1990

Statutory Personal Property Lease Law in Alabama

Peter A. Alces
*William & Mary Law School, paalce@wm.edu*

P. Cade Newman

---

**Repository Citation**

https://scholarship.law.wm.edu/facpubs/296

Copyright © 1990 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.
https://scholarship.law.wm.edu/facpubs
TABLE OF CONTENTS

I. INTRODUCTION ................................................. 102
II. ALABAMA’S PERSONAL PROPERTY LEASE LAW ................. 104
   A. Current Basis: Skelton v. Druid City Hospital Board .................. 104
   B. Historical Basis: Development of the Law of Bailments ................. 111
      1. The Importance of Historical Analysis ... 111
      2. Origin and Adoption ............................. 113
      3. Distinguishing the Common Law of Bailments ................... 115
   C. Distinguishing Bailment for Hire ...................... 118
   D. Duties Owed by the Bailee for Hire .................. 122
      1. Duties Imposed by Law .......................... 122
      2. Duties Imposed by Contract: Extension and Limitation .......... 124
      3. Miscellaneous Duties .............................. 126

* © Copyright 1990 by Peter A. Alces and P. Cade Newman. All Rights Reserved.
** Professor Marshall-Wythe School of Law, College of William and Mary. Professor Alces is the reporter for the Alabama Law Institute’s Uniform Commercial Code Article 2A Committee. The opinions expressed in this Article, however, are solely those of the authors and should not be construed as impressions or conclusions of the Committee, unless so noted. Professor Alces is particularly grateful to John Anton (J.D. 1991, Marshall-Wythe School of Law, College of William and Mary) for his careful and thorough research assistance.
*** Staff Attorney for the Securities and Exchange Commission, Division of Corporation Finance, Washington, D.C.; J.D. 1990, University of Alabama School of Law. The Securities and Exchange Commission, as a matter of policy, disclaims responsibility for any private publication or statement by any of its employees. The views expressed herein are those of the authors and do not necessarily reflect the views of the Commission, or of this author’s colleagues on the staff of the Commission.
I. Introduction

Promulgated in 1987 by the American Law Institute (A.L.I.) and the National Conference of Commissioners on Uniform State Laws (N.C.C.U.S.L.), Article 2A of the Uniform Commercial Code (U.C.C.) is the first comprehensive statutory formulation of personal property leasing law. In the best tradition of the Restatements and the U.C.C., Article 2A does not create personal property leasing law, but rather codifies the better common law practices in this rapidly expanding area of commercial law. The drafters of Article 2A endeavored to codify the legal treatment of personal property leases in much the same way that Articles 2 and 9 of the U.C.C. preemptively govern sales and secured transactions, respectively. While the scope of this new Article is expansive, consistent with its statutory analogue adopted from Article 2,\(^1\) the

---

1. The drafters of Uniform Article 2A note that:

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 bilat-
Drafters specifically focused upon recurring, and important leasing issues.\(^2\)

The Lease Article also continues the commercial law's vindication of freedom of contract principles, assuring that the parties to a lease transaction may, for the most part, tailor the lease to the exigencies of their particular circumstances.\(^3\) In addition, as with other U.C.C. Articles, the design of uniform Article 2A affords the states considerable flexibility in tailoring the uniform provisions to their existing state laws. For this reason, an understanding of Alabama case law that falls within Article 2A's ambit is crucial to the formulation of a proposed version of Article 2A for Alabama.

Adoption of Article 2A has not been widespread. Currently, only nine states have enacted the lease statute.\(^4\) But, support for Article 2A is increasing,\(^5\) and eventual adoption by a majority of states can reasonably be expected.\(^6\)

---

2. Article 2A is divided into five substantive parts: (1) "General Provisions" (2A-100s); (2) "Formation and Construction of Lease Contract" (2A-200s); (3) "Effect of Lease Contract" (2A-300s); (4) "Performance of Lease Contract" (2A-400s); and (5) "Default" (2A-500s). The new Article speaks to issues such as the formation (see §§ 2A-204 to -206), construction (see § 2A-207) and modification of leases (see § 2A-208); express and implied warranties (see §§ 2A-210 to -216); third-party interests and rights under leases (see § 2A-216); priority of leasing interests (see §§ 2A-306 to -307); repudiation, substituted and excused performance (see §§ 2A-401 to -407); rights and remedies when the lessor or lessee defaults (see §§ 2A-508 to -531); statute of frauds (see § 2A-201); and unconscionability (see § 2A-108).

3. U.C.C. § 2A-101 comment (1990). The drafters state that: "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." Id.

4. The states which have adopted Article 2A are California, Florida, Kentucky, Minnesota, Nevada, Oklahoma, Oregon, South Dakota and Utah. Telephone interview with John McCabe, Legislative Director of the National Conference of Commissioners on Uniform State Laws (Jan. 6, 1991).

5. For a discussion of Article 2A as originally promulgated; see generally Symposium: Article 2A of the Uniform Commercial Code, 39 ALA. L. REV. 559 (1988) [hereinafter Symposium].

6. In addition to the states which have adopted Article 2A it has reportedly been introduced in seven states. It has been estimated that twenty to twenty-five state legislatures will propose Article 2A with its 1990 Amendments during 1991. Telephone Interview with John McCabe, Legislative Director of the National Conference of Commissioners on Uniform State Laws (Jan. 6, 1991).
In the Fall of 1988, Robert L. McCurley, Director of the Alabama Law Institute, empaneled a committee of Alabama attorneys to consider the desirability of Alabama’s enacting a uniform personal property leasing law. That committee (the “Alabama Committee” or “Alabama Article 2A Committee”) has worked on a draft article since early 1989, and has developed a proposed act that vindicates the interest of uniformity and addresses recurring issues in a manner consistent with the principles of commercial law, as developed in this state. The committee, which met in several cities throughout the state, has actively sought the input of transactors concerned with personal property leasing law, and their counsel.

Prior to this initiative, commercial law governing personal property leasing had never been promulgated. Nevertheless, Alabama courts and transactors have drawn upon several sources of law to resolve controversies attending personal property lease transactions. The committee took notice of this existing body of Alabama law in its consideration of the efficacy of the formulations embodied in both the original uniform version of Article 2A7 and the 1990 Uniform Amendments to Article 2A.8

This Article attempts to facilitate Alabama’s consideration of Article 2A by exploring Alabama’s existing law governing personal property leases, and the likely effects of Article 2A on such law. After initially examining a case which illustrates how Alabama courts have applied Article 2 of the U.C.C., “Sales,” as a source of law to resolve personal property lease controversies, Part II of this endeavor will focus upon the predominant body of law currently governing personal property leases in Alabama: namely common-law “bailment for hire.” Part III will then discuss selected provisions of the Alabama draft version of proposed Article 2A.

II. ALABAMA’S PERSONAL PROPERTY LEASE LAW

A. Current Basis: Skelton v. Druid City Hospital Board9

Alabama’s current treatment of personal property leasing is deficient in two aspects. First, the volume of substantive personal

7. U.C.C. art. 2A (1989).
property lease law in Alabama is minimal. Courts and transacting parties have very little law upon which to rely. Unlike the states that have adopted Article 2A,10 Alabama has virtually no statutory lease law governing personal property. Moreover, a court that faces a personal property lease issue will find relatively few Alabama cases dealing with personal property lease transactions.11 Except for those very few issues that have been litigated, most personal property leasing questions remain unanswered in Alabama.

Second, the case law that does exist, for the most part, is inadequate. Alabama courts have primarily relied upon the common law of "bailment for hire" when dealing with personal property "lease"12 issues.13 The common law term, "bailment for hire," can be defined as a mutually beneficial transaction14 that involves the hiring or letting of property to one party, the bailee, who takes the property into his care and custody, and thereafter permits the bailee's temporary use and possession of it.15 The courts' application of common law bailment principles is appropriate because a common law personal property lease is, by definition, a bailment for hire.16

Nevertheless, bailment law has sometimes proven inadequate in resolving conflicts in modern lease transactions.17 Thus, in addressing this lack of authority, Alabama courts have occasionally

10. See supra note 4 and accompanying text.
12. Hendon v. McCoy, 222 Ala. 515, 517, 133 So. 295, 296-97 (1931) ("The word 'lease' is generally used with particular reference to real estate, resulting in the relation of landlord and tenant. . . . But, when applied to personal property, it properly results in the relation of bailor and bailee.") (citation omitted).
13. See Learned-Letcher Lumber Co. v. Fowler, 109 Ala. 169, 19 So. 396 (1896) (court applied bailment law in determining duration of agreement where plaintiff agreed to pay per diem rate for the use of defendant's oxen).
14. Aircraft Sales & Serv. v. Gantt, 255 Ala. 508, 511, 52 So. 2d 388, 391 (1951); see also Heughan v. State, 82 Ga. App. 640, 645, 61 S.E.2d 685, 689 (1950) ("A bailment for hire is a bailment for the mutual benefit of both parties.").
15. See infra text accompanying notes 80-92.
16. See U.C.C. § 2A-103 comment (j) (1990); see also Boss, Leases and Sales: Ne'er or Where Shall the Twain Meet?, 1983 Ariz. St. L.J. 357, 364, nn.31-32 ("[T]he term lease has become synonymous [sic] with the common law transaction called the 'bailment for hire' . . . .").
17. See Boss, Lease Chattel Paper: Unitary Treatment of a "Special" Kind of Commercial Specialty, 1983 Duke L.J. 69, 73 (noting "the lack of refinement in the old common law [of bailment]").
relied upon the law of real estate, the law of contracts, and direct and analogous applications of Articles 2 and 9 of the

18. The drafters of Article 2A noted this practice of borrowing from the law of real estate. See U.C.C. art. 2A foreword (1989) ("[U]nder present law, . . . [personal property transactions] are governed . . . partly by principles relating to real estate leases . . ."). Accord Aerowake Aviation v. Winter, 423 So. 2d 165, 166-67 (Ala. 1982) ("The dispute at trial [court level] and on appeal concerns the nature of the parties' arrangements . . . whether it was a bailment or merely a lease or license. If a bailment, [defendant] owes a duty as bailee to exercise ordinary and reasonable care for the protection of the [property]. If it [is] a lease or license, there would be no such duty . . .").

Nevertheless, the more reasoned approach clearly rejects the application of real property principles to personal property transactions. The Supreme Court of Alabama has more recently stated that: "[W]e reaffirm the rule that an action for conversion will not lie for the taking of real property." Faith, Hope & Love, Inc. v. First Ala. Bank of Talladega County N.A., 496 So. 2d 708, 711 (Ala. 1986). In other words,

[S]ince we necessarily are concerned with personal, rather than real, property a lease is nothing more than a written agreement creating a common-law bailment for hire for the mutual benefit of the parties, the bailor to receive the consideration for use of the bailed property, and the bailee to receive the benefit of the use of the bailed property during the term of the bailment. In more modern usage, long-term bailments for hire are usually referred to as leases, but this does not preclude application of the common-law principles of bailment.


At common law, "[r]eal estate [could] not be the subject of a bailment." W. ELLIOTT, A TREATISE ON THE LAW OF BAILMENTS AND CARRIERS § 6, at 11 (W. Hemingway 2d ed. 1929). Perhaps this is why some scholars have criticized the application of real estate principles to modern lease transactions. See, e.g., Boss, supra note 16, at 369 n.54 (suggesting that only analogies to real estate law should be used but not in toto application).

19. See Birmingham Television Corp. v. Water Works, 292 Ala. 147, 290 So. 2d 636 (1974); Woodson v. Hare, 244 Ala. 301, 303-04, 13 So. 2d 172, 174 (1943); Ex parte Mobile Light & R.R., 211 Ala. 525, 101 So. 177 (1924); see also, e.g., Skelton v. Druid City Hosp. Bd., 459 So. 2d 818, 821 (Ala. 1984) ("[O]ur legislature intended that [ Ala. Code] § 7-2-315 [dealing with implied warranty of fitness for particular purpose] be broadly interpreted to include transactions in which there is no actual transfer of title, such as rental and lease transactions."); DeKalb Agresearch v. Abbott, 391 F. Supp. 152 (N.D. Ala. 1974) (when transaction was determined to be lease and not sale, court applied common law and the law of contracts rather than the U.C.C.), aff'd, 511 F.2d 1162 (5th Cir. 1975).


U.C.C.\textsuperscript{22} As a result, Alabama law governing personal property leases represents a patchwork of principles that have been articulated by various courts over the past century; to the detriment of leasing parties, much of the available case law lacks continuity and clarity.

The need to clarify personal property lease law in Alabama is perhaps best illustrated by the current analysis and treatment of so-called “hybrid transactions”—those involving both goods and services.\textsuperscript{23} Courts have typically treated a hybrid transaction according to its predominant characteristic.\textsuperscript{24} For example, a transaction that involves both the sale and administration of
drugs, as well as one that involves the sale and installation of windows, would fall entirely within the scope of Article 2 if the predominant nature of the transaction is deemed a sale of goods.\textsuperscript{25} Similarly, in the absence of statutory lease law such as Article 2A, Alabama courts might interpret a lease contract involving a hybrid transaction by applying the provisions of the U.C.C. Article on Sales, Article 2.

This was the case in \textit{Skelton v. Druid City Hospital Board},\textsuperscript{26} where the plaintiff sued the manufacturer, distributor, salesperson and administering hospital for damages suffered when a suturing needle broke off in the plaintiff’s body during a hernia operation.\textsuperscript{27} The plaintiff, relying on section 7-2-315 of the Alabama Code,\textsuperscript{28} as well as supplementation by common law,\textsuperscript{29} claimed that the defendants impliedly warranted that the needle was fit for its intended purpose when “sold” to plaintiff. The trial court granted partial summary judgment for defendant Druid City Hospital on the grounds that the transaction was not a “sale” under the meaning of section 7-2-315, and that the hospital was not a merchant of goods but a provider of services. Consequently, the trial court held that there could be no implied warranty of fitness for a particular purpose.\textsuperscript{30}

The Supreme Court of Alabama reversed, rejecting defendant’s characterization of the transaction as wholly consisting of a “service,” and instead, determined that the hospital’s repeated use of a defective suturing needle was “more akin to a \textit{lease} or \textit{rental} of equipment than a sale.”\textsuperscript{31} The \textit{Skelton} court concluded that the Alabama legislature “intended that § 7-2-315 be broadly inter-

\begin{footnotesize}

27. \textit{Id.} at 819.
28. Section 7-2-315 of the Alabama Code states that:
Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller’s skill or judgment to select or furnish suitable goods, there is unless excluded or modified under section 7-2-316 an implied warranty that the goods shall be fit for such purpose.
29. \textit{Skelton}, 459 So. 2d at 820.
30. \textit{Id.}
\end{footnotesize}
interpreted to include transactions . . . such as rental and lease transactions.\textsuperscript{32} The court reasoned that the transaction was, in fact, a “hybrid” since it involved “both a service transaction and a ‘transaction in goods.’”\textsuperscript{33}

The \textit{Skelton} court’s application of commercial sales principles to a lease transaction illustrates the problematic state of personal property lease law in Alabama. \textit{Skelton} provides some authority for the application of Article 2 (especially the warranty provisions), either directly or by analogy, to lease transactions.\textsuperscript{34} In the absence

\begin{quote}

33. \textit{Skelton}, 459 So. 2d at 821 (emphasis in original).

34. The case also affects the analysis of hybrid transactions:

In light of the statement in the Official Comment to section 7-2-313, that the warranty sections of Article 2 “need not be confined to sales contracts,” we opine that our legislature intended that § 7-2-315 be broadly interpreted to include transactions in which there is no actual transfer of title, such as rental and lease transactions. \textit{Skelton}, 459 So. 2d at 821 (emphasis in original). \textit{Skelton} stands for the proposition that a “lease” transaction involving the rendition of services may be subject to the pervasive lease law, including Article 2A once adopted.

In his concurring opinion, Chief Justice Torbert offers sensible guidance for the hybrid transaction issues that will remain under Articles 2 and 2A. Applying principles set forth in \textit{Caldwell v. Brown Serv. Funeral Home}, 345 So. 2d 1341 (Ala. 1977), Chief Justice Torbert suggests that, in hybrid transaction cases, courts ought to focus on the predominant element of a transaction in determining whether the case should be treated as a “goods” or “services” transaction. \textit{Skelton}, 459 So. 2d at 824 (Torbert, C.J., specially concurring). In \textit{Caldwell}, the plaintiffs had entered into an agreement with a funeral home by which defendant was to provide plaintiff with graveside services, a casket, and a vault following the death of their son. As in \textit{Skelton}, plaintiff sought from defendant both services and goods necessary for the rendition of those services. Because the vault was found to be too small for the casket, graveside services had to be conducted a second time. Plaintiffs sued the funeral home for breach of the implied warranty of fitness for particular purpose. The Supreme Court of Alabama found an implied warranty to exist even though the transaction was clearly of a hybrid nature. \textit{See Caldwell}, 345 So. 2d at 1342-43. The court’s treatment of such “hybrid” transactions is not unique. The \textit{Skelton} court cited several cases as authority: Berry v. G.D. Searle \& Co., 56 Ill. 2d 548, 309 N.E.2d 550 (1974) (implied warranty found where transaction involved distribution of birth control pills to plaintiff); Mauran v. Mary Fletcher Hosp., 318 F. Supp. 297, 301 (D. Vt. 1970) (court construing Vermont law noted that “the trend of decisions in Vermont and elsewhere indicates that the Supreme Court of Vermont might very possibly recognize” implied warranties where transaction involved the inadvertent administration of insulin rather than “preoperative medicine”); Newmark v. Gimbel’s, Inc., 54 N.J. 585, 258 A.2d 697 (1969) (implied warranty found where transaction involved administration of permanent wave solution to plaintiff’s hair).

According to Chief Justice Torbert the central issue is:

\textit{Not whether mixed or hybrid agreements [such as in \textit{Skelton} and \textit{Caldwell}] give rise to the Uniform Commercial Code (U.C.C.) implied warranties, but rather how agreements involving both a transaction in goods and a rendering of services are to be}
of statutory lease law, Skelton is presumably a source of lease law in Alabama.

The problem, however, is the resulting imperfect fit between Article 2 and lease transactions. Article 2, unlike proposed Article 2A, was not designed to meet the exigencies attending personal property leases. Alabama’s proposed Article 2A has been designed as the mechanism by which Alabama can preemptively and comprehensively deal with an expanding area of commercial activity by incorporating the best aspects of Alabama common law. Of course

classified so that it may then be determined whether the U.C.C. implied warranties apply.

Skelton, 459 So. 2d at 824 (Torbert, C.J., specially concurring). Chief Justice Torbert cited for support Bonebrake v. Cox, 499 F.2d 951 (8th Cir. 1974), in which the Eighth Circuit Court of Appeals applied the same predominant factor analysis and concluded that a contract to supply and install bowling equipment was a transaction in goods even where the performance of services was substantial. Thus, “the U.C.C. was held to be applicable.” Skelton, 459 So. 2d at 824.

The determination of Articles 2 and 2A issues in the context of hybrid transactions would, under this approach, hinge on the predominant characteristics of the agreement. Where the transaction primarily involves a service with a lease of goods incidentally involved, the U.C.C. is less likely to be applicable. See Skelton, 459 So. 2d at 824-25 (Torbert, C.J., specially concurring) (citing Bonebrake v. Cox, 499 F.2d 951, 960 (8th Cir. 1974)). Chief Justice Torbert cited two cases as examples: Pitler v. Michael Reese Hosp., 92 Ill. App. 3d 739, 415 N.E.2d 1255 (1980) (transaction involving radiation treatments deemed to involve primarily services even though equipment was involved) and Ranger Constr. Co. v. Dixie Floor Co., 433 F. Supp. 442 (D.S.C. 1977) (transaction involving installation of resilient flooring deemed to involve primarily services). But where the transaction is predominantly a sale (or lease), with labor incidentally involved, the U.C.C. is more likely applicable. See Skelton, 459 So. 2d at 824-25 (Torbert, C.J., specially concurring) (citing Coakley & Williams, Inc. v. Shatterproof Glass Corp., 706 F.2d 456 (4th Cir. 1983) (contract to install windows held to be predominantly sale of goods) and Bonebrake v. Cox, 499 F.2d 951 (8th Cir. 1974) (contract to supply and install bowling equipment held to be predominantly a transaction in goods)).

It is not uncommon for a transaction to fall within the purview of both Article 2 and one or more other statutes. White & Summers, supra note 24, § 1-1, at 24. Such transactions generally give rise to scope issues that fall into one of two categories: (1) cases where goods are not involved at all, or cases which involve goods but where the transaction is not a sale (such as a lease); and (2) hybrid cases where the transaction involves both goods and services. White & Summers, supra note 24, § 1-1, at 25. See supra notes 23-33 and accompanying text regarding hybrid transactions.

Codification of Article 2A will not eliminate issues involving hybrid lease transactions. Even if Alabama’s proposed Article 2A is adopted, it is still inevitable that Alabama courts will face hybrid transactions that concurrently fall under both Article 2 and Article 2A. Thus, the hybrid transaction analyses, discussed supra notes 23-33 and accompanying text, will remain relevant as to whether courts apply either Article 2 or Article 2A, or both, and the common law of bailments, to the entire transaction. See White & Summers, supra note 24, § 1-1, at 26.
if Article 2A is adopted, Skelton’s holding that Article 2 should be applied to leasing issues would become moot.

In addition to considering Skelton’s impact, a proposal of Article 2A in Alabama would be incomplete without further examination of the existing lease law, the common law of bailments. The Alabama bailment cases that exist deal mainly with a bailee’s obligations within the bailment relationship, as well as his duty to care for the bailed personal property. While these bailment cases reflect only one aspect of a lease transaction, they do comprise most of Alabama’s existing personal property lease law and are, therefore, pertinent to the proposal of an Article 2A that is tailored for Alabama.

B. Historical Basis: Development of the Law of Bailments

1. The Importance of Historical Analysis.—An understanding of the common law of bailments is a prerequisite to the proper application of modern leasing principles. Assume, for example, that two individuals, “A” and “B,” wish to enter into an agreement in which A retains legal title to a certain automobile while possession is temporarily transferred to B. Both A and B agree that the transaction is to be accomplished according to any one of the following seven hypotheticals: (1) A pledges the car as security for a debt that he owes to B, and B is vested with the right to sell the car in the event of default; (2) A agrees to let B use the vehicle one weekend, yet A receives no corresponding benefit or compensation; (3) after paying B a fee, A parks his own car in B’s parking lot, taking his keys with him; (4) while at a restaurant A allows B, for a fee, to valet-park the vehicle, after which B maintains possession and, consequently, control over the vehicle; (5) A allows B to valet-park A’s car, and thereafter, A’s car keys are returned to him; (6) A pays B a monthly fee in exchange for the use of a particular parking space; or (7) B pays A a monthly fee and, in exchange, B receives A’s permission to possess and use the vehicle under certain terms.

In each of these agreements, issues involving contract formation and construction, warranties, and the rights and concomitant

35. See infra notes 106-24 and accompanying text.
36. See infra notes 125-42 and accompanying text.
duties of A and B are not only dependent upon the attendant contractual terms, but also upon the common law characterization of the transaction.\textsuperscript{37} Common law bailments such as the “pawn” and “loan,” examples (1) and (2),\textsuperscript{38} can easily be confused with other transactions such as the lease of real property found in example (6).\textsuperscript{39} Even though the historical development of modern leasing principles is deeply rooted in the common law bailment transaction, some types of bailments, such as those in examples (1) and (2), are not predecessors of modern personal property leases, as contrasted with example (7), which is such a predecessor.\textsuperscript{40}

Whether a court or an attorney chooses to characterize a particular agreement as a bailment or as some other type of transaction may be both the threshold and the dispositive issue in the case.\textsuperscript{41} Also, whether a judge or an attorney can distinguish between the various kinds of bailments may determine the outcome of an action. Since a lease of personal property is a derivative of the “bailment for hire,” an analysis of Article 2A’s effect on Alabama should consider the state’s bailment cases.

When reviewing Alabama’s common law, a two-tier analysis may facilitate an understanding of Article 2A’s application to a particular transaction. First, one must decide whether a bailment is involved as opposed to some other type of transaction. Second, if

\begin{footnotesize}
\begin{enumerate}
\item[37.] However, the drafters have made clear their intent to maintain Article 2A’s flexible application:
\begin{quote}
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. . . . 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.
\end{quote}

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.


\item[38.] See infra note 44 regarding Roman classifications of bailments.

\item[39.] See, e.g., Mobile Parking Stations v. Lawson, 53 Ala. App. 181, 298 So. 2d 266 (1974); see infra text accompanying notes 58-72.

\item[40.] Personal property leases can only be traced to one type of bailment—the bailment for hire. See infra notes 80-92 and accompanying text.

\item[41.] See infra text accompanying notes 55-80, distinguishing bailments from other similar transactions such as a real property lease or license.
\end{enumerate}
\end{footnotesize}
the transaction is a bailment, one must decide whether it is a “bailment for hire” (that is, a personal property lease) or some other type of bailment.

2. Origin and Adoption.—The legal doctrines governing bailments have descended to Alabama primarily from the English case of Coggs v. Bernard, in which the court adopted the Roman system of classifying bailments. The common law definition of a bailment was adopted by Alabama in Farmer v. Machine Craft.

In Farmer, the plaintiff filed suit against his employer to recover the property.

42. The bailment transaction has been subject to various definitions over the years. See, e.g., W. Elliott, supra note 18, § 1; J. Story, Commentaries On The Law of Bailments § 2 (6th ed. 1856). The term “bailment” derives from the French word, “bailler,” which means “to deliver.” J. Story § 2, at 1. Justice Story defined a bailment generally as “a delivery of a thing in trust for some special object or purpose, and upon a contract, expressed or implied, to conform to the object or purpose of the trust.” J. Story § 2, at 3.

Alabama adopted a slightly different definition of a bailment in Farmer v. Machine Craft, 406 So. 2d 981, 982 (Ala. Civ. App. 1981) (“delivery of personal property by one person to another in trust for a specific purpose, with a contract, express or implied, that the trust shall be faithfully executed, and the property returned or duly accounted for when the special purpose is accomplished, or kept until the bailor reclaims it.”). (quoting § 3 Am. Jur. 2d Bailments § 2 (1980)). At common law “[t]he subject-matter of a bailment is always personal property.” W. Elliott, supra note 18, § 6, at 11.

Article 2A states that “[a]t 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.” U.C.C. § 2A-103 comment (j) (1990).

43. 2 Ld. Raymond 909, 92 Eng. Rep. 107 (K.B. 1703). See generally W. Elliott, supra note 18, § 3, at 5-6; Boss, supra note 22, at 100 n.292 (“Coggs stands for the proposition, inter alia, that a bailee is not an insurer absolutely liable for damage to the bailed property, but he is responsible for his negligent acts.”) (citing R. Brown, The Law of Personal Property § 11.1, at 252-53 (3d ed. 1975)).

44. The six classes of bailments under Roman law were: (1) Depositum (deposit)—a bailment merely for custody without compensation; (2) Mandatum (mandate)—a bailment where the bailee performs some service without compensation; (3) Commodatum (gratuitous loan)—a gratuitous bailment of goods for bailee’s use; (4) Mutuum (loan of chattels)—a bailment where the original goods are not delivered back to the bailor but are replaced instead by similar goods. The transaction is not considered a true bailment at common law but rather is a sale or exchange; (5) Pignus (pawn or pledge)—a bailment where goods are pledged or pawned as a security for a debt and the bailee may sell the goods in the event of default; (6) locatio (hiring)—a bailment for reward or a hiring. This last category was further divided into locatio rei, concerning the hired use of a thing, and locatio operis, concerning the hired services of a thing. A locatio operis was even further characterized into three subparts. W. Elliott, supra note 18, § 4, at 8. These classifications have been criticized as “crude.” J. Schoeler, The Law of Bailments Including Pledge, Innkeepers, and Carriers § 5, at 4 n.1 (1905). See also R. Brown, supra note 43, § 10.1; W. Elliott, supra note 18, §§ 3, 4.

The concept of bailments was codified as early as the Code of Hammurabi and the Mosaic Law. W. Elliott, supra note 18, § 3, at 5 n.6.

for losses resulting from the theft of a toolbox that plaintiff voluntarily left at work.\textsuperscript{46} The plaintiff was required by the defendant to supply his own tools. Employees were allowed to leave their tools at work overnight, even though the defendant knew that its security system was inoperative. Although some employees were aware that the system did not work, and chose to take their tools home at night, the plaintiff opted to leave his tools. The defendant’s building was burglarized and plaintiff’s property was stolen. Plaintiff brought suit on a bailment theory, alleging that the defendant had neglected to maintain its alarm system and, therefore, had failed to exercise ordinary care in securing the bailed personal property.\textsuperscript{47} The trial court granted summary judgment for the defendant. On appeal, the court reasoned that the case turned on whether, as a matter of law, a bailment existed between plaintiff and defendant.\textsuperscript{48} The court held that the elements of a bailment include: 1) actual or constructive change of possession;\textsuperscript{49} 2) voluntary assumption of custody and possession of the property;\textsuperscript{50} 3) actual or constructive change in control over the item; and 4) the bailee’s intentional exercise of control.\textsuperscript{51} In spite of defendant’s occasional possession of the property, the court held that no bailment was created because no change in

\textsuperscript{46} Farmer, 406 So. 2d at 982.  
\textsuperscript{47} Id.  
\textsuperscript{48} Id.  
\textsuperscript{49} Id. See also, e.g., Mobile Parking Stations v. Lawson, 53 Ala. App. 181, 185, 298 So. 2d 266, 269 (1974) (bailment to park car for owner was terminated when parking attendant relinquished possession and control of vehicle by returning keys to owner); Kravitz v. Parking Serv. Co., 240 Ala. 467, 467, 199 So. 731, 732 (1940) (bailee’s “duties of reasonable care spring out of his possession”); Ridgely Operating Co. v. White, 227 Ala. 459, 462, 150 So. 693, 695 (1933) (“such possession may be constructive, growing out of the relation of the parties”).  
\textsuperscript{51} Farmer, 406 So. 2d at 983 (citing 8 Am. Jur. 2d Bailments § 66 (1980)). See, e.g., Mobile Parking Stations v. Lawson, 53 Ala. App. 181, 185, 298 So. 2d 266, 269 (1974) (no bailment found at time when car was stolen where plaintiff left car at defendant’s parking lot and took keys with him); Ex parte Mobile Light & R.R., 211 Ala. 525, 527, 101 So. 177, 178 (1924) (no bailment found where car owner paid to park car in defendant’s lot); see also Ho Bros. Restaurant v. Aetna Casualty & Sur. Co., 492 So. 2d 603, 605 (Ala. 1986) (court distinguished bailment from meaning of “entrustment” used within exculpatory clause of insurance contract).
control took place.\textsuperscript{52} The \textit{Farmer} court concluded that, in the absence of a bailment, the defendant had no duty to protect the property.\textsuperscript{53} Thus, a bailment transaction under Alabama common law is found only where one party voluntarily and intentionally assumes possession and control, either actual or constructive, of personal property on behalf of, or in trust for, another.\textsuperscript{54} Clearly, a personal property lease would constitute such a bailment.

3. \textit{Distinguishing the Common Law of Bailments}.—A modern lease transaction can be more clearly understood when the bailment is distinguished from similar transactions such as a license,\textsuperscript{55} sale,\textsuperscript{56} or real property lease.\textsuperscript{57} Drawing a bright line, however, has sometimes proved to be a problematic task for Alabama courts, and which in turn has contributed to the confusion regarding personal property lease principles in Alabama.

The case of \textit{Mobile Parking Stations v. Lawson}\textsuperscript{58} offers just such an example. Plaintiff turned his car over to a parking attendant at defendant’s parking lot.\textsuperscript{59} The attendant parked the vehicle, locked it, and then returned the keys to plaintiff.\textsuperscript{60} The plaintiff alleged that the attendant assured him that the lot was a “24-hour lot,” although a sign stated that the lot was monitored only from 6:00 a.m. to 8:00 p.m.\textsuperscript{61} Plaintiff, intending his son to pick up the car later, left money in the trunk so his son could pay any additional parking fees.\textsuperscript{62} The attendant, not wanting to be responsible for the money left in the trunk so his son could pay any additional parking fees,\textsuperscript{63} The attendant, not wanting to be responsible for the money left in the trunk so his son could pay any additional parking fees, directed plaintiff to leave the keys at the bus station across the street.\textsuperscript{64} Later, the vehicle was stolen from the parking lot and the plaintiff sued, claiming that a bailment existed and that defendant had converted the car.\textsuperscript{65}

The transaction in \textit{Lawson} is similar to that of a bailment. The defendant had taken temporary possession of the personal

\textsuperscript{52} \textit{Farmer}, 406 So. 2d at 983.
\textsuperscript{53} Id.
\textsuperscript{54} Id. at 982-83.
\textsuperscript{55} See infra notes 58-72 & 79 and accompanying text; see also supra note 41.
\textsuperscript{56} See infra notes 73-78 and accompanying text; see also supra note 41.
\textsuperscript{57} See infra notes 58-72 & 79 and accompanying text.
\textsuperscript{58} 53 Ala. App. 181, 298 So. 2d 266 (1974).
\textsuperscript{59} \textit{Lawson}, 53 Ala. App. at 183, 298 So. 2d at 267.
\textsuperscript{60} Id.
\textsuperscript{61} Id.
\textsuperscript{62} Id.
\textsuperscript{63} Id.
\textsuperscript{64} \textit{Lawson}, 53 Ala. App. at 183, 298 So. 2d at 267.
property on plaintiff's behalf. Nevertheless, the court found that no bailment existed. In determining what duty of care was owed by the attendant, the court analyzed similar cases and attempted to clarify the differences between a bailment, a license, and a lease (here, a lease of real, not personal, property—namely, plaintiff's lease of a space in the parking lot).

The court determined that a bailment would exist only where automobile owners leave their keys with attendants who voluntarily assume custody and control over the cars. If, however, the owner only gives permission to the attendant to park the car in a convenient place but does not give him dominion or custody of the vehicle, the transaction is a license. In addition, the court noted that a lease is formed where a specific parking space is assigned to the owner for his exclusive use.

The Lawson court concluded that the defendant did not have custody or control of the vehicle, as is necessary in the case of a true bailment and, therefore, was not liable for the theft. After the attendant parked the car and relinquished possession to the

---

65. Id. at 185, 298 So. 2d at 269.
66. Id. at 184, 298 So. 2d at 268.
68. Lawson, 53 Ala. App. at 184, 298 So. 2d at 268 (license is distinct from a bailment or a lease). The Supreme Court of Alabama has stated that:

A lease is a contract for the possession and profit of land by the lessee, and a recompense ... to the lessor, ... [while a] license is an authority to do some act or series of acts on the land of another, for the benefit of the licensee, without passing any estate in the land ... .

Holt v. City of Montgomery, 212 Ala. 235, 237, 102 So. 49, 50 (1924) (quoting Stinson v. Hardy, 27 Or. 584, 41 P. 116, 118 (1895)), quoted in Mason v. Carroll, 289 Ala. 610, 612, 269 So. 2d 879, 880 (1972). See also Steward v. St. Regis Paper Co., 484 F. Supp. 992, 995 (S.D. Ala. 1979) ("A lease conveys an interest in realty, while a license conveys only the right to do some act or acts on the land of another, which is an interest in personality and does not pass any estate in the land.")(citing Holt, 212 Ala. at 237, 102 So. at 50). Under this test a lease is presumed if the contract "'gives exclusive possession of the premises against all the world, including the owner.'" Id. (emphasis in original) (quoting Holt v. City of Montgomery, 212 Ala. 235, 237, 102 So. 49, 50-51 (1924)); Brown v. Five Points Parking Center, 121 Ga. App. 819, 175 S.E.2d 901 (1970) (holding that an agreement between plaintiff (car owner) and defendant ("lock and park" garage owner) was a license rather than a bailment where such was stated on parking ticket that plaintiff signed).

69. Lawson, 53 Ala. App. at 185, 298 So. 2d at 268 (where parking attendant merely directs the owner as to where to park, and the owner retains the keys, there has been no bailment, merely a license on the use of realty) (citing Lewis v. Ebersole, 244 Ala. 200, 203-04, 12 So. 2d 543, 544 (1943)).
70. Id. at 185, 298 So. 2d at 269.
owner by returning the keys, the defendant became a lessor of a parking space rather than a bailee of the vehicle. 71 Depending on the particular facts, a relatively simple and common act such as leaving a car at a parking lot or with a valet can be characterized as one of several different forms of transactions. The Lawson court confused the issue further by using the term "lease" rather than the term "bailment." 72 Regrettably, the court did not clarify that the lease in this case was one of real, rather than personal, property.

In another case, DeKalb Agresearch v. Abbott, 73 the court addressed the threshold issue of whether a transaction was a sale or a personal property lease (a common law bailment for hire). The court's distinction between these two transactions determined what law was to be applied—common law of "bailments for hire" or Article 2 of the U.C.C. In DeKalb, the plaintiff contracted to lease hens and eggs to defendant for breeding. 74 Plaintiff retained title to the hens and eggs, and defendant agreed not to sell or dispose of them without the plaintiff's consent. 75 Plaintiff moved for summary judgment on defendant's counterclaim that alleged breach of various express and implied warranties. 76 The court concluded that, based on the contract terms, the arrangement was in fact a lease and not a sale. 77 So the common law of both bailments and contracts was applied. 78

As Lawson and DeKalb illustrate, courts struggle with transactions that might more appropriately be handled as personal property leases under Article 2A. 79 A transaction may simultaneously resemble a common law bailment, a license, and a real property lease as in Lawson; or a lease may resemble a sale as in DeKalb. Interestingly, Article 2A would govern cases such as DeKalb where a personal property lease is found; and of course, if

71. Id.
72. Id.
75. Id.
76. Id.
77. Id.
78. Id. at 154 (The court accurately reasoned that the U.C.C. was not applicable to the lease but would have applied if the transaction had been deemed a contract of sale.).
79. This struggle is clearly illustrated by the recent case of Skelton v. Druid City Hosp. Ed., 459 So. 2d 818 ( Ala. 1984); see supra notes 24-34 and accompanying text.
the parties in *DeKalb* had been guided by a codification of applicable lease law, litigation might have been avoided.

Distinguishing the common law bailment from other similar transactions is undoubtedly critical to any analysis of modern leasing issues. But before Article 2A principles will be deemed applicable, an agreement must not only meet the requirements of a common law bailment, but the transaction must also specifically fall within the “bailment for hire” classification. A “bailment for hire” is the only transaction considered by Alabama common law to be a lease of personal property. Thus, identifying the differences between “bailments for hire” and other types of bailments is essential to an understanding of personal property leases.

C. Distinguishing Bailment for Hire

The common law antecedent of the personal property lease was the *locatio-rei* bailment, in which both parties benefitted from the hiring of a thing. This “bailment for hire,” or “bailment for

---


Draft Article 2A defines a “lease” as “a transfer of the right to possession and use of goods for a term in return for consideration.” *DRAFT ALA. CODE § 7-2A-103(1)(j) (1990)* (drafted verbatim from Uniform version). The drafters explain in the comments that:

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.

*DRAFT ALA. CODE § 7-2A-103 comment (j) (1990).*

81. *Accord* Bain v. Culbert, 209 Ala. 312, 313, 96 So. 228, 229 (1923); Prince v. Alabama State Fair, 106 Ala. 340, 342, 17 So. 449, 450 (1894); *see also supra* note 80 and infra notes 82-92.

82. *See J. Story, supra* note 42, § 368, at 323-24. Justice Story criticizes this definition as “incomplete” and articulates his own definition of a bailment for hire as also including cases of the hiring or letting “of labor and services, and of the carriage of goods.” *Id.* at 324.

83. Use of the term “bailment for hire” is common. *See, e.g.*, Atmore Truckers Ass’n v. Westchester Fire Ins. Co., 218 F.2d 461 (5th Cir. 1955); Atlantic Coast Line R.R. v. J.B. Maynard Constr., 259 Ala. 623, 625, 67 So. 2d 893, 895 (1953) (bailment “for hire and use” created when railroad company delivered cars containing ordered materials and turned control over to construction company); Dixie Drive It Yourself Sys., Mobile Co. v. Hames, 34 Ala. App. 619, 622, 43 So. 2d 140, 142, *cert. denied*, 253 Ala. 132, 43 So. 2d 143 (1949) (“bailee for hire”); *U.C.C. § 2A-103 comment (j) (1990) (“At common law a lease of personal property is a bailment for hire.”); *see also* Bain v. Culbert, 209 Ala. 312, 313, 96 So. 228, 229
mutual benefit,” is notably different in character and effect from other bailment transactions. The distinction is often crucial.

Alabama courts have recognized that accurate characterization of the transaction usually determines liability. No special duty of care will exist if a court finds that no bailment was established. If a court does find a bailment, the bailee’s duty will depend on whether a “bailment for hire” (a lease of personal property) or some other kind of bailment was established.

Although terminology and classification have historically varied, Alabama courts have generally delineated three types of bailments. The first exists where possession of an object is conveyed by the bailor solely to benefit the bailee. While this kind of bailment is referred to as a “gratuitous bailment,” a better characterization is “lucrative bailment” (a relationship involving more than a gratuitous bailment). See also generally J. Story, supra note 42, § 368 (The terms “bailment for mutual benefit” and “bailment for hire” are sometimes referred to as “lucrative” bailments).

84. This term is used synonymously with “bailment for hire.” See Aircraft Sales & Serv. v. Gantt, 255 Ala. 508, 511, 52 So. 2d 388, 391 (1951); White Swan Laundry v. Blue, 223 Ala. 663, 137 So. 598 (1931).

85. Sometimes, however, different characterizations of a transaction may result in the same disposition. See DeKalb Agrresearch v. Abbott, 391 F. Supp. 152 (N.D. Ala. 1974) (holding that transaction was lease and not a sale, stated that results would be the same if the transaction had been deemed a sale as plaintiff contended), aff’d, 511 F.2d 1162 (5th Cir. 1975).

86. See Mobile Parking Stations v. Lawson, 53 Ala. App. 181, 298 So. 2d 266 (1974); see supra notes 58-72 and accompanying text.

87. See W. Elliott, supra note 18, § 3, at 5-6; J. Story, supra note 42, § 3, at 6-9.

From the six Roman divisions of bailments four basic groupings emerged: (1) bailments for the bailor’s sole benefit, (2) bailments for the bailee’s sole benefit, (3) ordinary bailments for mutual benefit, and (4) exceptional bailments (which included “postmasters, innkeepers, and common carriers”). See W. Elliott, supra note 18, § 4, at 6-9; see also supra note 44.

88. Under Alabama law, bailments may also be termed either “gratuitous” or “lucrative.” See Bain v. Culbert, 209 Ala. 312, 313, 96 So. 228, 229 (1923); Prince v. Alabama State Fair, 106 Ala. 340, 342, 17 So. 449, 450 (1894). The classification of bailments as “gratuitous” usually includes bailments for the sole benefit of the bailor, as well as bailments for the sole benefit of the bailee. J. Schouler, supra note 44, § 6, at 4; see supra text accompanying notes 82-87. Thus, a “lucrative” bailment would be tantamount to a bailment for mutual benefit. See, e.g., Ridgely Operating Co. v. White, 227 Ala. 459, 462, 150 So. 693, 695 (1933) (“It is also true that, to require the duty of ordinary care upon a bailee, there must be some sort of consideration.”).

89. See, e.g., Glenn v. Blackman, 33 Ala. App. 571, 575, 35 So. 2d 698, 701 (court found that, at the time when bailed property was damaged, defendant was a bailee for his own benefit), cert. denied, 250 Ala. 664, 35 So. 2d 702 (1948).

90. See supra note 88.
acterization of the transaction is probably that of a "loan." Under this arrangement, the bailee owes the greatest duty to care for the bailor's goods and is liable for the slightest negligence.

The second classification is where the bailment is formed primarily for custodial purposes, such as with a deposit. This transaction, known as a "bailment for the sole benefit of the bailor," is also distinct from a personal property lease. Under a bailment for the sole benefit of the bailor, the bailee owes the bailor only a slight degree of care for the property and is therefore liable only for gross negligence.

The modern personal property lease can be traced directly to the third common law classification—"the bailment for hire," sometimes called a "bailment for mutual benefit." In this transaction, under an agreement for consideration, the bailee takes property into his custody and care, and has temporary possession and use of the property.

91. 8 C.J.S. Bailments § 18 (1988) ("A bailment can be structured for the sole benefit of the bailee . . . and is sometimes referred to as a 'loan.'" (footnotes omitted)).

92. See, e.g., Glenn, 33 Ala. App. at 575, 35 So. 2d at 701 ("bailee for his own sole benefit . . . owed extraordinary care toward the bailed property") (citing Thomas v. Hackney, 192 Ala. 27, 29, 68 So. 296, 296 (1915) (Hackney court stated that a gratuitous bailee, in contrast to the bailee in Glenn, is "obligated to the owner of the [bailed property] only to the exercise of slight care, and [is] only liable for gross neglect or bad faith.").

93. Like a gratuitous bailment for the sole benefit of the bailee, a bailment for the sole benefit of the bailor is sometimes styled as a "gratuitous bailment." See W. Elliott, supra note 18, § 16, at 29-30.

94. See Lincoln Reserve Life Ins. Co. v. Armes, 217 Ala. 464, 117 So. 46 (1928) (gratuitous bailee holding books for bailor). The Lincoln court added that a gratuitous bailee may be "only liable for gross negligence or misconduct resulting in the [property's] loss or destruction." Id. at 464, 117 So. at 46. See also Bain v. Culbert, 209 Ala. 312, 313, 96 So. 228, 229 (1923) (gratuitous bailee "only liable for gross negligence or bad faith in the premises"); see generally W. Elliott, supra note 18, § 24, at 47 ("liable only for gross negligence"); J. Schouler, supra note 44, § 7.

95. W. Elliott, supra note 18, § 24, at 47.

96. See Boss, supra note 16, at 364 nn.31-32; Boss, supra note 17, at 73 n.23.

97. See Atmore Truckers Ass'n v. Westchester Fire Ins. Co., 218 F.2d 461, 464 (5th Cir. 1955); see also supra text accompanying note 80.

The drafters of Article 2A state that "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." U.C.C. § 2A-103 comment (j) (1990).

98. See Boss, supra note 17, at 74 (discussing the division between absolute property rights and "special property" rights).
In *Atmore Truckers Association v. Westchester Fire Insurance Co.*,\(^9^9\) the issue of liability turned on the court's determination of whether defendant was a bailee for hire or a gratuitous bailee.\(^1^0^0\) The owner of a quantity of rayon yarn agreed to pay defendant a monthly fee in return for the yarn's storage.\(^1^0^1\) After the yarn was damaged by a fire while in the custody of the bailee, plaintiff insurer sued on the owner's behalf to recover for losses caused by fire and water damage.\(^1^0^2\) On appeal, the defendant bailee asserted that the transaction was a gratuitous bailment and, therefore, liability would exist only if the bailee had been grossly negligent.\(^1^0^3\) The Fifth Circuit Court of Appeals distinguished between a bailee for hire and a gratuitous bailee.\(^1^0^4\) The court held that the hallmark of a bailment for hire is the existence of consideration.\(^1^0^5\) Of course, any monthly fee paid to the bailee for storage of the yarn would constitute such consideration.

The transaction in *Atmore* differs slightly from the modern commercial lease because the bailee accepted money for taking possession of the property. Conversely, in a personal property lease today, the party in possession (the lessee) pays for the right to have temporary possession and control. However, *Atmore* clearly illustrates a true bailment for hire and demonstrates that the common law duty to care for the property is still applicable to modern lease transactions.

---

99. 218 F.2d 461 (5th Cir. 1955).

100. *Atmore*, 218 F.2d at 464, aff'g 120 F. Supp. 7 (S.D. Ala. 1954).

101. *Id.* at 463-64.

102. *Id.* at 461.

103. *Id.* at 463.


105. The *Atmore* court stated:

""The general rule as to the consideration of a contract is well understood, and is the same in [the] case of the bailments as in all other contracts. The law does not undertake to determine the adequacy of a consideration. That is left to the parties, who are the sole judges of the benefits or advantages to be derived from their contracts. It is sufficient if the consideration be of some value, though slight, or of a nature which may inure to the benefit of the party making the promise. Where such a consideration exists, a contract cannot be said to be a *nudum pactum*; [sic] nor a bailment, a gratuitous undertaking.""

*Atmore*, 218 F.2d at 464 (quoting Prince v. Alabama State Fair, 106 Ala. 340, 345-46, 17 So. 449, 450 (1894)).
D. Duties Owed by the Bailee for Hire

1. Duties Imposed by Law.—Once a transfer of personal property is determined to be a bailment for hire (personal property lease), the duties, rights and liabilities of the transacting parties are determined both by the standard of care imposed by common law and either the express or implied bailment contract itself. Generally, the bailee for hire (lessee) will be held to an ordinary level of diligence, and will therefore be answerable only for a failure to exercise such degree of care. The parties, however, retain considerable flexibility in extending or limiting their obligations by contract.

106. Bailment law sometimes looks to custom and usage of trade in order to fill any missing contract terms. Boss, supra note 22, at 52 n.81.


109. J. Schouler, supra note 44, § 10; see also DeKalb Agresearch v. Abbott, 391 F. Supp. 152, 154 (N.D. Ala. 1974) (concerning allegations of breach of implied warranty in bailment or lease arrangements court stated that “a contract between the parties which is clear and unambiguous as to their requisite responsibilities, or lack of same, controls the relationship.”), aff’d, 511 F.2d 1162 (5th Cir. 1975).

110. “Ordinary care” has been defined in a bailment case as “that degree of care with respect to the property which a man of average prudence and diligence would bestow on his own like property under like conditions. The law denominates this degree of care as ordinary care.” Atlantic Coast Line R.R. v. J.B. Maynard Constr. Co., 259 Ala. 623, 625, 67 So. 2d 893, 895 (1963) (citing Higman v. Camody, 112 Ala. 267, 272, 20 So. 480, 482 (1895)).

111. Dixie Drive It Yourself Sys., Mobile Co. v. Hames, 34 Ala. App. 619, 622, 43 So. 2d 140, 143 (bailee breached duty of care when he released automobile from garage to a third party without a claim check), cert. denied, 253 Ala. 132, 43 So. 2d 143 (1949); see also Anniston Lincoln-Mercury v. Mayse, 341 So. 2d 949, 950 (Ala. Civ. App. 1977) (automobile stolen while left with bailee for repairs); White Swan Laundry v. Blue, 223 Ala. 663, 665, 137 So. 898, 899 (1931) (“reasonable care to preserve the property from loss or injury”).

112. See White Swan Laundry v. Blue, 223 Ala. 663, 137 So. 898 (1931). Cf. Cloud v. Moon, 290 Ala. 33, 273 So. 2d 196 (1973) (bailor has duty to warn bailee of dangerous condition such as likelihood of truck burning or exploding after delivery to bailee for repairs); Aircraft Sales & Serv. v. Gantt, 255 Ala. 508, 52 So. 2d 388 (1951) (certain legal duties were imposed on the bailor/owner in the absence of express contrary agreement where bailor’s breach of care resulted in bailee’s crashing the leased airplane).
Part of the bailee’s obligation involves the legal duty of care for the bailed property. The bailee’s general standard of care varies according to how the agreement is categorized at common law. In a bailment for hire the bailee will generally be held to a reasonable degree of diligence to care for the property.

The court in Atmore, having found a bailment for hire, held that the issue of liability was dependent upon whether defendant had met his obligation of ordinary and reasonable care. Similarly, the court in Anniston Lincoln-Mercury v. Mayse held that defendant, a bailee for hire, was obligated to use ordinary care when an automobile was temporarily left with him for repairs. Plaintiff sued after his vehicle was stolen, and the Alabama Court of Civil Appeals held that recovery under a tort theory is possible in a bailment. In affirming a judgment for the plaintiff, the court concluded that prima facie negligence will be imputed to a bailee for hire when he fails, upon demand, to either redeliver the property to the bailor or to account for his failure to do so.

In addition to liability in tort, a bailee for hire may have certain implied contractual obligations. For example, the common law requires that the bailee in every bailment execute the contract in an honest and good-faith manner. A court may also find the constructive duty to exercise a reasonable degree of care for the bailed goods based solely on the bailment relationship. Moreover, in

---

113. See supra text accompanying notes 80-105.
114. The general duties of a bailee for hire may be modified by express contrary agreement. See infra text accompanying notes 125-42.
115. White Swan Laundry, 223 Ala. at 665, 137 So. at 899.
116. 218 F.2d 461 (5th Cir. 1955).
117. Atmore, 218 F.2d at 464.
119. Mayse, 341 So. 2d at 949-50.
120. Id. at 950.
121. Id.
122. See e.g., Allstate Ins. Co. v. Reeves, 440 So. 2d 1086, 1088-89 (Ala. Civ. App. 1983) (bailee denied recovery when he did not act in good faith while repairing bailed automobile since he failed to comply with the Abandoned Motor Vehicle Act); Birmingham Loan Co. v. Klinner, 39 Ala. App. 125, 128, 95 So. 2d 402, 404-05 (1957) (“If the bailee ... in good faith in fulfillment of the terms of the bailment ... restores the property to the bailor before he is notified that the true owner will look to him for it, no action will lie against him, for he has only done what was his duty.”) (quoting Nelson v. Iverson, 17 Ala. 216, 223 (1850)). See generally W. Elliott, supra note 18, § 17, at 32; J. Schouler, supra note 44, § 8, at 6.
123. See Ex parte Mobile Light & R.R., 211 Ala. 525, 526, 101 So. 177, 178 (1924) (court stated that liability of bailee would have to be based upon a contract “or upon a duty
some cases, the very existence of a bailment transaction may be implied by a court. 124

2. Duties Imposed by Contract: Extension and Limitation.—Parties to a lease, however, retain the flexibility to alter such legally imposed obligations. A bailment transaction, as a contract, may be oral, 125 implied, 126 or express. 127 In conjunction with the obligations imposed by law, 128 the parties to a bailment are generally subject to the principles of contract law. 129 Nevertheless, the freedom to contract, though expansive, 130 is not unlimited. 131

124. "A constructive bailment arises where a person having possession of a chattel holds it under such circumstances that the law imposes upon him the obligation to deliver it to another." Woodson v. Hare, 244 Ala. 301, 304, 13 So. 2d 172, 174 (1943) (court found constructive bailment to exist pursuant to a quasi-contract where bailee, a minor, lacked capacity to make contract). See generally W. HALE, supra note 108, § 12, at 43. Accord W. HALE, supra note 108, § 2, at 17 ("[L]egal disability . . . [is] to be used as a shield, and not as a sword . . . ; their disabilities relieve them from liability on their contracts, but not from liability for their torts [such as conversion] . . . [I]f they have come into possession of the goods, they must restore them, if possible.").


126. Kravitz v. Parking Serv. Co., 29 Ala. App. 523, 199 So. 727, cert. denied, 240 Ala. 467, 199 So. 731 (1940); Ex parte Mobile Light & R.R., 211 Ala. 525, 101 So. 177 (1924). See Atmore Truckers Ass'n v. Westchester Fire Ins. Co., 219 F.2d 461, 464 (5th Cir. 1955) (warehouseman's acceptance of compensation, in excess of handling costs, was for storage, and bailment relationship was therefore created).

127. See DeKalb Agresearch v. Abbott, 391 F. Supp. 152 (N.D. Ala. 1974), aff'd, 511 F.2d 1162 (5th Cir. 1975); Birmingham Television Corp. v. Water Works, 292 Ala. 147, 152, 290 So. 2d 636, 640 (1974) ("It is axiomatic that in bailments, as in other contracts, there must be a meeting of minds thereon and assent of both parties thereto; and a disclaimer of liability can only become effective if brought to the bailor's knowledge.") (quoting Kravitz v. Parking Serv. Co., 29 Ala. App. 523, 526, 199 So. 727, 729-30, cert. denied, 240 Ala. 467, 199 So. 731 (1940)); Goldstein v. Harris, 24 Ala. App. 3, 130 So. 313, cert. denied, 221 Ala. 612, 130 So. 315 (1930).


129. Cf. Lloyd v. Service Corp. of Ala., 453 So. 2d 735, 741 (Ala. 1984) (exculpatory clause in apartment lease ineffective where clause not bargained for and effect was unconscionable). See also supra note 127, and infra notes 131, 139 & 187-91 and accompanying text.

130. The drafters of Article 2A have maintained an emphasis on freedom to contract. U.C.C. § 2A-101 comment (1990) ("[T]he common law of leasing is dominated by the need to preserve freedom of contract.") (commentary regarding the statutory analogue adopted by Article 2A from Article 2).

131. See, e.g., Lloyd v. Service Corp. of Ala., 453 So. 2d 735 (Ala. 1984) (applying Ala. Code § 7-2-302 (1984) by analogy, court held exculpatory clause to be unconscionable and
In *Birmingham Television Corp. v. Water Works*,\(^{132}\) for example, the court found that the question of whether the bailor had actually accepted the terms of a warehouse receipt was sufficient to withstand a motion for summary judgment.\(^{133}\) The plaintiff/bailor had deposited certain equipment with the defendants for storage.\(^{134}\) The defendants gave the plaintiff warehouse receipts. Printed on the reverse side of each receipt was a clause that limited the period within which an action for damages could be brought.\(^{135}\) The warehouse was flooded and the equipment damaged.\(^{136}\) After the time specified in the contract for bringing suit had elapsed, the bailor sued to recover for damages.\(^{137}\) The trial

Therefore ineffective); Wilson v. World Omni Leasing, Inc., 540 So. 2d 713 (Ala. 1989) (following *Lloyd* and holding that Ala. Code § 7-2-302, governing unconscionability of contracts, applies by analogy to lease agreements); *Birmingham Television Corp. v. Water Works*, 292 Ala. 147, 290 So. 2d 636 (1974); *Goldstein v. Harris*, 24 Ala. App. 3, 130 So. 313 (validity of contract for bailment of fur coat that excluded bailee’s liability for loss due to fire was dependent on whether bailor fully assented to terms), cert. denied, 221 Ala. 612, 130 So. 315 (1930); see also *supra* note 21.

The rule allowing liability to be limited by special contract is applicable to both parties to the bailment. *Birmingham Television*, 292 Ala. at 152, 290 So. 2d at 640; see W. Hale, *supra* note 108, § 2, at 10-11, 27-28.

The freedom to contract and the applicability of Article 2A are also affected by this State’s version of the Uniform Consumer Credit Code (U.C.C.C. or “Mini-Code”) found at Ala. Code §§ 5-19-1 to -31 (1981 & Supp. 1990). The Mini-Code, a consumer protection statute, governs consumer financing transactions, including consumer leases that would also come within the scope of Article 2A. Nevertheless, when a transaction falls within Article 2A’s analogue, as well as within the scope of other state statutory law—such as the U.C.C.C. (the “Mini-Code”)—“the other statutory law typically controls.” *White & Summers, supra* note 24, § 1-1, at 25. Presumably, a similar result would occur where a transaction involved both Article 2A and the Mini-Code.

---

\(^{132}\) 292 Ala. 147, 290 So. 2d 636 (1974).

\(^{133}\) *Birmingham Television*, 292 Ala. at 151, 290 So. 2d at 639.

\(^{134}\) *Id.* at 149, 290 So. 2d at 637.

\(^{135}\) *Id.* The receipt stated in pertinent part:

NOTICE OF CLAIM AND FILING OF SUIT—Sec. 12

(b) No action may be maintained by the depositor or others against the warehouseman for loss or injury to the goods stored unless timely written claim has been given . . . and unless such action is commenced either within nine months after date of delivery by warehouseman or within nine months after depositor of record . . . is notified that loss or injury to part or all of the goods has occurred, whichever time is shorter.

*Id.* at 151, 290 So. 2d at 639.

\(^{136}\) *Birmingham Television*, 292 Ala. at 151, 290 So. 2d at 639.

\(^{137}\) *Id.* at 151, 290 So. 2d at 639.
court granted summary judgment for the defendant based upon the running of the asserted limitation period, as reflected in the exculpatory clause on the warehouse receipts. 138

On appeal, the Supreme Court of Alabama held that, as long as the terms were legal and not violative of public policy, parties to a bailment could limit their liability. 139 The court, however, was particularly concerned with ensuring that parties to a bailment actually assented to such limiting terms, 140 and therefore held that an exculpatory clause is not enforceable unless the bailor knew of, and actually agreed to, such terms. 141 Because a question existed as to whether the bailor had knowledge of and actually assented to such terms, summary judgment was reversed. 142

3. Miscellaneous Duties.—Alabama courts have primarily relied upon two sources when outlining the duties owed under a “bailment for hire” relationship. First, courts have relied upon the duties imposed by the common law to provide the general standard of care owed by a bailee for hire. 143 Second, courts have looked to the bailment contract itself in determining the extent to which the transacting parties have limited or expanded their own obligations. 144 The following brief survey of case law reveals that Alabama courts have addressed certain recurring issues: (a) repair, maintenance, and insurance; (b) contract construction and inter-

138. Id. at 152, 290 So. 2d at 640.
139. Id. Cf. Lloyd v. Service Corp. of Ala., 453 So. 2d 735 (Ala. 1984) (refusing to enforce an unconscionable exculpatory clause in a residential lease contract that purported to limit the bailor’s liability), modified by Morgan v. South Cent. Bell Tel. Co., 466 So. 2d 107, 117 (Ala. 1985) (“[A] more comprehensive rule . . . is that exculpatory clauses affecting the public interest are invalid . . . . Six criteria were established to identify the kind of agreement in which an exculpatory clause is invalid as contrary to public policy.” (citations omitted)). The Lloyd court stated that: “[E]nforcement of ‘unbargained for’ exculpatory clauses in residential leases [is] against the best interests of the citizens of Alabama and contrary to public policy.” Lloyd, 453 So. 2d at 740. See generally W. HALE, supra note 108, § 2, at 28 (explaining limits on the parties’ ability to enlarge or diminish liability by contract).
140. See Birmingham Television, 292 Ala. at 152, 290 So. 2d at 640; see also supra note 131 and accompanying text.
141. Id. (“‘Such special provision in a contract of bailment limiting bailee’s liability, to be effective, must be known to, or brought to the notice of, the bailor, and be assented to by him.’” (quoting Kravitz v. Parking Serv. Co., 29 Ala. App. 523, 525, 199 So. 727, 729, cert. denied, 240 Ala. 467, 199 So. 731 (1940)) (emphasis supplied by Birmingham Television court)).
142. Birmingham Television, 292 Ala. at 154, 290 So. 2d at 642.
143. See supra notes 94 & 106-24 and accompanying text.
144. See supra notes 125-42 and accompanying text.
pretation; and (c) contract termination and redelivery or conversion of goods.

(a) Repair, Maintenance, and Insurance—Any bailee, including a bailee for hire, generally has a duty to conform to contractual terms that address issues such as repair and maintenance, as well as use of the property in a particular manner. At common law, a bailee is liable for any incidental and ordinary expenses necessary for the care of the bailor’s goods. The bailee is also liable for any extraordinary expenses occasioned by his negligent actions. When the property is in need of repairs, the bailee may have an obligation to cease using the property and to notify the bailor of the need for repairs; or the bailee may make repairs himself. However, where a bailee voluntarily makes repairs, he is under an obligation to make them in good faith.

Although not required by law, the bailee may insure the bailed property for the mutual benefit of the parties to the transaction. Where such insurance is purchased for the mutual benefit of the parties, the bailee will likely be obligated to pay the insurance proceeds over to the bailor.

(b) Contract Construction and Interpretation—A second issue that has been addressed in Alabama is the construction and interpretation of the bailment contract. When a bailment or lease must be interpreted, courts apply accepted principles of construction to give effect to the parties’ intentions. In DeKalb

145. See Boss, supra note 22, at 101.
146. See Cartledge v. Sloan, 124 Ala. 596, 26 So. 918 (1899).
147. W. Elliott, supra note 18, § 14, at 27.
148. Id. § 16, at 31.
149. See, e.g., Higman v. Camody, 112 Ala. 267, 20 So. 480 (1895).
150. See W. Hale, supra note 108, § 2, at 28-30; W. Elliott, supra note 18, § 17. See also Allstate Ins. Co. v. Reeves, 440 So. 2d 1086 (Ala. Civ. App. 1983) (bailee denied recovery for repairs made to bailed property where repairs were not made in good faith).
152. Goldstein, 24 Ala. App. at 4, 130 So. at 314 (court held that insurance proceeds were held in trust for bailor where bailed fur coat was damaged by fire).
153. See, e.g., DeKalb Agresearch v. Abbott, 391 F. Supp. 152, 153-54 (N.D. Ala. 1974) (transaction determined to be a lease and not a sale was “not covered by the Uniform Commercial Code, and is therefore, dependent upon the common law and the law of contracts for its construction and effect” (footnote omitted)), aff’d, 511 F.2d 1162 (5th Cir. 1975); see also Learned-Letcher Lumber Co. v. Fowler, 109 Ala. 169, 19 So. 396 (1895) (not error to admit parol evidence where controversy depended on construction of the writings).
Agresearch v. Abbott,\textsuperscript{154} for instance, the court evaluated the defendant’s claim of breach of express and implied warranties in light of the fact that the parties had reduced their agreement to a written document. The court held that, in a bailment or lease, the contract will control with regard to claims for breach of warranty if the parties’ obligations are clearly and unambiguously addressed.\textsuperscript{155} Therefore, where parties have reduced their agreement to writing, the document will control the court’s construction and interpretation, in the absence of mistake or fraud.\textsuperscript{156}

(c) **Contract Termination and Redelivery or Conversion of Goods**—Alabama case law has also addressed issues regarding the termination of the bailment contract, the bailee’s obligation to redeliver the bailed goods, and the bailee’s liability for conversion. Return of the property is generally an express or implied element in every common law bailment.\textsuperscript{157} At the bailment’s termination, the bailee must redeliver the property over to the bailor even if the bailee becomes bankrupt while in possession of the property.\textsuperscript{158} In fact, a bailor may establish a prima facie case of bailee’s negligence if the bailee did not, upon demand, either return the property or explain his failure to do so.\textsuperscript{159} A bailee may additionally be presumed negligent where the goods are lost,\textsuperscript{160} unless the loss was caused by the violence of nature.\textsuperscript{161} The bailee may also be liable for conversion of goods where he wrongfully delivered the property to someone else.\textsuperscript{162} However, a bailee will generally not be liable to the true owner if the bailee in good faith delivered the property to

\begin{itemize}
\item \textsuperscript{154} 391 F. Supp. 152 (N.D. Ala. 1974), aff’d, 511 F.2d 1162 (5th Cir. 1975).
\item \textsuperscript{155} DeKalb, 391 F. Supp. at 154.
\item \textsuperscript{156} Id.
\item \textsuperscript{157} See, e.g., In re Sitkin Smelting & Refining, 639 F.2d 1213 (5th Cir. Unit B 1981) (in determining whether transaction was bailment or sale, stated that one test of bailment is whether option was retained to direct the return or sale of goods); W. Elliott, supra note 18, § 20, at 36; W. Hale, supra note 108, § 2, at 30-35.
\item \textsuperscript{158} In re Sitkin Smelting & Refining, 639 F.2d 1213 (5th Cir. Unit B 1981) (court held that bailor’s claim to property was superior to claims of bailee’s secured creditors where transaction was deemed to be bailment rather than sale); see also Boss, supra note 22, at 99-100 n.285.
\item \textsuperscript{160} See Ridgely Operating Co. v. White, 227 Ala. 459, 150 So. 693 (1933).
\item \textsuperscript{161} See Lauderdale County Coop. v. Lansdell, 263 Ala. 557, 83 So. 2d 201 (1955).
\item \textsuperscript{162} See Pope & Co. v. Union Warehouse Co., 195 Ala. 309, 70 So. 159 (1915); infra note 172.
\end{itemize}
the bailor before notification that the true owner would look to him for the property. 163

The bailee is also obliged to use the property in accordance with the authority given to him. Use by the bailee beyond this authority will likely constitute a conversion of the property for which the bailee would be liable. 164 In Jones v. Americar, 165 the Supreme Court of Alabama addressed the issue of a lessee's conversion of certain personal property retained under a lease agreement. 166 A lessor of automobiles pursuant to a franchise agreement claimed that the lessee had become delinquent on payments. 167 The lessee subsequently cancelled the contract, and the lessor brought an action seeking damages for conversion of twenty-nine automobiles and for breach of contract. 168 The court recognized the traditional definition of conversion: Conversion occurs when a party appropriates a thing for his own use and enjoyment, or destroys or exercises dominion over property against the owner's claim of title. 169

Conversion may also result where: (1) The bailee attempts an assignment contrary to the terms of the bailment contract, 170 (2) the bailee sells the goods without express authority, 171 or (3) the bailee wrongfully delivers the property to a third-party claiming to be the true bailor. 172 Liability for conversion may also arise where

---

164. Cartlidge v. Sloan, 124 Ala. 596, 602, 26 So. 918, 920 (1899) ("The general rule is that if a bailee, having authority to use a chattel in a particular way, uses it in a different way, or to a greater extent than authorized, such unauthorized use is a conversion of the chattel . . . "); see also W. Elliott, supra note 18, § 13; W. Hale, supra note 108, § 2, at 29 (quoting Cartlidge, 124 Ala. at 602, 26 So. 2d at 920).
166. The court held that evidence supported a verdict for the lessor on the lessee's conversion but, nevertheless, reversed on other grounds. The court defined "conversion as consisting in . . . the appropriation of the thing to the party's own use and beneficial enjoyment, or in its destruction, or in exercising of dominion over it, in exclusion or defiance of the plaintiff's right, or in withholding the possession from the plaintiff, under a claim of title inconsistent with his own." Jones, 283 Ala. at 647, 219 So. 2d at 900-01 (quoting Geneva Gin and Storage Co. v. Rawls, 240 Ala. 320, 322, 199 So. 734, 735 (1940)).
167. Id. at 641, 219 So. 2d at 895.
168. Id. at 642, 219 So. 2d at 895.
169. Id. at 647, 219 So. 2d at 900-01.
170. See Gwin v. Emerald Co., 201 Ala. 384, 386, 78 So. 758, 760 (1918) ("Any attempted assignment, contrary to the terms of the bailment, is a conversion . . . ").
171. See Calhoun v. Thompson, 56 Ala. 166, 169 (1876) (unauthorized delivery of horse in violation of terms of the bailment amounted to conversion).
172. See Pope & Co. v. Union Warehouse Co., 195 Ala. 309, 70 So. 159 (1915) (bailee who turned cotton bales over to third party was liable to true owner for conversion).
the bailee's agents negligently dispose of the property. Finally, where conversion results from a bailee's failure to exercise the degree of diligence as required under the circumstances, he may be liable for the full value of the property if it was rendered worthless.

III. THE ALABAMA ARTICLE 2A PROJECT

Given the foregoing description of the current state of personal property lease law in Alabama, it seems appropriate to describe, in general terms, the impact that Article 2A will likely have on this area of the commercial law in our state. A section-by-section analysis of the new act, however, would be impractical for several reasons. First, comprehensive and accessible overviews of the proposed statute have been published elsewhere; second, Article 2A is based, to a considerable extent, on Article 2 of the Code, and there is no dearth of authority treating recurring Article 2 issues in Alabama, as well as commentary treating the essential similarity of Article 2A to its statutory analogue. Furthermore, the practitioner would be better aided by a discussion of both the scope and tenor of the deliberations by the Alabama Committee, as well as by a discussion of specific issues of particular interest to attorneys in the state.

Pope court noted, however, that "the rule of liability would be otherwise if the bailee were induced to surrender the chattel by some plausible deception practiced upon him by the pseudo-bailor." Id. at 311, 70 So. at 160.

173. See Allen v. Jacob Dold Packing Co., 204 Ala. 652, 655, 86 So. 525, 528 (1920) (bailee's agents negligently filled third party's meat order by taking meat owned by, and stored for, plaintiff; such appropriation by the bailee resulted in an unlawful interference of plaintiff's "use, enjoyment, or dominion over it[s property] . . . as to be a conversion.").


This section of the Article will, therefore, describe briefly the contours of the debate attending the promulgation of Article 2A in Alabama, and consider specific provisions under consideration by the Alabama Committee. As a prefatory matter, it must be emphasized that, at the time of this writing, the work of the Alabama Committee was not yet finished. But now is the time to apprise Alabama practitioners regarding the course of our deliberations.

The *Alabama Law Review* Article 2A Symposium was published shortly after the promulgation of Uniform Article 2A. The Symposium included both contributions from attorneys who had been directly involved in the drafting of Article 2A, and contributions from attorneys who, although not involved in the drafting, maintained an interest in the commercial law and were concerned with adjustments to the Uniform Commercial Code. It is fair to state that the general conclusion of the participants was that Article 2A should be enacted, but only after changes had been made to both the text and comments of the Uniform Act.

Largely as a response to the inadequacies of the uniform version identified in the *Alabama Law Review* Article 2A Symposium, Donald Rapson and Robert Haydock, members of the Permanent Editorial Board for the Uniform Commercial Code, and Harry Sigman, a California practitioner and past chairman of the Uniform Commercial Code Committee of that state's bar, developed a set of uniform amendments for Article 2A. That set of revisions came to be known as the "California/Massachusetts" version of the Act ("Cal/Mass Amendments"). They treated generally three areas: Priority of claims to lease property; lessor and lessee damages; and provisions for consumer protection.

In December 1990, in response to the Cal/Mass Amendments, the A.L.I. and N.C.C.U.S.L. promulgated a draft of certain uniform

---

178. Symposium, supra note 5.
179. Article 2A was promulgated in 1987. U.C.C. art. 2A foreword (1989).
180. Marion W. Benfield, Jr., and Frederick H. Miller were members of the Article 2A drafting committee. U.C.C. art. 2A drafting committee members (1989).
amendments to Article 2A ("Uniform Amendments"). These 1990 uniform revisions have now been circulated to the various states for their consideration. The Uniform Amendments are based upon the Cal/Mass Amendments, but do not incorporate consumer protections to the same extent as the Cal/Mass Amendments. The Alabama Committee considered first the Cal/Mass Amendments and then, most recently, the 1990 Uniform Amendments. The proposed Alabama draft of Article 2A represents a combination of these two amendment formulations, as well as nonuniform amendments developed by the Alabama Committee in response to the perceived personal property leasing needs of this state.

The Alabama Committee has endeavored to consider each provision of the Uniform Act, not just in terms of the tensions identified between the original Uniform Act, the 1990 Uniform Amendments, and the Cal/Mass version, but more importantly, in terms of the particular needs and interests of Alabama’s commercial jurisprudence. The following sections of this Article will highlight several of the more controversial issues raised with regard to particular provisions of the Uniform Act and will describe, in general terms, the scope of the deliberations by the Alabama Committee with regard to these issues. To aid such presentation, both the uniform version of particular provisions and the current draft of the Alabama version of those same provisions ("Alabama Draft Proposal") will be compared and discussed.

A. "Finance Leases"

A finance lease transaction contemplates three parties: the supplier of certain goods (seller); the lessor of the goods (buyer); and the lessee of the goods (user). From the perspective of the lessee, the transaction may closely resemble a sale made by the supplier and financed by the financing lessor. The supplier is responsible for the fitness of the goods, and the lessor generally serves only a financing function. Given such a relationship among the parties, it makes good commercial sense to recognize the true posture of the parties and provide the lessee limited recourse against the financing lessor, thereby requiring the lessee to look to the supplier with regard to the fitness of the goods.

183. See infra notes 245-52 and accompanying text.
The original uniform definition of a “finance lease” is contained in Section 2A-103(1)(g):

§ 2A-103. Definitions and Index of Definitions.
(1) In this Article unless the context otherwise requires:

(g) “Finance lease” means a lease in 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) either the lessee receives a copy of the contract evidencing the lessor's purchase of the goods on or before signing the lease contract, or the lessee’s approval of the contract evidencing the lessor’s purchase of the goods is a condition to effectiveness of the lease contract.\(^{184}\)

The current draft of the Alabama version incorporates the 1990 Uniform Amendment and defines finance lease as follows:

§ 7-2A-103. DEFINITIONS AND INDEX OF DEFINITIONS.
(1) In this Article unless the context otherwise requires:

(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

\(^{184}\) U.C.C. § 2A-103(1)(g) (1989).
as part of the contract by which the lessor acquired the goods or the right to possession and use of the goods; or (D) if the lease is not a consumer lease, the lessor, before the lessee signs the lease contract, informs the lessee in writing (a) of the identity of the person supplying the goods to the lessor, unless the lessee has selected that person and directed the lessor to acquire the goods or the right to possession and use of the goods from that person, (b) that the lessee is entitled under this Article to the promises and warranties, including those of any third party, provided to the lessor by the person supplying the goods in connection with or as part of the contract by which the lessor acquired the goods or the right to possession and use of the goods, and (c) that the lessee may communicate with the person supplying the goods to the lessor and receive an accurate and complete statement of those promises and warranties, including any disclaimers and limitations of them or of remedies. 185

The difference between the two versions was suggested by the Cal/Mass Amendments. 186 The current version, as incorporated by the Alabama Draft Proposal, is designed to better serve principles of freedom of contract that are fundamental to the commercial law.

The parties need not cast their agreement in terms of any magic words. The current version would recognize the finance lease incidents of the transaction so long as the lessor discloses all warranties, along with disclaimers and limitations, provided by the lessor and supplier. Moreover, in nonconsumer leases, 187 the lessor may assure finance lease treatment by simply informing the lessee


187. "Consumer Lease" is defined as follows: [A] lease that a lessor regularly engaged in the business of leasing or selling makes to a lessee, except an organization, 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 $100,000.
of the supplier's identity, and by apprising the lessee that he may have rights against the supplier under the terms of the purchase contract executed by the supplier and the lessor.

B. Unconscionability

In commercial law the concept of unconscionability has been problematic. 188 Perhaps it is best to simply consider the unconscionability provision of Article 2 of the Alabama Commercial Code 189 as something of a statutory waste dump into which all the hard cases have been deposited in an attempt to avoid making bad law. The drafters of Article 2A proposed a version of the unconscionability provision that departs from the formulation of its Sales analogue:

(1) If the court as a matter of law finds a lease contract or any clause of a lease contract to have been unconscionable at the time it was made the court may refuse to enforce the lease contract, or it may enforce the remainder of the lease contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.
(2) With respect to a consumer lease, if the court as a matter of law finds that a lease contract or any clause of a lease contract has been induced by unconscionable conduct or that unconscionable conduct has occurred in the collection of a claim arising from a lease contract, the court may grant appropriate relief.
(3) Before making a finding of unconscionability under subsection (1) or (2), the court, on its own motion or that of a party, shall afford the parties a reasonable opportunity to present evidence as to the setting, purpose, and effect of the lease contract or clause thereof, or of the conduct.
(4) In an action in which the lessee claims unconscionability with respect to a consumer lease:

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

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

(c) In determining attorney’s fees, the amount of the recovery on behalf of the claimant under subsections (1) and (2) is not controlling. 190

Contrast the above uniform formulation with the current draft of Alabama section 7-2A-108:

§ 7-2A-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) Before making a finding of unconscionability under subsection (1), the court, on its own motion or that of a party, shall afford the parties a reasonable opportunity to present evidence as to the setting, purpose, and effect of the lease contract or clause thereof, or of the conduct. 191

There is a symbiotic relationship between the commercial fraud law and unconscionability principles. 192 The Alabama Committee has recognized this symbiotic relationship and has deleted

---

192. See Drewry v. Drewry, 8 Va. App. 460, 466, 383 S.E.2d 12, 18 (1989) (court found husband had exerted undue influence in securing spouse’s waiver of support—action for unconscionability may be broader than an action for fraud: “A party may be free of fraud but guilty of overreaching or oppressive conduct in securing the agreement which is so patently unfair that courts of equity may refuse to enforce it.”); see generally Mallor, Unconscionability in Contracts Between Merchants, 40 Sw. L.J. 1065, 1072 (1986) (“Most judges and commentators agree that an unconscionability determination involves the evaluation of two distinct but interrelated matters: how the parties arrived at the terms, and the justifiability of the terms themselves . . . . Given its concern for reality of consent, the procedural aspect of unconscionability overlaps with the traditional contract doctrines regarding the formation of a contract and those that police agreements for fraud, duress, and the like.”). Mallor at 1072 (footnotes omitted).
subsections (2) and (4) of the Uniform Act. The decision to delete these two uniform subsections is the product of the conclusion that the common law\textsuperscript{193} and statutory\textsuperscript{194} fraud theories of recovery available in Alabama provide sufficient protection to those who may be the victims of insidious overreaching.


\textsuperscript{194} ALA. CODE §§ 6-5-100 to -104 (1975) provide as follows:

§ 6-5-100. FRAUD — RIGHT OF ACTION GENERALLY.

Fraud by one, accompanied with damage to the party defrauded, in all cases gives a right of action.

§ 6-5-101. SAME — MISREPRESENTATIONS OF MATERIAL FACTS.

Misrepresentations of a material fact made willfully to deceive, or recklessly without knowledge, and acted on by the opposite party, or if made by mistake and innocently and acted on by the opposite party, constitute legal fraud.

§ 6-5-102. SUPPRESSION OF MATERIAL FACTS.

Suppression of a material fact which the party is under an obligation to communicate constitutes fraud. The obligation to communicate may arise from the confidential relations of the parties or from the particular circumstances of the case.

§ 6-5-103. DECEIT — RIGHT OF ACTION GENERALLY.

Willful misrepresentation of a material fact made to induce another to act, and upon which he does act to his injury, will give a right of action. Mere concealment of such a fact, unless done in such a manner as to deceive and mislead, will not support an action. In all cases of deceit, knowledge of a falsehood constitutes an essential element. A fraudulent or reckless representation of facts as true, which the party may not know to be false, if intended to deceive, is equivalent to a knowledge of the falsehood.

§ 6-5-104. SAME — FRAUDULENT DECEIT.

(a) One who willfully deceives another with intent to induce him to alter his position to his injury or risk is liable for any damage which he thereby suffers.

(b) A deceit within the meaning of this section is either:

(1) The suggestion as a fact of that which is not true by one who does not believe it to be true;

(2) The assertion as a fact of that which is not true by one who has no reasonable ground for believing it to be true;

(3) The suppression of a fact by one who is bound to disclose it or who gives information of other facts which are likely to mislead for want of communication of that fact; or

(4) A promise made without any intention of performing it.
C. Modifications of Contracts and Statute of Frauds Requirements

The common law "pre-existing duty" rule\textsuperscript{195} proved unworkable in the commercial law. Section 2-209\textsuperscript{196} of the uniform sales law is designed to replace the formalistic and fictional "consideration" basis of the common law rule with a provision that considers business realities as well as the dangers of commercial fraud and extortion attending modification of commercial contracts.\textsuperscript{197}

Under both Alabama section 7-2-209\textsuperscript{198} and draft section 7-2A-208,\textsuperscript{199} an attempted modification that fails to satisfy the statutory or contractual requirements may still be effective as a waiver.\textsuperscript{200}

With regard to the impact of the statute of frauds upon the contract as modified, compare uniform section 2A-208 and the extant Alabama draft of the same provision:

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

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

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

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

(4) A party who has made a waiver affecting an executory portion of a lease contract may retract the waiver by reasonable notification received by the other party that strict performance will be required of any term waived, unless the retraction would be unjust in view of a material change of position in reliance on the waiver.\textsuperscript{201}

---

\textsuperscript{195} The "pre-existing duty" rule is based on the premise that if a party presently owes a duty under contract, additional consideration is necessary to modify that duty. \textit{See} Griffin v. Hardin, 456 So. 2d 1113, 1116 (Ala. Civ. App. 1984) (promise to do what one is already under legal obligation to do is not sufficient consideration for another contract).

\textsuperscript{196} U.C.C. § 2-209 (1989).

\textsuperscript{197} \textit{Id.} § 2-209 comment 1.


\textsuperscript{201} U.C.C. § 2A-208 (1990).
Compare the draft Alabama version, section 7-2A-208:

§ 7-2A-208. MODIFICATION, RESCISSION, AND WAIVER.

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

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

(3) The requirements of the statute of frauds section of this Article (Section 7-2A-201) must be satisfied if the contract as modified is within its provisions.

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

(5) A party who has made a waiver affecting a 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.202

The statute of frauds provision of section 7-2A-208(3) was incorporated into the Alabama draft because the reasons offered for its exclusion in the official comment to the uniform act were not convincing.203 "The commercial community's interest in certainty would [be] better served by clearly providing that a modification would have to satisfy the"204 writing requirement provided in section 7-2A-201, rather than by leaving this issue to ad hoc resolution by the courts of this state.

D. Warranty of Quiet Possession

The Alabama version of section 2A-211 tracks exactly the language of the uniform act:

§ 7-2A-211. WARRANTIES AGAINST INTERFERENCE AND AGAINST INFRINGEMENT; LESSEE'S. OBLIGATION AGAINST INFRINGEMENT.

204. Id.
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.

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.

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.

However, it is not the language of the section but rather the language of its official comment that has caused the Committee some problem. In pertinent part, the official comment explains that "[t]he warranty of quiet possession was abolished with respect to sales of goods." In the draft Alabama comment, the Committee takes issue with such statement in that:

In Alabama, it is not clear that the warranty of quiet enjoyment was so much abolished in the Sales article as it was subsumed in the broad language of section 7-2-312. . . . The express inclusion of the warranty of quiet enjoyment in this provision does not imply that there is no such warranty in the Sales analogue.

While the Alabama Committee recognized the potential inconsistency between the sales and lease law, adjustment of the sales commentary to reflect the conclusion that the warranty of quiet possession is alive and well in Alabama sales transactions would be beyond the charge of the Alabama Article 2A Committee. The reference to the sales analogue in the lease provision comment should suffice.


E. Disclaimer of Warranties

Perhaps no area of the commercial law is of greater or more frequent concern to both general practitioners and commercial law specialists than warranties and warranty disclaimers. The implied warranties of the sales law go to the very foundations of the parties' deal.\textsuperscript{208} These warranties vindicate the transactors' expectations, and are likely to be the focus of litigation concerning the parties' performance of, and conformity with, the terms of their contract. Insofar as leases contemplate an allocation of property rights not wholly distinct from the division of property rights recognized in the sale of goods,\textsuperscript{209} Article 2A contains both express and implied warranty provisions that similarly establish the contours of the lessor's and lessee's undertaking. And just as the consideration of warranties is fundamental to the lease transaction, the disclaimer of warranties concomitantly impacts the lessor/lessee relationship.

The Alabama draft version of section 2A-214, "Exclusion or Modification of Warranties," departs from the uniform version. The uniform version provides:

§ 2A-214. Exclusion or Modification of Warranties.

1. Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit a warranty must be construed wherever reasonable as consistent with each other; but, subject to the provisions of Section 7-2A-202 on parol or extrinsic evidence, negation or limitation is inoperative to the extent that the construction is unreasonable.

2. Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language 'must

\begin{footnotesize}
\textsuperscript{208} U.C.C. § 2-313 comment 4 (1989) ("[T]he whole purpose of the law of warranty is to determine what it is that the seller has in essence agreed to sell . . . . [I]n determining what [the parties] have agreed upon[,] good faith is a factor and consideration should be given to the fact that the probability is small that a real price is intended to be exchanged for a pseudo-obligation.").

\end{footnotesize}
mention "merchantability", be by a writing, and be conspicuous. Language to exclude all implied warranties of fitness is sufficient if it is in writing, is conspicuous and states, for example, "There is no warranty that the goods will be fit for a particular purpose."

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

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

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

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

(4) To exclude or modify a warranty against interference or against infringement (Section 2A-211) or any part of it, the language must be specific, be by a writing, and be conspicuous, unless the circumstances, including course of performance, course of dealing, or usage of trade, give the lessee reason to know that the goods are being leased subject to a claim or interest of any person.\(^{210}\)

Compare the above uniform version with its draft Alabama counterpart:

\[ \text{§ 7-2A-214. EXCLUSION OR MODIFICATION OF WARRANTIES.} \]

(1) Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit a warranty must be construed wherever reasonable as consistent with each other; but, subject to the provisions of Section 7-2A-202 on parol or extrinsic evidence, negation or limitation is inoperative to the extent that the construction is unreasonable.

(2) Subject to subsection (3):

\[^{210}\text{U.C.C. § 2A-214 (1990).}\]
(a) to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability, be by a writing, and be conspicuous. Language to exclude the implied warranty of merchantability is sufficient if it is in writing, is conspicuous and states, for example, “There is no warranty that the goods will be merchantable”.

(b) to exclude or modify any implied warranty of fitness the exclusion must be by a writing and be conspicuous. Language to exclude all implied warranties of fitness is sufficient if it is in writing, is conspicuous and states, for example, “There is no warranty that the goods will be fit for a particular purpose.”

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

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

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

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

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

(5) Nothing in subsection (2) or subsection (3)(a) or in Section 7-2A-215 shall be construed so as to limit or exclude the lessor’s lia-
bility for damages for injury to the person in the case of consumer goods.\textsuperscript{211}

The Committee's intention is that the Alabama version be understood as departing formally rather than substantively from the uniform act. The design of the Alabama departures from the uniform formulation is to provide transactors better guidance with regard to the drafting of effective disclaimers. Further, Article 2A should be construed in a manner consistent with the law that has been derived from the Sales analogue. For example, the decision by the Supreme Court of Alabama in \textit{Gaylord v. Lawler Mobile Homes},\textsuperscript{212} that "as is," "with all faults," and "as they stand" disclaimers will be ineffective in sales of new goods, should apply as well to the lease of new goods once Article 2A is enacted in Alabama. Finally, the inclusion of nonuniform subsection (5) brings this section of the proposed lease law into conformity with the parallel Alabama sales provision.

\textbf{F. Third-Party Beneficiaries of Warranties}

Intimately related to the issue of what warranty protections are afforded the lessee are questions concerning the scope of persons and interests protected by express and implied warranties. What renders these issues particularly problematic is the parallel development of products liability law as the tort response to breach of warranty claims for injuries sustained by remote parties.\textsuperscript{213} The uniform version of section 2A-216, "Third-Party Beneficiaries of Express and Implied Warranties,"\textsuperscript{214} and its Alabama draft variation represent efforts to maintain the delicate balance between these parallel jurisprudential paths. As with the Sales Article, the Lease Article provides three alternative formulations of the third-party beneficiary provision. And just as Alabama

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{211} Draft Ala. Code § 7-2A-214 (1990).
\item \textsuperscript{212} 477 So. 2d 382 (Ala. 1985).
\item \textsuperscript{213} According to Professor Prosser, a third party beneficiary, as if standing in the shoes of the purchaser, can sue for breach of warranty. W. Keeton, D. Dobbs, R. Keeton & D. Owens, PROSSER AND KEeton ON THE LAW OF TORTS § 95A (5th ed. 1984). Section 2-318 of the uniform commercial law presents three alternatives for third party beneficiaries of warranties. Alternative A limits the beneficiaries to "family, household and guests of the purchaser." Alternatives B and C further expand the class of beneficiaries. U.C.C. § 2-318 comment 3 (1989).
\item \textsuperscript{214} U.C.C. § 2A-216 (1990).
\end{itemize}
\end{footnotesize}
has selected Alternative B in the sales law, the draft Lease Article chooses Alternative B as follows:

§ 2A-216. Third-Party Beneficiaries of Express and Implied Warranties.

ALTERNATIVE A

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

ALTERNATIVE B

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


216. Alternative A limits the extension of the warranty to family, household members, or guests of the lessee. Alternatives B and C extend the warranty to any “person who may reasonably be expected to use” the goods. In addition, Alternative B states that: “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.” Draft Ala. Code § 7-2A-216(2) (1990).
A warranty to or for the benefit of a lessee under this Article, whether express or implied, extends to any person who may reasonably be expected to use, consume, or be affected by the goods and who is injured by breach of the warranty. The operation of this section may not be excluded, modified, or limited with respect to injury to the person of an individual to whom the warranty extends, but an exclusion, modification, or limitation of the warranty, including any with respect to rights and remedies, effective against the lessee is also effective against the beneficiary designated under this section. 217

Compare with that uniform provision, the following Alabama draft:

§ 7-2A-216. THIRD-PARTY BENEFICIARIES OF EXPRESS AND IMPLIED WARRANTIES.

(1) A warranty to or for the benefit of a lessee under this Article, whether express or implied, extends to any natural person if it is reasonable to expect that such person may use, consume, or be affected by the goods and who is injured in person by breach of the warranty.

(2) 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.

(3) The operation of this section may not be excluded, modified, or limited, but an exclusion, modification, or limitation of the warranty, including any with respect to rights and remedies, effective against the lessee is also effective against any person referred to in subsections (1) and (2) of this section. 218

The Alabama draft provision is intended to substantially mirror in substance the analogous Alabama sales law section. Therefore, the same results should be obtained under both bodies of law. The differences in the lease formulation should merely clarify the complete and correct reading of the sales law provision.

The Alabama draft differs from the uniform lease provision in the last clause of what would be Alabama Code section 7-2A-216(3). The Alabama adjustment deletes the word “beneficiary” 219 and instead inserts for clarification “any person referred to in sub-

sections (1) and (2) of this section." This clarification should make it clear that a disclaimer effective against the lessee would also be effective against both those persons specifically described in subsection (1), as well as those parties who would be deemed beneficiaries by operation of subsection (2).

In Bishop v. Sales, the Alabama Supreme Court determined that Alabama Code section 7-2-318, which codified Alternative B of the Uniform Act, abrogates any vertical privity of contract requirement. It is contemplated that case law development will determine whether vertical privity is similarly vitiated in the lease law by this section. Of course, this provision would in no way impair the right of a party who is in privity of contract with the lessor to bring an action against the lessor notwithstanding the fact that the plaintiff would not be within the class of third-party beneficiaries recognized in the section.

G. Alienation of Lessor’s and Lessee’s Interests

Secured financing has grown substantially in the course of the last thirty years, roughly since the promulgation of Article 9 of the U.C.C. governing security interests in personal property. The design of Article 9 has been to provide for the grant of a collateral interest in multifarious property interests, so that the owners of those interests may realize the value of such assets in the more liquid form of financing proceeds, secured by those assets.

Likewise, a lease of personal property contemplates a division of property interests between the lessor and lessee. The lessor retains the right to the flow of lease payments as well as a residual interest in the personality, and the lessee enjoys the right to use the property. Insofar as either or both parties to a lease contract may be or may choose to become Article 9 debtors, it is crucial that

---

221. 336 So. 2d 1340 (Ala. 1976).
222. Bishop, 336 So. 2d at 1345.
223. “Debtor” is defined as follows:
[T]he person who owes payment or other performance of the obligation secured, whether or not he owns or has rights in the collateral, and includes the seller of accounts or chattel paper. Where the debtor and the owner of the collateral are not the same person, the term “debtor” means the owner of the collateral in any provision of the Article dealing with the collateral, the obligor in any provision dealing with the obligation, and may include both where the context so requires . . . .

commercial law determine the rights of the lessee, lessor, and secured creditor of the lessor or of the lessee *inter se*.

Section 2A-303 of the uniform act formulates rules governing the alienability of the lessor's and lessee's interests in the lease property. The original version of section 2A-303 provided that:


(1) Any interest of a party under a lease contract and the lessee's residual interest in the goods may be transferred unless

(a) the transfer is voluntary and the lease contract prohibits the transfer; or

(b) the transfer materially changes the duty of or materially increases the burden or risk imposed on the other party to the lease contract, and within a reasonable time after notice of the transfer the other party demands that the transferee comply with subsection (2) and the transferee fails to comply.

(2) Within a reasonable time after demand pursuant to subsection (1)(b), the transferee shall:

(a) cure or provide adequate assurance that he [or she] will promptly cure any default other than one arising from the transfer;

(b) compensate or provide adequate assurance that he [or she] will promptly compensate the other party to the lease contract and any other person holding an interest in the lease contract, except the party whose interest is being transferred, for any loss to that party resulting from the transfer;

(c) provide adequate assurance of future due performance under the lease contract; and

(d) assume the lease contract.

(3) Demand pursuant to subsection (1)(b) is without prejudice to the other party's rights against the transferee and the party whose interest is transferred.

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

(5) Unless otherwise agreed by the lessor and the lessee, no delegation of performance relieves the assignor as against the other party of any duty to perform or any liability for default.

(6) A right to damages for default with respect to the whole lease contract or a right arising out of the assignor's due performance of his [or her] entire obligation can be assigned despite agreement otherwise.

(7) To prohibit the transfer of an interest of a party under a lease contract, the language of prohibition must be specific, by a writing, and conspicuous.224

Professor Steven Harris identified troublesome ambiguities and uncertainties that might result from the promulgation of that uniform provision.225 Rather than burden the commercial finance industry with what he perceived to be the troublesome priority implied by uniform section 2A-303, he proposed that the grant of collateral interests in property created by a personal property lease be excepted from the operation of section 2A-303.226 The promoters of the Cal/Mass Amendments were persuaded by Harris's analysis and suggested that the provision be modified.227 The 1990 Uniform Amendments follow the Cal/Mass lead and contain the revised version of section 2A-303 currently incorporated in the proposed Alabama Act:

§ 7-2A-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 7-9-102(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

226. Id. at 844-45.
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) 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. (b) 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 7-2A-501(2);

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

(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.228

The current draft of Alabama Article 2A incorporates the 1990 Uniform Amendments in order to facilitate the hypothecation of valuable interests in secured financing. Under subsection (2), a transfer prohibited by the lease gives rise to the remedies of subsection (5), but is otherwise effective. In other words, even though the transfer was contractually prohibited, the unauthorized transfer is not automatically void.229 In addition, the default remedy

---

229. U.C.C. § 2A-303 comment 1 (1990) provides as follows:
[Transfers] 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) which limits the prejudiced party to remedies for default under this Article if the transfer has been made an event of default, or damages if the transfer is prohibited.
Id. See also U.C.C. § 9-311 (1989) (voluntary and involuntary transfers of an interest).
under subsection (5)(b) is limited to actual damages which could not have been mitigated by the nontransferor.\textsuperscript{230}

Under subsection (3), a lease provision prohibiting the transfer of a security interest is not enforceable unless there is an actual transfer that “involves an actual delegation of a material performance of the lessor” in violation of the lease.\textsuperscript{231} Thus, according to comment 4,\textsuperscript{232} granting a security interest, by itself, does not trigger a right to a remedy; there must be a transfer and the delegation of a material performance owed to the non-transferring party under the lease contract. As comments 2 and 7 make clear, materiality is judged by the existence of a further duty under the lease that the transferring party owes to the nontransferring party.\textsuperscript{233} Comment 7\textsuperscript{234} indicates that the distinction between operating leases and nonoperating leases would aid in the understanding of the subsection.\textsuperscript{235}

H. Liquidation of Damages

The rule was established in Alabama before the promulgation of the U.C.C. that a liquidated damages provision in a contract would not be enforced to the extent that it represented a penalty rather than the parties’ good faith effort to allocate risks attending the default of one or the other of the parties to the contract.\textsuperscript{236} In fact, it has been held in this state in a case decided after the enactment of Article 2 that the voidability of a liquidated damages provision as a penalty is to be determined as a matter of law by the

\textsuperscript{230} U.C.C. § 2A-303(5)(b)(ii) (1990). Of course, this statement is true if the transfer is prohibited. If the transfer is an event of default under the lease agreement, then under subsection (5)(a) the non-transferor is entitled to lease remedies and/or the remedies granted under section 7-2A-501(2).

\textsuperscript{231} Id. § 2A-303 & comment 4.

\textsuperscript{232} Id.

\textsuperscript{233} Id. comments 2 & 7.

\textsuperscript{234} Id. comment 7. As an aside, comment 7 actually refers to subsection (4) rather than subsection (3), but the wording and substance of these subsections are quite similar such that the comment is relevant to each subsection.

\textsuperscript{235} U.C.C. § 2A-303 comment 7 (1990) (“Although the distinction may be difficult to draw in some cases, it is instructive to focus on the differences between ‘operating’ and ‘nonoperating’ leases as generally understood in the marketplace.”).

court, rather than as a matter of fact.\textsuperscript{237} Section 2A-504, of both the uniform version\textsuperscript{238} and the Alabama draft,\textsuperscript{239} provides the following:

§ 2A-504. Liquidation of Damages.

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

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

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

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

(b) in the absence of those terms, 20 percent of the then present value of the total rent the lessee was obligated to pay for the balance of the lease term, or, in the case of a consumer lease, the lesser of such amount or $500.

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

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

(b) the amount or value of any benefits received by the lessee directly or indirectly by reason of the lease contract.\textsuperscript{240}

\textsuperscript{237} Pasquale, 51 Ala. App. at 137, 283 So. 2d at 447 (holding that liquidated damages provision was not unreasonable, and therefore not void as a penalty).
\textsuperscript{238} U.C.C. § 2A-504 (1990).
\textsuperscript{239} DRAFT ALA. CODE § 7-2A-504 (1990).
\textsuperscript{240} U.C.C. § 2A-504 (1990); see also DRAFT ALA. CODE § 7-2A-504 (1990).
Although the statute itself has not caused the Committee considerable trouble, there is some concern about the official comment promulgated by the A.L.I. and N.C.C.U.S.L. That comment explains, in pertinent part, that the provision in the Article 2 analogue\(^{241}\) "providing that a term fixing unreasonably large liquidated damages is void as a penalty, was ... not incorporated."\(^{242}\) While that would seem to suggest that an unreasonably large liquidated damages amount would not be voidable as a penalty, the comment further explains that "[b]y 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."\(^{243}\) The design is of course to encourage the parties' incorporation of liquidated damages provisions, unburdened by the concern that a court will, post hoc, void the liquidated damages figure as a penalty. The drafters note that insofar as the liquidated damages provision would often contemplate reimbursement of the lessor for tax loss, it would not be unusual for the liquidated damages amount to exceed, perhaps by many times, the value of the lease property.\(^{244}\)

The Alabama Committee has expressed some concern with the inference that might be drawn from the deletion of the provision from the Sales analogue that an unreasonably large liquidated damages figure would be void as a penalty. Instead, it would seem that if tax laws could result in losses that exceed substantially the value of the lease property, there is in fact nothing unreasonable about a liquidated damages clause that would provide for recovery of such tax losses. That construction of the uniform statute and commentary may be preferable to a reading that would suggest that a venerable contract principle in this state, the voidability of unreasonable liquidated damages, would be abrogated by adoption of uniform section 2A-504.

\(^{241}\) U.C.C. § 2-718 (1989). In particular, section 2-718(1) provides that damages may be liquidated "at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy." \textit{Id.} § 2-718(1).


\(^{243}\) \textit{Id.}

\(^{244}\) \textit{Id.}
I. Consumer Issues

Professor Fred Miller, a member of the Permanent Editorial Board of the Uniform Commercial Code and a drafter of uniform Article 2A, wrote an article in the *Alabama Law Review* Article 2A Symposium concerning the Uniform Act's treatment of recurring consumer issues. In light of Professor Miller's observations, the sponsors of the Cal/Mass Amendment package evidently felt that it was necessary to provide consumers more protection than was offered by the uniform version of the act. While it is not feasible to survey all the consumer provisions in the uniform and Cal/Mass versions, there is one section in particular that has generated considerable discussion among the members of the Alabama Committee. Reproduced below are the provisions of uniform section 2A-516 and the Cal/Mass counterpart:

Uniform provision—

§ 2A-516. Effect of Acceptance of Goods; Notice of Default; Burden of Establishing Default After Acceptance; Notice of Claim or Litigation to Person Answerable Over.

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

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

(3) If a tender has been accepted:

(a) within a reasonable time after the lessee discovers or should have discovered any default, the lessee shall notify the lessor and the supplier, or be barred from any remedy;

(b) except in the case of a consumer lease, within a reasonable time after the lessee receives notice of litigation for infringement or the like (Section 2A-

---

211) the lessee shall notify the lessor or be barred from any remedy over for liability established by the litigation; and

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

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

(a) The lessee may give the lessor or the supplier written notice of the litigation. If the notice states that the lessor or the supplier may come in and defend and that if the lessor or the supplier does not do so he [or she] will be bound in any action against him [or her] by the lessee by any determination of fact common to the two litigations, then unless the lessor or the supplier after seasonable receipt of the notice does come in and defend he [or she] is so bound.

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

(5) The provisions of subsections (3) and (4) apply to any obligation of a lessee to hold the lessor or the supplier harmless against infringement or the like (Section 2A-211). 246

Cal/Mass Amendment and Alabama proposal—

§ 7-2A-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, other than a consumer lease in which the supplier assisted in the preparation of the lease contract or participated in negotiating the terms of the lease con-

tract with the lessor, if made with knowledge of a nonconformity, acceptance cannot be revoked because of it. In any other case, if made with knowledge of a nonconformity, acceptance cannot be revoked because of it unless the acceptance was on the reasonable assumption that the nonconformity would be seasonably cured. Acceptance does not of itself impair any other remedy provided by this Article or the lease agreement for nonconformity.

(3) If a tender has been accepted:

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

(b) within a reasonable time after the lessee receives notice of litigation for infringement or the like (Section 7-2A-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 7-2A-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 7-2A-211).247

(6) Subsection (3) shall not apply to a consumer lease.

The sponsors of the Cal/Mass Amendments have not explained their reasons for modifying the right of a consumer lessee to revoke acceptance of goods in the case of a finance lease.248 The inference may be reasonably drawn, however, that the design is to give effect to consumer expectations that the typical consumer finance lease is akin to a sale. When a consumer goes to a Chevrolet dealership to buy a Camaro, she may decide instead to lease the car, not because the consumer is aware of the different allocation of rights and liabilities in a lease (as contrasted with a sale), but because the monthly lease payments are within her means while the purchase payments are not. Furthermore, in the consumer finance lease setting, the Cal/Mass Amendment seems to recognize the operation of commercial principles that led to the informed development of the “close-connectedness” doctrine in commercial paper law.249 Under the Cal/Mass Amendments, the consumer finance lessee would not however have an absolute right to revoke vis-à-vis the financer. The right of revocation would only arise “if the supplier assisted in the preparation of the lease contract or participated in the negotiation of the lease contract terms with the lessor,”250 a prototypical close-connectedness situation.251


251. See Arcanum Nat’l Bank v. Hessler, 69 Ohio St. 2d 549, 433 N.E.2d 204, 210 (1982) (citing J. White & R. Summers, Uniform Commercial Code § 14-8, at 481 (2d ed. 1972)). Professors White and Summers list five factors which are indicative of a close connection between the lender and the seller:

(1) the lender drafting forms for the seller;
(2) the lender approving and/or establishing the seller’s procedures;
(3) the lender making an independent check on the debtor’s credit or some other direct contact between the lender and the debtor;
The justification for the previous uniform version focuses on the fact that the financing lessor is really in no position to police the fitness of the goods. Any enhanced right to revoke a consumer lease may therefore have a chilling effect on the financing of consumer leases—clearly a result inconsistent with the best interests of consumers and financers alike. This tension, of course, has attended the promulgation of all consumer legislation. For these reasons, the Alabama Committee decided to follow the Cal/Mass version, rather than the old uniform formulation.

**J. Lessor’s Action for Rent and the Duty to Mitigate**

The default provisions of Uniform Article 2A that would supplement a lessor’s common law remedies, for the most part, track parallel provisions in the Sales analogue. Given fundamental differences between the allocation of property rights in sales and leases, however, there are necessarily some differences in the formulation of the default provisions of the two articles. These sections have been carefully considered by the *Alabama Law Review* Article 2A Symposium commentators. In particular, section

(4) the seller’s heavy reliance on the lender; and

(5) common or connected ownership or management of the seller and lender.


252. McKenzie, *The Cost of Protection*, L.A. Daily J., March 31, 1982, at 4, col. 3 (“Once we have recognized the potential cost of increased product safety[,] the problems of whether products should be made safer [are] no longer simple. Not all consumers demand the same of safety, given the price... Diversity, not uniformity, is the hallmark of society, and an economic system that serves society must reflect this.”).

253. *Compare* U.C.C. § 2A-523 (1990) *with* U.C.C. § 2-703 (1989) (these sections list available remedies in the event of lessee or buyer default, respectively). More specifically, subsections (a), (b), (c), (d), (e) and (f) of section 2-703 correspond generally to subsections (c), (d), (b), (e), (e) and (a) of section 2A-523, respectively.

254. *Compare* U.C.C. § 2A-527(5) (1990) (“lessor is not accountable to the lessee for any profit made on any disposition” in an event of lessee default) *and* id. § 2A-529(2)-(3) (“lessor shall hold [identified goods] for the lessee during remaining lease term” unless the lessor elects to dispose of such goods) (emphasis added) *with* U.C.C. § 2-706(6) (1989). Although section 2-706(6) provides that “[t]he seller is not accountable to the [defaulting] buyer for any profit made on any resale,” it makes clear that “[a] person in the position of a seller (Section 2-707) or a buyer who has rightfully rejected or justifiably revoked acceptance must account for any excess over the amount of his security interest.” *Id.*

2A-529, concerning the lessor's action for rent upon the lessee's default, has generated considerable discussion during the Alabama Committee's deliberations.

Compare the original uniform version of this provision,

§ 2A-529. Lessor's Action for the Rent.

(1) After default by the lessee under the lease contract (Section 2A-523(1)), if the lessor complies with subsection (2), the lessor may recover from the lessee as damages:

(a) for goods accepted by the lessee and for conforming goods lost or damaged within a commercially reasonable time after risk of loss passes to the lessee (Section 2A-219), (i) accrued and unpaid rent as of the date of default, (ii) the present value as of the date of default of the rent for the remaining lease term of the lease agreement, and (iii) any incidental damages allowed under Section 2A-530, less expenses saved in consequence of the lessee's default; and

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

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

(3) The lessor may dispose of the goods at any time before collection of the judgment for damages obtained pursuant to subsection (1). If the disposition is before the end of the remaining lease term of the lease agreement, the lessor's recovery against the lessee for damages will be governed by Section 2A-527 or Section 2A-528.

(4) Payment of the judgment for damages obtained pursuant to subsection (1) entitles the lessee to use and possession of the goods not then disposed of for the remaining lease term of the lease agreement.
(5) After a lessee has wrongfully rejected or revoked acceptance
of goods, has failed to pay rent then due, or has repudiated (Section
2A-402), a lessor who is held not entitled to rent under this section
must nevertheless be awarded damages for non-acceptance under
Sections 2A-527 and 2A-528.\textsuperscript{256}

with the 1990 Uniform Amendment version, adopting the Cal/
Mass Amendment, and incorporated into the Alabama Draft:

\textbf{§ 2A-529. LESSOR’S ACTION FOR THE RENT.}

(1) After default by the lessee under the lease contract of the
type described in Section 2A-523(1), or 2A-523(3)(a) or, if agreed,
after other default by the lessee, if the lessor complies with subsec-
tion (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 reasona-
ble time after risk of loss passes to the lessee (Section
2A-219), (i) accrued and unpaid rent as of the date of
entry of judgment in favor of the lessor, (ii) the pre-
sent value as of the same date of the rent for the then
remaining lease term of the lease agreement, and (iii)
any incidental damages allowed under Section 2A-
530, less expenses saved in consequence of the lessee’s
default; and

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

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

(3) The lessor may dispose of the goods at any time before col-
lection of the judgment for damages obtained pursuant to

\textsuperscript{256} U.C.C. § 2A-529 (1989).
subsection (1). If the disposition is before the end of the remaining lease term of the lease agreement, the lessor’s recovery against the lessee for damages is governed by Section 2A-527 or Section 2A-528, and the lessor will cause an appropriate credit to be provided against any judgment for damages to the extent that the amount of the judgment exceeds the recovery available pursuant to Section 2A-527 or 2A-528.

(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 a lessee has wrongfully rejected or revoked acceptance of goods, has failed to pay rent then due, or has repudiated (Section 2A-402), a lessor who is held not entitled to rent under this section must nevertheless be awarded damages for non-acceptance under Sections 2A-527 and 2A-528.257

Perhaps the most notable contrast between the two versions is that the Uniform Amendment imposes upon the lessor a broader duty to mitigate258 his damages against the lessee in certain limited circumstances.259 The original uniform version limited the lessor’s duty to mitigate to a more limited situation;260 the lessor could have therefore simply recovered the lease property and held it for the remainder of the lease term, apparently without any obligation to relet the property for the lessee’s account.261 The reason for the original Uniform Act’s seemingly flagrant departure from common law and statutory principles of mitigation was based on the nature of the lessor’s and lessee’s interests in leased property. Arguably, the lessor is the owner of the leased property and should not be required, or even encouraged by personal property lease law, to compromise that absolute ownership interest. Accordingly, this position holds that Article 2A should not mandate that such goods be relet. Given that view of the lessor’s ownership interest, the anal-

259. Id. § 2A-529(1)(b) (duty to mitigate arises as to undelivered, identified goods, repossessed goods, and goods that have been tendered back by the lessee).
260. U.C.C. § 2A-529(1)(b) & comment (1989) (duty to mitigate arises only “with respect to goods identified to the lease contract (but not accepted by the lessee—see subparagraph (1)(a)) . . .”).
ogy to, and imposition by, sales law of a duty upon a seller to resell the goods after a buyer's breach is simply inapposite.

Professor Marion Benfield championed forcefully the position taken by the Cal/Mass Amendments and now adopted by the 1990 Uniform Amendments; in fact, his article in the Alabama Law Review Article 2A Symposium occasioned these amendments. The current formulation requires only that the lessor make "a reasonable effort to dispose of" the goods. The penalty for the lessor's failure to act in that reasonable manner is denial of damages as described in subsection (1)(b).

K. Protection of Lessor's Residual Interest

Perhaps not unrelated to the issues presented in the preceding section regarding damages is the issue of the lessee's duty to protect the lessor's residual interest in the leased goods. It is, after all, the lessor's residual interest that is at risk when the lessor is required to mitigate by selling or reletting the lease property. There was originally no uniform provision that specifically formulated a lessee's duty to protect the lessor's residual interest, nor was there a provision that provided that the lessee's compromise of the lessor's residual interest would constitute an event of default, absent such provision in the lease agreement. It is, of course, true that carefully drafted lease agreements should provide just such a lessee duty and event of default.

266. Id. comment 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 unavailable 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 a reasonable effort." (emphasis added)).
267. Id. § 2A-529 comment 1 ("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.").
The California draft of the version of Article 2A incorporates a provision concerning the lessor’s residual interest, and that provision has now been incorporated into the 1990 Uniform Amendments, as well as by the Alabama Committee:

§ 2A-532. LESSOR’S RIGHTS TO RESIDUAL INTEREST

In addition to any other recovery permitted by this Article or other law, the lessor may recover from the lessee an amount that will fully compensate the lessor for any loss of or damage to the lessor’s residual interest in the goods caused by the default of the lessee.269

IV. Conclusion

This Article has endeavored to familiarize the Alabama commercial bar with the current contours of personal property lease law in this state, and to acquaint the practitioner with the progress of the Alabama Article 2A Committee’s deliberations. It has described the sources of the status quo, and has suggested the need for comprehensive codification in this area of the commercial law.

The authors hope that progress on this project will continue apace and culminate, in the not-too-distant future, in the type of coherent personal property lease law that will serve the interests of all Alabama constituencies. Further, by striking the appropriate balance between the needs of this state and the systemic goals of uniformity, enactment of an Alabama version of Article 2A will enhance the practice of commercial law in Alabama and thereby encourage national, as well as international, interests to enter into lease transactions governed by the new Alabama statute.

269. U.C.C. § 2A-532 (1990); DRAFT ALA. CODE § 7-2A-532 (1990); CAL. COM. CODE ANN. § 10532 (West 1990); see also CALIFORNIA REPORT, supra note 186, at 1045-46.