). |
| “Discover” | Section 1‑201(25). |
| “Goods” | Section 2A‑103(1)(h). |
| “Insolvent” | Section 1‑201(23). |
| “Lease contract” | Section 2A‑103(1)(l). |
| “Lessee” | Section 2A‑103(1)(n). |
| “Lessor” | Section 2A‑103(1)(p). |
| “Notifies” and “Notification” | Section 1‑201(26). |
| “Person” | Section 1‑201(30). |
| “Receipt” | Section 2‑103(1)(c). |
| “Remedy” | Section 1‑201(34). |
| “Rights” | Section 1‑201(36). |

SOUTH CAROLINA REPORTER’S COMMENT

Although there is no South Carolina lease law on point, the common law recognizes the right of an unpaid seller, upon discovery of the buyer’s insolvency, to stop the delivery of goods which are in transit. Monaghan Mills v. Gilbreath Mfg. Co., 96 S.C. 195, 80 S.E. 194 (1913). Article 2 expanded the common law and allowed stoppage when the goods were in the hands of other bailees. See South Carolina Reporter’s Comments to Section 36‑2‑705. This section expands this later rule to leases.

Subsection (2) codifies the common law rule that the right of stoppage terminates upon receipt of the goods. See John Frazier & Co. v. Hilliard, 2 Strob 309 (1848). Once the goods are in the control of the lessee, the lessor may no longer stop delivery, but must exercise his right to take possession from the defaulting lessee.

CROSS REFERENCES

Obligation of bailee to deliver, excuse, see Section 36‑7‑403.

Rights acquired in the absence of due negotiation, effect of diversion, seller’s stoppage of delivery, see Section 36‑7‑504.

LIBRARY REFERENCES

Bailment 5.

Westlaw Key Number Search: 50k5.

C.J.S. Bailments Sections 15, 23 to 24.

**SECTION 36‑2A‑527.** Lessor ‘ s rights to dispose of goods.

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

(2) Except as otherwise provided with respect to damages liquidated in the lease agreement (Section 36‑2A‑504) or otherwise determined pursuant to agreement of the parties (Sections 36‑1‑302 and 36‑2A‑503), if the disposition is by lease agreement substantially similar to the original lease agreement and the new lease agreement is made in good faith and in a commercially reasonable manner, the lessor may recover from the lessee as damages (i) accrued and unpaid rent as of the date of the commencement of the term of the new lease agreement, (ii) the present value, as of the same date, of the total rent for the then remaining lease term of the original lease agreement minus the present value, as of the same date, of the rent under the new lease agreement applicable to that period of the new lease term which is comparable to the then remaining term of the original lease agreement, and (iii) any incidental damages allowed under Section 36‑2A‑530, less expenses saved in consequence of the lessee’s default.

(3) If the lessor’s disposition is by lease agreement that for any reason does not qualify for treatment under subsection (2), or is by sale or otherwise, the lessor may recover from the lessee as if the lessor had elected not to dispose of the goods and Section 36‑2A‑528 governs.

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

(5) The lessor is not accountable to the lessee for any profit made on any disposition. A lessee who has rightfully rejected or justifiably revoked acceptance shall account to the lessor for any excess over the amount of the lessee’s security interest (Section 36‑2A‑508(5)).

HISTORY: 2001 Act No. 67, Section 2; 2014 Act No. 213 (S.343), Section 22, eff October 1, 2014.

OFFICIAL COMMENT

Uniform Statutory Source: Section 2‑706(1), (5) and (6).

Changes: Substantially revised.

Purposes: 1. Subsection (1), a revised version of the first sentence of subsection 2‑706(1), allows the lessor the right to dispose of goods after a statutory or other material default by the lessee (even if the goods remain in the lessee’s possession—Section 2A‑525(2)), after the lessor refuses to deliver or takes possession of the goods, or, if agreed, after other contractual default. The lessor’s decision to exercise this right is a function of a commercial judgment, not a statutory mandate replete with sanctions for failure to comply. Cf. Section 9‑625. As the owner of the goods, in the case of a lessor, or as the prime lessee of the goods, in the case of a sublessor, compulsory disposition of the goods is inconsistent with the nature of the interest held by the lessor or the sublessor and is not necessary because the interest held by the lessee or the sublessee is not protected by a right of redemption under the common law or this Article. Subsection 2A‑527(5).

2. The rule for determining the measure of damages recoverable by the lessor against the lessee is a function of several variables. If the lessor has elected to effect disposition under subsection (1) and such disposition is by lease that qualifies under subsection (2), the measure of damages set forth in subsection (2) will apply, absent agreement to the contrary. Sections 2A‑504, 2A‑103(4) and 1‑102(3).

3. The lessor’s damages will be established using the new lease agreement as a measure if the following three criteria are satisfied: (i) the lessor disposed of the goods by lease, (ii) the lease agreement is substantially similar to the original lease agreement, and (iii) such disposition was in good faith, and in a commercially reasonable manner. Thus, the lessor will be entitled to recover from the lessee the accrued and unpaid rent as of the date of commencement of the term of the new lease, and the present value, as of the same date , of the rent under the original lease for the then remaining term less the present value as of the same date of the rent under the new lease agreement applicable to the period of the new lease comparable to the remaining term under the original lease, together with incidental damages less expenses saved in consequence of the lessee’s default. If the lessor’s disposition does not satisfy the criteria of subsection (2), the lessor may calculate its claim against the lessee pursuant to Section 2A‑528. Section 2A‑523(1)(e).

4. Two of the three criteria to be met by the lessor are familiar, but the concept of the new lease agreement that is substantially similar to the original lease agreement is not. Given the many variables facing a party who intends to lease goods and the rapidity of change in the market place, the policy decision was made not to draft with specificity. It was thought unwise to seek to establish certainty at the cost of fairness. The decision of whether the new lease agreement is substantially similar to the original will be determined case by case.

5. While the section does not draw a bright line, it is possible to describe some of the factors that should be considered in a finding that a new lease agreement is substantially similar to the original. The various elements of the new lease agreement should be examined. Those elements include the options to purchase or release; the lessor’s representations, warranties and covenants to the lessee as well as those to be provided by the lessee to the lessor; and the services, if any, to be provided by the lessor or by the lessee. All of these factors allocate cost and risk between the lessor and the lessee and thus affect the amount of rent to be paid. These findings should not be made with scientific precision, as they are a function of economics, nor should they be made independently, as it is important that a sense of commercial judgment pervade the finding. See Section 2A‑507(2). To establish the new lease as a proper measure of damage under subsection (2), these various factors, taken as a whole, must result in a finding that the new lease agreement is substantially similar to the original. If the differences between the original lease and the new lease can be easily valued, it would be appropriate for a court to find that the new lease is substantially similar to the old lease, adjust the difference in the rent between the two leases to take account of the differences, and award damages under this section. If, for example, the new lease requires the lessor to insure the goods in the hands of the lessee, while the original lease required the lessee to insure, the usual cost of such insurance could be deducted from rent due under the new lease before the difference in rental between the two leases is determined.

6. The following hypothetical illustrates the difficulty of providing a bright line. Assume that A buys a jumbo tractor for $1 million and then leases the tractor to B for a term of 36 months. The tractor is delivered to and is accepted by B on May 1. On June 1 B fails to pay the monthly rent to A. B returns the tractor to A, who immediately releases the tractor to C for a term identical to the term remaining under the lease between A and B. All terms and conditions under the lease between A and C are identical to those under the original lease between A and B, except that C does not provide any property damage or other insurance coverage, and B agreed to provide complete coverage. Coverage is expensive and difficult to obtain. It is a question of fact whether it is so difficult to adjust the recovery to take account of the difference between the two leases as to insurance that the second lease is not substantially similar to the original.

7. A new lease can be substantially similar to the original lease even though its term extends beyond the remaining term of the original lease, so long as both (a) the lease terms are commercially comparable (e.g., it is highly unlikely that a one‑month rental and a five‑year lease would reflect similar realities), and (b) the court can fairly apportion a part of the rental payments under the new lease to that part of the term of the new lease which is comparable to the remaining lease term under the original lease. Also, the lease term of the new lease may be comparable to the remaining term of the original lease even though the beginning and ending dates of the two leases are not the same. For example, a two‑month lease of agricultural equipment for the months of August and September may be comparable to a two‑month lease running from the 15th of August to the 15th of October if in the particular location two‑month leases beginning on August 15th are basically interchangeable with two‑month leases beginning August 1st. Similarly, the term of a one‑year truck lease beginning on the 15th of January may be comparable to the term of a one‑year truck lease beginning January 2d. If the lease terms are found to be comparable, the court may base cover damages on the entire difference between the costs under the two leases.

8. Subsection (3), which is new, provides that if the lessor’s disposition is by lease that does not qualify under subsection (2), or is by sale or otherwise, Section 2A‑528 governs.

9. Subsection (4), a revised version of subsection 2‑706(5), applies to protect a subsequent buyer or lessee who buys or leases from the lessor in good faith and for value, pursuant to a disposition under this section. Note that by its terms, the rule in subsection 2A‑304(1), which provides that the subsequent lessee takes subject to the original lease contract, is controlled by the rule stated in this subsection.

10. Subsection (5), a revised version of subsection 2‑706(6), provides that the lessor is not accountable to the lessee for any profit made by the lessor on a disposition. This rule follows from the fundamental premise of the bailment for hire that the lessee under a lease of goods has no equity of redemption to protect.

Cross References: Sections 1‑102(3), 2‑706(1), 2‑706(5), 2‑706(6), 2A‑103(4), 2A‑304(1), 2A‑504, 2A‑507(2), 2A‑523(1)(e), 2A‑525(2), 2A‑527(5), 2A‑528 and 9‑625.

Definitional Cross References:

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|  |  |
| “Buyer” and “Buying” | Section 2‑103(1)(a). |
| “Delivery” | Section 1‑201(14). |
| “Good faith” | Sections 1‑201(19) and 2‑103(1)(b). |
| “Goods” | Section 2A‑103(1)(h). |
| “Lease” | Section 2A‑103(1)(j). |
| “Lease contract” | Section 2A‑103(1)(l). |
| “Lessee” | Section 2A‑103(1)(n). |
| “Lessor” | Section 2A‑103(1)(p). |
| “Present value” | Section 2A‑103(1)(u). |
| “Rights” | Section 1‑201(36). |
| “Sale” | Section 2‑106(1). |
| “Security interest” | Section 1‑201(37). |
| “Value” | Section 1‑201(44). |

SOUTH CAROLINA REPORTER’S COMMENT

There is no South Carolina lease law on point. This section permits a lessor to choose between disposing of goods or using them without any subsequent disposal.

Editor’s Note

2014 Act No. 213, Section 51, provides as follows:

“SECTION 51. This act becomes effective on October 1, 2014. It applies to transactions entered into and events occurring after that date.”

Effect of Amendment

2014 Act No. 213, Section 22, in subsection (2), substituted “36‑1‑302” for “36‑1‑102(3)”.

LIBRARY REFERENCES

Bailment 5, 22, 32.

Westlaw Key Number Search: 50k5; 50k22; 50k32.

C.J.S. Bailments Sections 15, 23 to 24, 99 to 102, 117 to 119.

**SECTION 36‑2A‑528.** Lessor ‘ s damages for nonacceptance, failure to pay, repudiation, or other default.

(1) Except as otherwise provided with respect to damages liquidated in the lease agreement (Section 36‑2A‑504) or otherwise determined pursuant to agreement of the parties (Sections 36‑1‑302 and 36‑2A‑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 36‑2A‑527(2), or is by sale or otherwise, the lessor may recover from the lessee as damages for a default of the type described in Section 36‑2A‑523(1) or 36‑2A‑523(3)(a), 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 36‑2A‑530, less expenses saved in consequence of the lessee’s default.

(2) If the measure of damages provided in subsection (1) is inadequate to put a lessor in as good a position as performance would have, the measure of damages is the present value of the profit, including reasonable overhead, the lessor would have made from full performance by the lessee, together with any incidental damages allowed under Section 36‑2A‑530, due allowance for costs reasonably incurred and due credit for payments or proceeds of disposition.

HISTORY: 2001 Act No. 67, Section 2; 2014 Act No. 213 (S.343), Section 23, eff October 1, 2014.

OFFICIAL COMMENT

Uniform Statutory Source: Section 2‑708.

Changes: Substantially revised.

Purposes: 1. Subsection (1), a substantially revised version of Section 2‑708(1), states the basic rule governing the measure of lessor’s damages for a default described in Section 2A‑523(1) or (3)(a), and, if agreed, for a contractual default. This measure will apply if the lessor elects to retain the goods (whether undelivered, returned by the lessee, or repossessed by the lessor after acceptance and default by the lessee) or if the lessor’s disposition does not qualify under subsection 2A‑527(2). Section 2A‑527(3). Note that under some of these conditions, the lessor may recover damages from the lessee pursuant to the rule set forth in Section 2A‑529. There is no sanction for disposition that does not qualify under subsection 2A‑527(2). Application of the rule set forth in this section is subject to agreement to the contrary. Sections 2A‑504, 2A‑103(4) and 1‑102(3).

2. If the lessee has never taken possession of the goods, the measure of damage is the accrued and unpaid rent as of the date of default together with the present value, as of the date of default, of the original rent for the remaining term of the lease less the present value as of the same date of market rent, and incidental damages, less expenses saved in consequence of the default. Note that the reference in Section 2A‑528(1)(i) and (ii) is to the date of default not to the date of an event of default. An event of default under a lease agreement becomes a default under a lease agreement only after the expiration of any relevant period of grace and compliance with any notice requirements under this Article and the lease agreement. American Bar Foundation, Commentaries on Indentures, Section 5‑1, at 216‑217 (1971). Section 2A‑501(1). This conclusion is also a function of whether, as a matter of fact or law, the event of default has been waived, suspended or cured. Sections 2A‑103(4) and 1‑103. If the lessee has taken possession of the goods, the measure of damages is the accrued and unpaid rent as of the earlier of the time the lessor repossesses the goods or the time the lessee tenders the goods to the lessor plus the difference between the present value, as of the same time, of the rent under the lease for the remaining lease term and the present value, as of the same time, of the market rent.

3. Market rent will be computed pursuant to Section 2A‑507.

4. Subsection (2), a somewhat revised version of the provisions of subsection 2‑708(2), states a measure of damages which applies if the measure of damages in subsection (1) is inadequate to put the lessor in as good a position as performance would have. The measure of damage is the lessor’s profit, including overhead, together with incidental damages, with allowance for costs reasonably incurred and credit for payments or proceeds of disposition. In determining the amount of due credit with respect to proceeds of disposition a proper value should be attributed to the lessor’s residual interest in the goods. Sections 2A‑103(1)(q) and 2A‑507(4).

5. In calculating profit, a court should include any expected appreciation of the goods, e.g. the foal of a leased brood mare. Because this subsection is intended to give the lessor the benefit of the bargain, a court should consider any reasonable benefit or profit expected by the lessor from the performance of the lease agreement. See Honeywell, Inc. v. Lithonia Lighting, Inc., 317 F. Supp. 406, 413 (N.D. Ga. 1970); Locks v. Wade, 36 N.J. Super. 128, 131, 114 A.2d 875, 877 (Super. Ct. App. Div. 1955). Further, in calculating profit the concept of present value must be given effect. Taylor v. Commercial Credit Equip. Corp., 170 Ga. App. 322, 316 S.E.2d 788 (Ct. App. 1984). See generally Section 2A‑103(1)(u).

Cross References: Sections 1‑102(3), 2‑708, 2A‑103(1)(u), 2A‑402, 2A‑504, 2A‑507, 2A‑527(2) and 2A‑529.

Definitional Cross References:

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| “Agreement” | Section 1‑201(3). |
| “Goods” | Section 2A‑103(1)(h). |
| “Lease” | Section 2A‑103(1)(j). |
| “Lease agreement” | Section 2A‑103(1)(k). |
| “Lessee” | Section 2A‑103(1)(n). |
| “Lessor” | Section 2A‑103(1)(p). |
| “Party” | Section 1‑201(29). |
| “Present value” | Section 2A‑103(1)(u). |
| “Sale” | Section 2‑106(1). |

SOUTH CAROLINA REPORTER’S COMMENT

In Mid‑Continent Refrigerator Co. v. Dean, 256 S.C. 99, 180 S.E.2d 892 (1971), the court apparently awarded damages to the plaintiff‑lessor based on the monthly rental from default until the date the lessor accepted return of the refrigerator. The result under Article 2A would have been calculated pursuant to subsection (1), which specifies that the date on which the lessee tendered the refrigerator to the lessor would have been the date from which the damages were calculated, rather than the date on which the lessor accepted the returned refrigerator. However, under this section the lessor Mid‑Continent would have been entitled to receive incidental damages in addition to the excess of the contractually‑specified rent over the market rent.

It is important to note that Mid‑Continent apparently involved a lease unlike those in common usage today. Modern leases usually provide contractual acceleration of future rent or otherwise liquidate the lessor’s damages; such provisions are permitted under Article 2A. D&D Leasing Co. of S.C. v. Lipson, 305 S.C. 540, 409 S.E.2d 794 (Ct. App. 1991), involved such a contractual acceleration clause which the court enforced, noting that it created no windfall for the lessor, since the lessee received credit for the price received on the lessor’s sale of the goods. The result under Article 2A could require discounting the accelerated rents to present value, rather than simply summing them as was done in D&D Leasing. See Section 36‑2A‑504 ( imposing a reasonableness test for liquidated damages provisions) and Official Comment (u) (“Present Value”) to Section 36‑2A‑103.

Consistent with the statutory analogue, in the absence of contractual damage provisions, Article 2A includes measures of damages for the protection of the lessor’s benefit of the bargain based on market rent. Were the lessor able to sell or relet the goods, the lessor would have two transactions instead of one, had the breaching lessee performed. If the calculation under subsection (1) is inadequate in this circumstance to place the lessor in the same position as performance of the original lease, subsection (2) allows the lessor to recover lost profit.

Editor’s Note

2014 Act No. 213, Section 51, provides as follows:

“SECTION 51. This act becomes effective on October 1, 2014. It applies to transactions entered into and events occurring after that date.”

Effect of Amendment

2014 Act No. 213, Section 23, in subsection (1), substituted “36‑1‑302” for “36‑1‑102(3)”.

LIBRARY REFERENCES

Bailment 32.

Westlaw Key Number Search: 50k32.

C.J.S. Bailments Sections 117 to 119.

NOTES OF DECISIONS

Lost volume seller 1

Review 3

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1. Lost volume seller

Video poker machine lessor was not required to demonstrate excess capacity as to a specific type of machine in order to recover lost profits as damages, under lost volume seller theory, from buyer of bingo hall’s assets which terminated poker machine lease, where lessor had more supply capacity of the machines than it had demand, and lease did not require lessor to place any particular machines on the premises, other than one multi‑player poker unit (Per opinion of Waller, J., with one justice concurring and one justice concurring specially). Collins Entertainment Corp. v. Coats and Coats Rental Amusement (S.C. 2006) 368 S.C. 410, 629 S.E.2d 635, rehearing denied. Damages 62(3)

Legislature has tacitly approved of the lost volume seller doctrine (Per opinion of Waller, J., with one justice concurring and one justice concurring specially). Collins Entertainment Corp. v. Coats and Coats Rental Amusement (S.C. 2006) 368 S.C. 410, 629 S.E.2d 635, rehearing denied. Damages 62(4); Sales 1998

By definition, a lost volume seller cannot mitigate damages through resale; resale does not reduce a lost volume seller’s damages because the breach has still resulted in its losing one sale and a corresponding profit (Per opinion of Waller, J., with one justice concurring and one justice concurring specially). Collins Entertainment Corp. v. Coats and Coats Rental Amusement (S.C. 2006) 368 S.C. 410, 629 S.E.2d 635, rehearing denied. Damages 62(4); Sales 1998

Whether a seller is a lost volume seller is a question of fact (Per opinion of Waller, J., with one justice concurring and one justice concurring specially). Collins Entertainment Corp. v. Coats and Coats Rental Amusement (S.C. 2006) 368 S.C. 410, 629 S.E.2d 635, rehearing denied. Sales 2783

The lost volume seller theory allows for the recovery of lost profits despite resale of the services that were the subject of the terminated contract if the seller can prove that he would have entered into both transactions but for the breach (Per opinion of Waller, J., with one justice concurring and one justice concurring specially). Collins Entertainment Corp. v. Coats and Coats Rental Amusement (S.C. 2006) 368 S.C. 410, 629 S.E.2d 635, rehearing denied. Damages 62(4)

2. Sufficiency of evidence

Evidence was sufficient to support finding that video poker machine lessor was a lost volume seller such that lessor, which brought intentional interference with contract claim against buyer of bingo hall’s assets after buyer terminated lease, could recover lost profit damages; there was evidence that lessor had surplus machines and that lessor placed 19 of 20 machines removed from bingo hall into other premises (Per opinion of Waller, J., with one justice concurring and one justice concurring specially). Collins Entertainment Corp. v. Coats and Coats Rental Amusement (S.C. 2006) 368 S.C. 410, 629 S.E.2d 635, rehearing denied. Damages 62(3)

3. Review

Buyer of bingo hall’s assets preserved for review issue of whether lost volume seller doctrine applied to video poker machine lessor’s tortious interference with contract claim, as buyer argued generally against adoption of the lost volume seller doctrine (Per opinion of Pleicones, J., with two justices agreeing separately). Collins Entertainment Corp. v. Coats and Coats Rental Amusement (S.C. 2006) 368 S.C. 410, 629 S.E.2d 635, rehearing denied. Appeal And Error 175

Buyer of bingo hall’s assets, which terminated video poker machine lease, failed to make any argument in trial court with respect to specific types of machines at issue in and thus failed to preserve for appeal issue of whether lessor, which claimed lost profit damages as a lost volume seller, had excess capacity with respect to specific machines at issue in lease (Per opinion of Waller, J., with one justice concurring and one justice concurring specially). Collins Entertainment Corp. v. Coats and Coats Rental Amusement (S.C. 2006) 368 S.C. 410, 629 S.E.2d 635, rehearing denied. Appeal And Error 175

**SECTION 36‑2A‑529.** Lessor ‘ s action for the rent.

(1) After default by the lessee under the lease contract of the type described in Section 36‑2A‑523(1) or 36‑2A‑523(3)(a) or, if agreed, after other default by the lessee, if the lessor complies with subsection (2), the lessor may recover from the lessee as damages:

(a) for goods accepted by the lessee and not repossessed by or tendered to the lessor, and for conforming goods lost or damaged within a commercially reasonable time after risk of loss passes to the lessee (Section 36‑2A‑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 36‑2A‑530, less expenses saved in consequence of the lessee’s default; and

(b) for goods identified to the lease contract if the lessor is unable after reasonable effort to dispose of them at a reasonable price or the circumstances reasonably indicate that effort will be unavailing, (i) accrued and unpaid rent as of the date of entry of judgment in favor of the lessor, ( ii) the present value as of the same date of the rent for the then remaining lease term of the lease agreement, and (iii) any incidental damages allowed under Section 36‑2A‑530, less expenses saved in consequence of the lessee’s default.

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

(3) The lessor may dispose of the goods at any time before collection of the judgment for damages obtained pursuant to subsection (1). If the disposition is before the end of the remaining lease term of the lease agreement, the lessor’s recovery against the lessee for damages is governed by Section 36‑2A‑527 or Section 36‑2A‑528, and the lessor will cause an appropriate credit to be provided against a judgment for damages to the extent that the amount of the judgment exceeds the recovery available pursuant to Section 36‑2A‑527 or 36‑2A‑528.

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

(5) After default by the lessee under the lease contract of the type described in Section 36‑2A‑523(1) or Section 36‑2A‑523(3)(a) or, if agreed, after other default by the lessee, a lessor who is held not entitled to rent under this section must nevertheless be awarded damages for nonacceptance under Section 36‑2A‑527 or Section 36‑2A‑528.

HISTORY: 2001 Act No. 67, Section 2.

OFFICIAL COMMENT

Uniform Statutory Source: Section 2‑709.

Changes: Substantially revised.

Purposes: 1. Absent a lease contract provision to the contrary, an action for the full unpaid rent (discounted to present value as of the time of entry of judgment as to rent due after that time) is available as to goods not lost or damaged only if the lessee retains possession of the goods or the lessor is or apparently will be unable to dispose of them at a reasonable price after reasonable effort. There is no general right in a lessor to recover the full rent from the lessee upon holding the goods for the lessee. If the lessee tenders goods back to the lessor, and the lessor refuses to accept the tender, the lessor will be limited to the damages it would have suffered had it taken back the goods. The rule in Article 2 that the seller can recover the price of accepted goods is rejected here. In a lease, the lessor always has a residual interest in the goods which the lessor usually realizes upon at the end of a lease term by either sale or a new lease. Therefore, it is not a substantial imposition on the lessor to require it to take back and dispose of the goods if the lessee chooses to tender them back before the end of the lease term: the lessor will merely do earlier what it would have done anyway, sell or relet the goods. Further, the lessee will frequently encounter substantial difficulties if the lessee attempts to sublet the goods for the remainder of the lease term. In contrast to the buyer who owns the entire interest in goods and can easily dispose of them, the lessee is selling only the right to use the goods under the terms of the lease and the sublessee must assume a relationship with the lessor. In that situation, it is usually more efficient to eliminate the original lessee as a middleman by allowing the lessee to return the goods to the lessor who can then redispose of them.

2. In some situations even where possession of the goods is reacquired, a lessor will be able to recover as damages the present value of the full rent due, not under this section, but under 2A‑528(2) which allows a lost profit recovery if necessary to put the lessor in the position it would have been in had the lessee performed. Following is an example of such a case. A is a lessor of construction equipment and maintains a substantial inventory. B leases from A a backhoe for a period of two weeks at a rental of $1,000. After three days, B returns the backhoe and refuses to pay the rent. A has five backhoes in inventory, including the one returned by B. During the next 11 days after the return by B of the backhoe, A rents no more than three backhoes at any one time and, therefore, always has two on hand. If B had kept the backhoe for the full rental period, A would have earned the full rental on that backhoe, plus the rental on the other backhoes it actually did rent during that period. Getting this backhoe back before the end of the lease term did not enable A to make any leases it would not otherwise have made. The only way to put A in the position it would have been in had the lessee fully performed is to give the lessor the full rentals. A realized no savings at all because the backhoe was returned early and might even have incurred additional expense if it was paying for parking space for equipment in inventory. A has no obligation to relet the backhoe for the benefit of B rather than leasing that backhoe or any other in inventory for its own benefit. Further, it is probably not reasonable to expect A to dispose of the backhoe by sale when it is returned in an effort to reduce damages suffered by B. Ordinarily, the loss of a two‑week rental would not require A to reduce the size of its backhoe inventory. Whether A would similarly be entitled to full rentals as lost profit in a one‑year lease of a backhoe is a question of fact: in any event the lessor, subject to mitigation of damages rules, is entitled to be put in as good a position as it would have been had the lessee fully performed the lease contract.

3. Under subsection (2) a lessor who is able and elects to sue for the rent due under a lease must hold goods not lost or damaged for the lessee. Subsection (3) creates an exception to the subsection (2) requirement. If the lessor disposes of those goods prior to collection of the judgment ( whether as a matter of law or agreement), the lessor’s recovery is governed by the measure of damages in Section 2A‑527 if the disposition is by lease that is substantially similar to the original lease, or otherwise by the measure of damages in Section 2A‑528. Section 2A‑523 Official Comment.

4. Subsection (4), which is new, further reinforces the requisites of Subsection (2). In the event the judgment for damages obtained by the lessor against the lessee pursuant to subsection (1) is satisfied, the lessee regains the right to use and possession of the remaining goods for the balance of the original lease term; a partial satisfaction of the judgment creates no right in the lessee to use and possession of the goods.

5. The relationship between subsections (2) and (4) is important to understand. Subsection (2) requires the lessor to hold for the lessee identified goods in the lessor’s possession. Absent agreement to the contrary, whether in the lease or otherwise, under most circumstances the requirement that the lessor hold the goods for the lessee for the term will mean that the lessor is not allowed to use them. Sections 2A‑103(4) and 1‑203. Further, the lessor’s use of the goods could be viewed as a disposition of the goods that would bar the lessor from recovery under this section, remitting the lessor to the two preceding sections for a determination of the lessor’s claim for damages against the lessee.

6. Subsection (5), the analogue of subsection 2‑709(3), further reinforces the thrust of subsection (3) by stating that a lessor who is held not entitled to rent under this section has not elected a remedy; the lessor must be awarded damages under Sections 2A‑527 and 2A‑528. This is a function of two significant policies of this Article—that resort to a remedy is optional, unless expressly agreed to be exclusive (Section 2A‑503(2)) and that rights and remedies provided in this Article generally are cumulative. (Section 2A‑501(2) and (4)).

Cross References: Sections 1‑203, 2‑709, 2‑709(3), 2A‑103(4), 2A‑501(2), 2A‑501(4), 2A‑503(2), 2A‑504, 2A‑523(1)(e), 2A‑525(2), 2A‑527, 2A‑528 and 2A‑529(2).

Definitional Cross References:

|  |  |
| --- | --- |
|  |  |
| “Action” | Section 1‑201(1). |
| “Conforming” | Section 2A‑103(1)(d). |
| “Goods” | Section 2A‑103(1)(h). |
| “Lease” | Section 2A‑103(1)(j). |
| “Lease agreement” | Section 2A‑103(1)(k). |
| “Lease contract” | Section 2A‑103(1)(l). |
| “Lessee” | Section 2A‑103(1)(n). |
| “Lessor” | Section 2A‑103(1)(p). |
| “Present value” | Section 2A‑103(1)(u). |
| “Reasonable time” | Section 1‑204(1) and (2). |

SOUTH CAROLINA REPORTER’S COMMENT

Subsection (1)(a) provides the calculation for accelerated rentals for goods accepted by the lessee. If the identified goods are destroyed after the risk of loss passes to the lessee, the lessee is liable to the lessor for the rent. In Tri‑Continental Leasing Corp. v. Stevens, Stevens & Thomas, P.A., 287 S.C. 338, 338 S.E.2d 343 (Ct.App. 1985), the lessee was held liable to the finance lessor for accelerated rentals. (The supplier of the copier was held liable to the lessee on the counterclaim.) Like the analogue, this section is in accord with South Carolina case law.

Subsection (1)(b) tracks earlier law by requiring the lessor to mitigate damages, where practical, before recovery will be allowed for accelerated rentals.

LIBRARY REFERENCES

Bailment 20, 24 to 34.

Westlaw Key Number Search: 50k20; 50k24 to 50k34.

C.J.S. Bailments Sections 76 to 78, 103 to 119.

**SECTION 36‑2A‑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.

HISTORY: 2001 Act No. 67, Section 2.

OFFICIAL COMMENT

Uniform Statutory Source: Section 2‑710.

Changes: Revised to reflect leasing practices and terminology.

Definitional Cross References:

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| --- | --- |
|  |  |
| “Aggrieved party” | Section 1‑201(2). |
| “Delivery” | Section 1‑201(14). |
| “Goods” | Section 2A‑103(1)(h). |
| “Lessee” | Section 2A‑103(1)(n). |
| “Lessor” | Section 2A‑103(1)(p). |

SOUTH CAROLINA REPORTER’S COMMENT

Incidental damages would include such expenses as resale, storage, and notice charges. See Smoothing Iron Heater Co. v. Blakely, 94 S.C. 224, 77 S.E. 945 (1913) (seller’s damages include storage and insurance cost); Woods v. Cramer, 34 S.C. 508, 13 S.E. 660 (1891) (seller recovered storage and resale expenses).

Consistent with the approach in the statutory analogue, Article 2A does not include a reference to allowable consequential damages for an aggrieved lessor.

LIBRARY REFERENCES

Bailment 32.

Westlaw Key Number Search: 50k32.

C.J.S. Bailments Sections 117 to 119.

**SECTION 36‑2A‑531.** Standing to sue third parties for injury to goods.

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

(i) has a security interest in the goods;

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

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

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

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

HISTORY: 2001 Act No. 67, Section 2.

OFFICIAL COMMENT

Uniform Statutory Source: Section 2‑722.

Changes: Revised to reflect leasing practices and terminology.

Definitional Cross References:

|  |  |
| --- | --- |
|  |  |
| “Action” | Section 1‑201(1). |
| “Goods” | Section 2A‑103(1)(h). |
| “Lease contract” | Section 2A‑103(1)(l). |
| “Lessee” | Section 2A‑103(1)(n). |
| “Lessor” | Section 2A‑103(1)(p). |
| “Party” | Section 1‑201(29). |
| “Rights” | Section 1‑201(36). |
| “Security interest” | Section 1‑201(37). |

SOUTH CAROLINA REPORTER’S COMMENT

There is no South Carolina lease law on point. This section extends the sales provision, Section 36‑2‑722, to leases.

LIBRARY REFERENCES

Bailment 35.

Westlaw Key Number Search: 50k35.

C.J.S. Bailments Sections 120 to 126.

**SECTION 36‑2A‑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.

HISTORY: 2001 Act No. 67, Section 2.

OFFICIAL COMMENT

Uniform Statutory Source: None.

Purposes: This section recognizes the right of the lessor to recover under this Article (as well as under other law) from the lessee for failure to comply with the lease obligations as to the condition of leased goods when returned to the lessor, for failure to return the goods at the end of the lease, or for any other default which causes loss or injury to the lessor’s residual interest in the goods.

SOUTH CAROLINA REPORTER’S COMMENT

Unlike a seller, a lessor retains a residual interest in the leased goods, which can be harmed by the actions of the lessee. In order to protect the residual interest, Article 2A adds this additional right of recovery. There are no South Carolina cases on point.

LIBRARY REFERENCES

Bailment 32.

Westlaw Key Number Search: 50k32.

C.J.S. Bailments Sections 117 to 119.