

**TITLE XXVI**  
**UNIFORM COMMERCIAL CODE**

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**CHAPTER 1  
UNIFORM COMMERCIAL CODE; GENERAL PROVISIONS**

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## PART 1

### SHORT TITLE, CONSTRUCTION, APPLICATION AND SUBJECT MATTER OF THE ACT

#### §26-1-101 Short Title

Chapters 1 through 10 of this title shall be known and may be cited as Uniform Commercial Code.

#### §26-1-102 Purposes; Rules of Construction; Variation by Agreement

- (1) This code shall be liberally construed and applied to promote its underlying purposes and policies.
- (2) Underlying purposes and policies of this code are:
  - (a) to simplify, clarify and modernize the law governing commercial transactions;
  - (b) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties; and
  - (c) to make uniform the law among the various jurisdictions.
- (3) The effect of provisions of this code may be varied by agreement, except as otherwise provided in this code and except that the obligations of good faith, diligence, reasonableness and care prescribed by this code may not be disclaimed by agreement but the parties may by agreement determine the standards by which the performance of such obligations is to be measured if such standards are not manifestly unreasonable.
- (4) The presence in certain provisions of this code of the words “unless otherwise agreed” or words of similar import does not imply that the effect of other provisions may not be varied by agreement under 26-1-102(3)
- (5) In this code unless the context otherwise requires:
  - (a) words in the singular number include the plural, and in the plural include the singular;
  - (b) words of the masculine gender include the feminine and the neuter, and when the sense so indicate words of the neuter gender may refer to any gender.
- (6) For any reference to a section of the Uniform Commercial Code which has not been adopted in the Choctaw Tribal code, the section as adopted by the State of Mississippi shall apply.
- (7) Unless otherwise specifically stated, any references to regulations of the Secretary of State of the State of Mississippi is to be used for guidance only and this code does not adopt

existing or future regulations of the Secretary of State of the State of Mississippi as controlling or mandatory.

**§26-1-103      Supplementary General Principles of Law Applicable**

Unless displaced by the particular provisions of this code, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake bankruptcy, or other validating or invalidating cause shall supplement its provisions.

**§26-1-104      Construction Against Implicit Repeal**

This code being a general act intended as a unified coverage of its subject matter, no part of it shall be deemed to be impliedly repealed by subsequent legislation if such construction can reasonably be avoided.

**§26-1-105      Territorial Application of the Code; Parties' Power to Choose Applicable Law**

(1) Except as provided hereafter in this section, when a transaction bears a reasonable relation to this jurisdiction and also to another state or nation the parties may agree that the law either of this jurisdiction or of such other state or nation shall govern their rights and duties. Failing such agreement, this code applies to transactions bearing an appropriate relation to this jurisdiction. Provided, however, the law of the Mississippi Band of Choctaw Indians shall always govern the rights and duties of the parties in regard to disclaimers of implied warranties of merchantability or fitness, limitations of remedies for breaches of implied warranties of merchantability of fitness, or the necessity for privity of contract to maintain a civil action for breach of implied warranties of merchantability or fitness notwithstanding any agreement by the parties that the laws of some other state or nation shall govern the rights and duties of the parties.

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

Rights of Creditors Against Sold Goods (§26-2-402).  
Applicability of the Chapter on Leases (§§26-2A-105 and 26-2A-106).  
Letters of Credit (§26-5-116).  
Perfection Provisions of the Chapter on Secured Transactions (§26-9-103).

**§26-1-106      Remedies to Be Liberally Administered**

(1) The remedies provided by this code shall be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed but neither consequential or special nor penal damages may be had except as specifically provided in this code or by other rule of law.

(2) Any right or obligation declared by this code is enforceable by action unless the provision declaring it specifies a different and limited effect.

**§26-1-107      Waiver or Renunciation of Claim or Right After Breach**

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

**§26-1-108      Severability**

If any provision or clause of this code or application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the code which can be given effect without the invalid provision or application, and to this end the provisions of this code are declared to be severable.

**§26-1-109      Section Captions**

Section captions are parts of this code.

**§26-1-110      Captions in Supplement; Interpretation [Abrogated]**

## PART 2

### GENERAL DEFINITIONS AND PRINCIPLES OF INTERPRETATION

#### §26-1-201 General Definitions

Subject to additional definitions contained in the subsequent chapters of this code which are applicable to specific chapters or parts thereof, and unless the context otherwise requires, in this code:

- (1) “Action” in the sense of a judicial proceeding includes recoupment, counterclaim, setoff, suit in equity and any other proceedings in which rights are determined.
- (2) “Aggrieved party” means a party entitled to resort to a remedy.
- (3) “Agreement” means the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance as provided in this code (§§26-1-205 and 26-2-208). Whether an agreement has legal consequences is determined by the provisions of this code, if applicable; otherwise by the law of contacts (§26-1-103). (Compare “Contract.”)
- (4) “Bank” means any person engaged in the business of banking.
- (5) “Bearer” means the person in possession of an instrument, document of title, or certificated security payable to bearer or endorsed in blank.
- (6) “Bill of Lading” means a document evidencing the receipt of goods for shipment issued by a person engaged in the business of transportation or forwarding goods, and includes an airbill. “Airbill” means a document serving for air transportation as a bill of lading does for marine or rail transportation, and includes an air consignment note or air waybill.
- (7) “Branch” includes a separately incorporated foreign branch of a bank.
- (8) “Burden of establishing” a fact means the burden of persuading the triers of fact that the existence of the fact is more probable than its nonexistence.
- (9) “Buyer in Ordinary Course of Business” means a person who in good faith and without knowledge that the sale to him is in violation of the ownership rights or security interest of a third party in the goods buys in ordinary course from a person in the business of selling goods of that kind but does not include a pawnbroker. All persons who sell minerals or the like (including oil and gas) at wellhead or minehead shall be deemed to be persons in the business of selling goods of that kind. “Buying” may be for cash or by exchange of other property or on secured or unsecured credit and includes receiving goods or documents of title under a pre-existing contract for sale but does not include a transfer in bulk or as security for or in total or partial satisfaction of a money debt.
- (10) “Conspicuous” A term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. A printed heading in capitals (as: NONNEGOTIABLE BILL OF LADING) is conspicuous. Language in the body of a form is “Conspicuous” if it is in larger or other contrasting type or color. But in

a telegram any stated term is “conspicuous.” Whether a term or clause is “conspicuous” or not is for decision by the court.

- (11) “Contract” means the total legal obligation which results from the parties’ agreement as affected by this code and any other applicable rules of law. (Compare “Agreement.”)
- (12) “Creditor” includes a general creditor, a secured creditor, a lien creditor and any representative of creditors, including an assignee for the benefit of creditors, a trustee in bankruptcy, a receiver in equity and an executor or administrator of an insolvent debtor’s or assignor’s estate.
- (13) “Defendant” includes a person in the position of defendant in a cross-action or counterclaim.
- (14) “Delivery” with respect to instruments, documents of title, chattel paper, or certificated securities means voluntary transfer of possession.
- (15) “Document of Title” includes bill of lading, dock warrant, dock receipt, warehouse receipt or order for the delivery of goods, and also any other document which in the regular course of business or financing is treated as adequately evidencing that the person in possession of it is entitled to receive, hold and dispose of the document and the goods it covers. To be a document of title a document must purport to be issued by or addressed to a bailee and purport to cover goods in the bailee’s possession which are either identified or are fungible portions of an identified mass.
- (16) “Fault” means wrongful act, omission or breach.
- (17) “Fungible” with respect to goods or securities means goods or securities of which any unit is, by nature or usage of trade, the equivalent of any other like unit. Goods which are not fungible shall be deemed fungible for the purposes of this code to the extent that under a particular agreement or document unlike units are treated as equivalents.
- (18) “Genuine” means free of forgery or counterfeiting.
- (19) “Good Faith” means honesty in fact in the conduct or transaction concerned.
- (20) “Holder,” with respect to a negotiable instrument, means the person in possession if the instrument is payable to bearer or, in the case of an instrument payable to an identified person, if the identified person is in possession. “Holder,” with respect to a document of title, means the person in possession if the goods are deliverable to bearer or to the order of the person in possession.
- (21) To “honor” is to pay or to accept and pay, or where a credit so engages to purchase or discount a draft complying with the terms of the credit.
- (22) “Insolvency proceedings” includes any assignment for the benefit of creditors or other proceedings intended to liquidate or rehabilitate the estate of the person involved.
- (23) A person is “insolvent” who either has ceased to pay his debts in the ordinary course of business or cannot pay his debts as they become due or is insolvent within the meaning of the federal bankruptcy law.

- (24) “Money” means a medium of exchange authorized or adopted by a domestic or foreign government and includes a monetary unit of account established by an intergovernmental organization or by agreement between two (2) or more nations.
- (25) A person has “notice” of a fact when:
- (a) he has actual knowledge of it; or
  - (b) he has received a notice of notification of it; or
  - (c) from all the facts and circumstances known to him at the time in questions he has reason to know that it exists.

A person “knows” or has “knowledge” of a fact when he has actual knowledge of it. “Discover” or “learn” or a word or phrase of similar import refers to knowledge rather than to reason to know. The time and circumstances under which a notice or notification may cease to be effective are not determined by this code.

- (26) A person “notifies” or “gives” a notice of notification to another by taking such steps as may be reasonably required to inform the other in ordinary course whether or not such other actually comes to know of it. A person “receives” a notice or notification when:
- (a) it comes to his attention; or
  - (b) it is duly delivered at the place of business through which the contract was made or at any other place held out by him as the place for receipt of such communications.
- (27) Notice, knowledge or a notice or notification received by an organization is effective for a particular transaction from the time when it is brought to the attention of the individual conducting that transaction, and in any event from the time when it would have been brought to his attention if the organization had exercised due diligence. An organization exercises due diligence if it maintains reasonable routines for communicating significant information to the person conducting the transaction and there is reasonable compliance with the routines. Due diligence does not require an individual acting for the organization to communicate information unless such communication is part of his regular duties or unless he has reason to know of the transaction and that the transaction would be materially affected by the information.
- (28) “Organization” includes a corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership or association, two (2) or more persons having a joint or common interest, or any other legal or commercial entity.
- (29) “Party,” as distinct from “third party,” means a person who has engaged in a transaction or made an agreement within this code.
- (30) “Person” includes an individual or an organization (§26-1-102).

- (31) “Presumption” or “presumed” means that the trier of fact must find the existence of the fact presumed unless and until evidence is introduced which would support a finding of its nonexistence.
- (32) “Purchase” includes taking by sale, discount, negotiation, mortgage, pledge, lien, issue or reissue, gift or any other voluntary transaction creating an interest in property.
- (33) “Purchaser” means a person who takes by purchase.
- (34) “Remedy” means any remedial right to which an aggrieved party is entitled with or without resort to a tribunal.
- (35) “Representative” includes an agent, an officer of a corporation or association, and a trustee, executor or administrator of an estate, or any other person empowered to act for another.
- (36) “Rights” includes remedies.
- (37) “Security interest” means an interest in personal property or fixtures which secures payment or performance of an obligation.
  - (a) The retention or reservation of title by a seller of goods notwithstanding shipment or delivery to the buyer (§26-2-401) is limited in effect to a reservation of a “security interest.” The term also includes any interest of a buyer of accounts or chattel paper which is subject to Chapter 9. The special property interest of a buyer of goods on identification of such goods to a contract for sale under §26-2-401 is not a “security interest,” but a buyer may also acquire “security interest,” by complying with Chapter 9. Unless a consignment is intended as security, reservation of title thereunder is not a “security interest” but a consignment is in any event subject to the provisions on consignment sales (§26-2-326).
  - (b) Whether a transaction creates a lease or security interest is determined by the facts of each case; however, a transaction creates a security interest if the consideration the lessee is to pay the lessor for the right to possession and use of the goods is an obligation for the term of the lease not subject to termination by the lessee, and:
    - (i) the original term of the lease is equal to or greater than the remaining economic life of the goods,
    - (ii) the lessee is bound to renew the lease for the remaining economic life of the goods or is bound to become the owner of the goods,
    - (iii) the lessee has an option to renew the lease for the remaining economic life of the goods for no additional consideration or nominal additional consideration upon compliance with the lease agreement, or
    - (iv) the lessee has an option to become the owner of the goods for no additional consideration or minimal additional consideration upon compliance with the lease agreement.

- (c) A transaction does not create a security interest merely because it provides that:
- (i) the present value of the consideration the lessee is obligated to pay the lessor for the right to possession and use of the goods is substantially equal to or is greater than the fair market value of the goods at the time the lease is entered into,
  - (ii) the lessee assumes risk of loss of the goods, or agrees to pay taxes, insurance, filing, recording, or registration fees, or service or maintenance costs with respect to the goods,
  - (iii) the lessee has an option to renew the lease or to become the owner of the goods,
  - (iv) the lessee has an option to renew the lease for a fixed rent that is equal to or greater than the reasonably predictable fair market rent for the use of the goods for the term of the renewal at the time the option is to be performed, or
  - (v) the lessee has an option to become the owner of the goods for a fixed price that is equal to or greater than the reasonably predictable fair market value of the goods at the time the option is to be performed.
- (d) For purposes of this 26-1-201(37):
- (i) Additional consideration is not nominal if:
    - (1) when the option to renew the lease is granted to the lessee the rent is stated to be the fair market rent for the use of the goods for the term of the renewal determined at the time the option is to be performed, or
    - (2) when the option to become the owner of the goods is granted to the lessee the price is stated to be the fair market value of the goods determined at the time the option is to be performed. Additional consideration is nominal if it is less than the lessee's reasonably predictable cost of performing under the lease agreement if the option is not exercised;
  - (ii) "Reasonably predictable" and "Remaining Economic Life of the Goods" are to be determined with reference to the fact and circumstances at the time the transaction is entered into; and
  - (iii) "Present Value" means the amount as of a date certain of one or more sums payable in the future, discounted to the date certain. The discount is determined by the interest rate specified by the parties if the rate is not manifestly unreasonable at the time the transaction is entered into; otherwise, the discount is determined by a commercially reasonable rate that takes into account the facts and circumstances of each case at the time the transaction was entered into.

- (38) “Send” in connection with any writing or notice means to deposit in the mail or deliver for transmission by any other usual means of communication with postage or cost of transmission provided for and properly addressed and in the case of an instrument to an address specified thereon or otherwise agreed, or if there be none to any address reasonable under the circumstances. The receipt of any writing or notice within the time at which it would have arrived if properly sent has the effect of a proper sending.
- (39) “Signed” includes any symbol executed or adopted by a party with present intention to authenticate a writing.
- (40) “Surety” includes guarantor.
- (41) “Telegram” includes a message transmitted by radio, teletype, cable, any mechanical method of transmission, or the like.
- (42) “Term” means that portion of an agreement which relates to a particular matter.
- (43) “Unauthorized” signature means one made without actual, implied, or apparent authority and includes a forgery.
- (44) “Value” except as otherwise provided with respect to negotiable instruments and bank collections a person gives “Value” for rights if he acquires them:
  - (a) In return for a binding commitment to extend credit or for the extension of immediately available credit whether or not drawn upon and whether or not a charge-back is provided for in the event of difficulties in collection; or
  - (b) As security for or in total or partial satisfaction of a pre-existing claim; or
  - (c) By accepting delivery pursuant to a pre-existing contract for purchase; or
  - (d) Generally, in return for any consideration sufficient to support a simple contract.
- (45) “Warehouse Receipt” means a receipt issued by a person engaged in the business of storing goods for hire.
- (46) “Written” or “Writing” includes printing, typewriting, or any other intentional reduction to tangible form.

**§26-1-202 Prima Facie Evidence by Third Party Documents**

A document in due form purporting to be a bill of lading, policy or certificate of insurance, official weigher’s or inspector’s certificate, consular invoice, or any other document authorized or required by the contract to be issued by a third party shall be prima facie evidence of its own authenticity and genuineness and of the fact stated in the document by the third party.

**§26-1-203 Obligation of Good Faith**

Every contract or duty within this code imposes an obligation of good faith in its performance or enforcement.

**§26-1-204 Time; Reasonable Time; “Seasonably”**

- (1) Whenever this code requires any action to be taken within a reasonable time, any time which is not manifestly unreasonable may be fixed by agreement.
- (2) What is a reasonable time for taking any action depends on the nature, purpose and circumstances of such action.
- (3) An action is taken “seasonably” when it is taken at or within the time agreed or if no time is agreed at or within a reasonable time.

**§26-1-205 Course of Dealing and Usage of Trade**

- (1) A course of dealing is a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.
- (2) A usage of trade is any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify any expectation that it will be observed with respect to the transaction in question. The existence and scope of such usage are to be proved as facts. If it is established that such a usage is embodied in a written trade code or similar writing the interpretation of the writing is for the court.
- (3) A course of dealing between parties and any usage of trade in the vocation or trade in which they are engaged or of which they are or should be aware give particular meaning to and supplement or qualify terms of an agreement.
- (4) The express terms of an agreement and an applicable course of dealing or usage of trade shall be construed wherever reasonable as consistent with each other; but when such construction is unreasonable, express terms control both course of dealing and usage of trade and course of dealing controls usage of trade.
- (5) An applicable usage of trade in the place where any part of performance is to occur shall be used in interpreting the agreement as to that part of the performance.
- (6) Evidence of relevant usage of trade offered by one party is not admissible unless and until he has given the other party such notice as the court finds sufficient to prevent unfair surprise to the latter.

**§26-1-206 Statute of Frauds for Kinds of Personal Property Not Otherwise Covered**

- (1) Except in the cases described 26-1-206(2), a contract for the sale of personal property is not enforceable by way of action or defense beyond five thousand dollars (\$5,000.00) in amount or value of remedy unless there is some writing which indicates that a contract for sale has been made between the parties at a defined or stated price, reasonably identifies the subject matter, and is signed by the party against whom enforcement is sought or by his authorized agent.

- (2) 26-1-206(1) of this section does not apply to contracts for the sale of goods (§26-2-201) nor to security agreements (§26-9-203).

**§26-1-207 Performance of Acceptance Under Reservation of Rights**

- (1) A party who, with explicit reservation of rights, performs or promises performance or assents to performance in a manner demanded or offered by the other party does not thereby prejudice the rights reserved. Such words as “without prejudice,” “under protest” or the like are sufficient.
- (2) 26-1-207(1) does not apply to an accord and satisfaction.

**§26-1-208 Option to Accelerate at Will**

A term providing that one party or his successor in interest may accelerate payment or performance or require collateral or additional collateral “at will” or “when he deems himself insecure” or in words of similar import shall be construed to mean that he shall have power to do so only if he in good faith believes that the prospect of payment or performance is impaired. The burden of establishing lack of good faith is on the party against whom the power has been exercised.

## **CHAPTER 2 UNIFORM COMMERCIAL CODE; SALES**

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## PART 1

### SHORT TITLE, GENERAL CONSTRUCTION AND SUBJECT MATTER

#### §26-2-101 Short Title

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

#### §26-2-102 Scope; Certain Security and Other Transactions Excluded From This Chapter

Unless the context otherwise requires, this chapter applies to transactions in goods; it does not apply to any transaction which although in the form of an unconditional contract to sell or present sale is intended to operate only as a security transaction nor does this Chapter impair or repeal any statute regulating sales to consumers, farmers or other specified classes of buyers.

#### §26-2-103 Definitions and Index of Definitions

- (1) In this Chapter unless the context otherwise requires:
  - (a) “Buyer” means a person who buys or contracts to buy goods.
  - (b) “Good Faith” in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.
  - (c) “Receipt” of goods means taking physical possession of them.
  - (d) “Seller” means a person who sells or contracts to sell goods.
- (2) Other definitions applying to this chapter or to specified parts thereof, and the sections in which they appear are:

“Acceptance.” §26-2-606  
“Banker’s Credit.” §26-2-325  
“Between Merchants.” §26-2-104  
“Cancellation.” §26-2-106(4)  
“Commercial Unit.” §26-2-105  
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“Entrusting.” §26-2-403  
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“Identification.” §26-2-501  
“Installment Contract.” §26-2-612  
“Letter of Credit.” §26-2-325  
“Lot.” §26-2-105

“Merchant.” §26-2-104  
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“Person in Position of Seller.” §26-2-707  
“Present Sale.” §26-2-106  
“Sale.” §26-2-106  
“Sale on Approval.” §26-2-326  
“Sale or Return.” §26-2-326  
“Termination.” §26-2-106

- (3) The following definitions in other chapters or from the Mississippi Code of 1972, as amended, apply to this chapter:

“Check.” See Miss. Code Ann. §75-3-104  
“Consignee.” §26-7-102  
“Consignor.” §26-7-102  
“Consumer Goods.” §26-9-109  
“Dishonor.” See Miss. Code Ann. §75-3-507  
“Draft.” See Miss. Code Ann. §75-3-104

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

**§26-2-104 Definitions: “Merchant”; “Between Merchants”; “Financing Agency”**

- (1) “Merchant” means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.
- (2) “Financing Agency” means a bank, finance company or other person who in the ordinary course of business makes advances against goods or documents of title or who by arrangement with either the seller or the buyer intervenes in ordinary course to make or collect payment due or claimed under the contract for sale, as by purchasing or paying the seller’s draft or making advances against it or by merely taking it for collection whether or not documents of title accompany the draft. “Financing Agency” includes also a bank or other person who similarly intervenes between persons who are in the position of seller and buyer in respect to the goods (§26-2-707).
- (3) “Between Merchants” means in any transaction with respect to which both parties are chargeable with the knowledge or skill of merchants.

**§26-2-105 Definitions: Transferability; “Goods”; “Future Goods”; “Lot”; “Commercial Unit”**

- (1) “Goods” means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Chapter 8 of Uniform Commercial Code – not adopted) and things in action. “Goods” also includes the unborn young of animals and growing

crops and other identified things attached to realty as described in the section on goods to be severed from realty (§26-2-107).

- (2) Goods must be both existing and identified before any interest in them can pass. Goods which are not both existing and identified are “Future Goods.” A purported present sale of future goods or of any interest therein operates as a contract to sell.
- (3) There may be a sale of a part interest in existing identified goods.
- (4) An undivided share in an identified bulk of fungible goods is sufficiently identified to be sold although the quantity of the bulk is not determined. Any agreed proportion of such a bulk or any quantity thereof agreed upon by number, weight or other measure may to the extent of the seller’s interest in the bulk be sold to the buyer who then becomes an owner in common.
- (5) “Lot” means a parcel or a single article which is the subject matter of a separate sale or delivery, whether or not it is sufficient to perform the contract.
- (6) “Commercial Unit” means such a unit of goods as by commercial usage is a single whole for purposes of sale and division of which materially impairs its character or value on the market or in use. A commercial unit may be a single article (as a machine) or a set of articles (as a suite of furniture or an assortment of sizes) or a quantity (as a bale, gross, or carload) or any other unit treated in use or in the relevant market as a single whole.

**§26-2-106 Definitions: “Contract”; “Agreement”; “Contract for Sale”; “Sale”; “Present Sale”; “Conforming to Contract”; “Termination”; “Cancellation”**

- (1) In this chapter unless the context otherwise requires “Contract” and “Agreement” are limited to those relating to the present or future sale of goods. “Contract For Sale” includes both a present sale of goods and a contract to sell goods at a future time. A “Sale” consists in the passing of title from the seller to the buyer for a price (§26-2-401). A “Present Sale” means a sale which is accomplished by the making of the contract.
- (2) Goods or conduct including any part of a performance are “Conforming” or “Conform to the Contract” when they are in accordance with the obligations under the contract.
- (3) “Termination” occurs when either party pursuant to a power created by agreement or law puts an end to the contract otherwise than for its breach. On “Termination” all obligations which are still executory on both sides are discharged but any right based on prior breach or performance survives.
- (4) “Cancellation” occurs when either party puts an end to the contract for breach by the other and its effect is the same as that of “Termination” except that the canceling party also retains any remedy for breach of the whole contract or any unperformed balance.

**§26-2-107 Goods to be Severed From Realty: Recording**

- (1) A contract for the sale of minerals or the like (including oil and gas) or a structure or its materials to be removed from realty is a contract for the sale of goods within this Chapter if they are to be severed by the seller but until severance a purported present sale thereof

which is not effective as a transfer of an interest in land is effective only as a contract to sell.

- (2) A contract for the sale apart from the land of growing crops or other things attached to realty and capable of severance without material harm thereto but not described in §26-2-107(1) or of timber to be cut is a contract for the sale of goods within this Chapter whether the subject matter is to be severed by the buyer or by the seller even though it forms part of the realty at the time of contracting, and the parties can by identification effect a present sale before severance.
- (3) The provisions of this section are subject to any third party rights provided by the law relating to realty records, and the contract for sale may be executed and recorded as a document transferring an interest in land and shall then constitute notice to third parties of the buyer's rights under the contract for sale.

## PART 2

### FORM, FORMATION AND READJUSTMENT OF CONTRACT

#### §26-2-201 **Formal Requirements; Statute of Frauds**

- (1) Except as otherwise provided in this section, a contract for the sale of goods for the price of five hundred dollars (\$500.00) or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing.
- (2) Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of §26-2-201(1) against such party unless written notice of objection to its contents is given within ten (10) days after it is received.
- (3) A contract which does not satisfy the requirements of §26-2-201 (1) but which is valid in other respects is enforceable:
  - (a) if the goods are to be specially manufactured for the buyer and are not suitable for sale to others in the ordinary course of the seller's business and the seller, before notice of repudiation is received and under circumstances which reasonably indicate that the goods are for the buyer, has made either a substantial beginning of their manufacture or commitments for their procurement; or
  - (b) if the party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract for sale was made, but the contract is not enforceable under this provision beyond the quantity of goods admitted; or
  - (c) with respect to goods for which payment has been made and accepted or which have been received and accepted (§26-2-606).

#### §26-2-202 **Final Written Expression: Parol or Extrinsic Evidence**

- (1) Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented:
  - (a) by course of dealing or usage of trade §26-1-205 or by course of performance §26-2-208; and
  - (b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

**§26-2-203      Seals Inoperative**

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

**§26-2-204      Formation in General**

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

**§26-2-205      Firm Offers**

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

**§26-2-206      Offer and Acceptance in Formation of Contract**

- (1) Unless otherwise unambiguously indicated by the language or circumstances:
  - (a) an offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances;
  - (b) an order or other offer to buy goods for prompt or current shipment shall be construed as inviting acceptance either by a prompt promise to ship or by the prompt or current shipment of conforming or nonconforming goods, but such a shipment of nonconforming goods does not constitute an acceptance if the seller seasonably notifies the buyer that the shipment is offered only as an accommodation to the buyer.
- (2) Where the beginning of a requested performance is a reasonable mode of acceptance, an offeror who is not notified of acceptance within a reasonable time may treat the offer as having lapsed before acceptance.

**§26-2-207      Additional Terms in Acceptance or Confirmation**

- (1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional

to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

- (2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:
  - (a) the offer expressly limits acceptance to the terms of the offer;
  - (b) they materially alter it; or
  - (c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.
- (3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this code.

**§26-2-208 Course of Performance or Practical Construction**

- (1) Where the contract for sale involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection shall be relevant to determine the meaning of the agreement.
- (2) The express terms of the agreement and any such course of performance, as well as any course of dealing and usage of trade, shall be construed whenever reasonable as consistent with each other; but when such construction is unreasonable, express terms shall control course of performance and course of performance shall control both course of dealing and usage of trade (§26-1-205.)
- (3) Subject to the provisions of §26-2-209 on modification and waiver, such course of performance shall be relevant to show a waiver or modification of any term inconsistent with such course of performance.

**§26-2-209 Modification, Rescission and Waiver**

- (1) An agreement modifying a contract within this Chapter needs no consideration to be binding.
- (2) A signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded, but except as between merchants such a requirement on a form supplied by the merchant must be separately signed by the other party.
- (3) The requirements of the statute of frauds section of this Chapter §26-2-201 must be satisfied if the contract as modified is within its provisions.

- (4) Although an attempt at modification or rescission does not satisfy the requirements of §26-2-209(2) or (3) it can operate as a waiver.
- (5) A party who has made a waiver affecting an executory portion of the contract may retract the waiver by reasonable notification received by the other party that strict performance will be required of any term waived, unless the retraction would be unjust in view of a material change of position in reliance on the waiver.

**§26-2-210 Delegation of Performance; Assignment of Rights**

- (1) A party may perform this duty through a delegate unless otherwise agreed or unless the other party has a substantial interest in having his original promisor perform or control the acts required by the contract. No delegation of performance relieves the party delegating of any duty to perform or any liability for breach.
- (2) Unless otherwise agreed all rights of either seller or buyer can be assigned except where the assignment would materially change the duty of the other party, or increase materially the burden or risk imposed on him by his contract, or impair materially his chance of obtaining return performance. A right to damages for breach of the whole contract or a right arising out of the assignor's due performance of his entire obligation can be assigned despite agreement otherwise.
- (3) Unless the circumstances indicate the contrary a prohibition of assignment of "the Contract" is to be construed as barring only the delegation to the assignee of the assignor's performance.
- (4) An assignment of "the Contract" or of "All My Rights Under the Contract" or an assignment in similar general terms is an assignment of rights and unless the language or the circumstances, (as in an assignment for security), indicate the contrary, it is a delegation of performance of the duties of the assignor and its acceptance by the assignee constitutes a promise by him to perform those duties. This promise is enforceable by either the assignor or the other party to the original contract.
- (5) The other party may treat any assignment which delegates performance as creating reasonable grounds for insecurity and may without prejudice to his rights against the assignor demand assurances from the assignee [§26-2-609].

## **PART 3**

### **GENERAL OBLIGATION AND CONSTRUCTION OF CONTRACT**

#### **§26-2-301 General Obligations of Parties**

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

#### **§26-2-302 Unconscionable Contract or Clause**

- (1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.
- (2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

#### **§26-2-303 Allocation or Division of Risks**

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

#### **§26-2-304 Price Payable in Money, Goods, Realty, or Otherwise**

- (1) The price can be made payable in money or otherwise. If it is payable in whole or in part in goods each party is a seller of the goods which he is to transfer.
- (2) Even though all or part of the price is payable in an interest in realty the transfer of the goods and the seller’s obligations with reference to them are subject to this chapter, but not the transfer of the interest in realty or the transferor’s obligations in connection therewith.

#### **§26-2-305 Open Price Term**

- (1) The parties if they so intend can conclude a contract for sale even though the price is not settled. In such a case the price is a reasonable price at the time for delivery if:
  - (a) nothing is said as to price; or
  - (b) the price is left to be agreed by the parties and they fail to agree; or
  - (c) the price is to be fixed in terms of some agreed market or other standard as set or recorded by a third person or agency and it is not so set or recorded.
- (2) A price to be fixed by the seller or by the buyer means a price for him to fix in good faith.

- (3) When a price left to be fixed otherwise than by agreement of the parties fails to be fixed through fault of one party the other may at his option treat the contract as cancelled or himself fix a reasonable price.
- (4) Where, however, the parties intend not to be bound unless the price be fixed or agreed and it is not fixed or agreed there is no contract. In such a case the buyer must return any goods already received or if unable so to do must pay their reasonable value at the time of delivery and the seller must return any portion of the price paid on account.

**§26-2-306 Output, Requirements and Exclusive Dealings**

- (1) A term which measures the quantity by the output of the seller or the requirements of the buyer means such actual output or requirements as may occur in good faith, except that no quantity unreasonably disproportionate to any stated estimate or in the absence of a stated estimate to any normal or otherwise comparable prior output or requirements may be tendered or demanded.
- (2) A lawful agreement by either the seller or the buyer for exclusive dealing in the kind of goods concerned imposes unless otherwise agreed an obligation by the seller to use best efforts to supply the goods and the buyer to use best efforts to promote their sale.

**§26-2-307 Delivery in Single Lot or Several Lots**

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

**§26-2-308 Absence of Specified Place for Delivery**

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

**§26-2-309 Absence of Specific Time Provisions; Notice of Termination**

- (1) The time for shipment or delivery or any other action under a contract if not provided in this Chapter or agreed upon shall be a reasonable time.
- (2) Where the contract provides for successive performances but is indefinite in duration it is valid for a reasonable time but unless otherwise agreed may be terminated at any time by either party.

- (3) Termination of a contract by one party except on the happening of an agreed event requires that reasonable notification be received by the other party and an agreement dispensing with notification is invalid if its operation would be unconscionable.

**§26-2-310 Open Time for Payment or Running of Credit; Authority to Ship under Reservation**

- (1) Unless otherwise agreed:
  - (a) payment is due at the time and place at which the buyer is to receive the goods even though the place of shipment is the place of delivery; and
  - (b) if the seller is authorized to send the goods he may ship them under reservation, and may tender the documents of title, but the buyer may inspect the goods after their arrival before payment is due unless such inspection is inconsistent with the terms of the contract (§26-2-513); and
  - (c) if delivery is authorized and made by way of documents of title otherwise than by §26-2-310(1)(b) then payment is due at the time and place at which the buyer is to receive the documents regardless of where the goods are to be received; and
  - (d) where the seller is required or authorized to ship the goods on credit the credit period runs from the time of shipment but postdating the invoice or delaying its dispatch will correspondingly delay the starting of the credit period.

**§26-2-311 Options and Cooperation Respecting Performance**

- (1) An agreement for sale which is otherwise sufficiently definite (§26-2-204(3)) to be a contract is not made invalid by the fact that it leaves particulars of performance to be specified by one of the parties. Any such specification must be made in good faith and within limits set by commercial reasonableness.
- (2) Unless otherwise agreed specifications relating to assortment of the goods are at the buyer's option and except as otherwise provided in §26-2-319(1)(c) and (3) of §26-2-319 specifications or arrangements relating to shipment are at the seller's option.
- (3) Where such specification would materially affect the other party's performance but is not seasonably made or where one party's cooperation is necessary to the agreed performance of the other but is not seasonably forthcoming, the other party in addition to all other remedies:
  - (a) is excused for any resulting delay in his own performance; and
  - (b) may also either proceed to perform in any reasonable manner or after the time for a material part of his own performance treat the failure to specify or to cooperate as a breach by failure to deliver or accept the goods.

**§26-2-312 Warranty of Title and Against Infringement; Buyer's Obligation Against Infringement**

- (1) Subject to §26-2-312 (2) there is in a contract for sale a warranty by the seller that:
  - (a) the title conveyed shall be good, and its transfer rightful; and
  - (b) the goods shall be delivered free from any security interest or other lien or encumbrance of which the buyer at the time of contracting has no knowledge.
- (2) A warranty under §26-2-312 (1) will be excluded or modified only by a specific language or by circumstances which give the buyer reason to know that the person selling does not claim title in himself or that he is purporting to sell only such right or title as he or a third person may have.
- (3) Unless otherwise agreed a seller who is a merchant regularly dealing in goods of the kind warrants that the goods shall be delivered free of the rightful claim of any third person by way of infringement or the like but a buyer who furnishes specifications to the seller must hold the seller harmless against any such claim which arises out of compliance with the specifications.

**§26-2-313 Express Warranties by Affirmation, Promise, Description, Sample**

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

**§26-2-314 Implied Warranty: Merchantability; Usage of Trade**

- (1) Except as provided in §26-2-314 (5), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.
- (2) Goods to be merchantable must be at least such as:
  - (a) pass without objection in the trade under the contract description; and

- (b) in the case of fungible goods, are of fair average quality within the description; and
  - (c) are fit for the ordinary purposes for which such goods are used; and
  - (d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
  - (e) are adequately contained, packaged and labeled as the agreement may require; and
  - (f) conform to the promises or affirmations of fact made on the container or label, if any.
- (3) Other implied warranties may arise from course of dealing or usage of trade.
  - (4) With respect to the sale of cattle, hogs and sheep, there shall be no implied warranty that the cattle, hogs and sheep are free from sickness or disease at the time the sale is consummated, conditioned upon reasonable showing by the seller or his agent that all state, federal or Tribal regulations pertaining to animal health were complied with.
  - (5) Nothing in this section shall prohibit the express disclaimer or express modification of any implied warranties of merchantability or any express limitation of remedies for breach of such warranties concerning computer hardware, computer software, and services performed on computer hardware and computer software, which are sold between merchants.

**§26-2-315 Implied Warranty: Fitness for Particular Purpose**

Except as otherwise provided in this section, 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 an implied warranty that the goods shall be fit for such purpose. Provided, however, with respect to the sale of cattle, hogs and sheep, there shall be no implied warranty that the cattle, hogs and sheep are free from sickness or disease at the time the same is consummated, conditioned upon reasonable showing by the seller or his agent that all state and Tribal regulations pertaining to animal health were complied with.

Nothing in this section shall prohibit the express disclaimer or express modification of any implied warranties of fitness for a particular purpose or any express limitation of remedies for breach of such warranties concerning computer hardware, computer software, and services performed on computer hardware and computer software, which are sold between merchants.

**§26-2-315.1 Exclusion or Modification of Consumer Warranties; Unenforceability**

- (1) Any oral or written language used by a seller of consumer goods and services, which attempts to exclude or modify any implied warranties of merchantability and fitness for a particular purpose or to exclude or modify the consumer's remedies for breach of those warranties, is unenforceable. However, the seller may recover from the manufacturer any damages resulting from breach of the implied warranty of merchantability or fitness for a particular purpose.

(2) Any oral or written language used by a manufacturer of consumer goods, which attempts to limit or modify a consumer's remedies for breach of the manufacturer's express warranties, is unenforceable.

(3)

(a) The provisions of this section do not apply to a motor vehicle:

(i) Required to be titled under the state law.

(ii) That is over six (6) model years old or that has been driven more than seventy-five thousand (75,000) miles; and

(iii) If, at the time of the sale of the motor vehicle, the seller gives the purchaser notice of the inapplicability of this section on the form prescribed by the State Attorney General or Attorney General of the Mississippi Band of Choctaw Indians if such form has been adopted.

(b)

(i) An exclusion or modification of an implied warranty of merchantability, or any part of a warranty under this subsection shall be in writing, mention merchantability, and be conspicuous.

(ii) An exclusion or modification of the implied warranty of fitness shall be in writing and conspicuous.

(iii) Any exclusion or modification of either warranty shall be separately acknowledged by the signature of the buyer.

Nothing in this section shall prohibit the express disclaimer or express modification of any implied warranties of merchantability and fitness for a particular purpose or any express limitation of remedies for breach of such warranties concerning computer hardware, computer software, and services performed on computer hardware and computer software which are sold between merchants.

**§26-2-316 [Reserved]**

**§26-2-317 Cumulation and Conflict of Warranties Express or Implied**

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

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

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

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

**§26-2-318 Third Party Beneficiaries of Warranties Express or Implied**

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

**§26-2-319 F.O.B. and F.A.S. Terms**

- (1) Unless otherwise agreed the term F.O.B. (which means "Free on Board") at a named place, even though used only in connection with the stated price, is a delivery term under which:
  - (a) when the term is F.O.B. the place of shipment, the seller must at that place ship the goods in the manner provided in this Chapter (§26-2-504) and bear the expense and risk of putting them into the possession of the carrier; or
  - (b) when the term is F.O.B. the place of destination, the seller must at this his own expense and risk transport the goods to that place and there tender delivery of them in the manner provided in this Chapter (§26-2-503);
  - (c) when under either (a) or (b) the term is also F.O.B. vessel, car or other vehicle, the seller must in addition at his own expense and risk load the goods on board. If the term is F.O.B. vessel the buyer must name the vessel and in an appropriate case the seller must comply with the provisions of this Chapter on the form of bill of lading (§26-2-323).
- (2) Unless otherwise agreed the term F.A.S. vessel (which means "Free Alongside") at a named port, even though used only in connection with the stated price, is a delivery term under which the seller must:
  - (a) at this own expense and risk deliver the goods alongside the vessel in the manner usual in that port or on a dock designated and provided by the buyer; and
  - (b) obtain and tender a receipt for the goods in exchange for which the carrier is under a duty to issue a bill of lading.
- (3) Unless otherwise agreed in any case falling within §26-2-319(1)(a) or (c) or §26-2-319(2) the buyer must seasonably give any needed instructions for making delivery, including when the term is F.A.S. or F.O.B. the loading berth of the vessel and in an appropriate case its name and sailing date. The seller may treat the failure of needed instructions as a failure of cooperation under this chapter (§26-2-311). He may also at this option move the goods in any reasonable manner preparatory to delivery or shipment.

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

**§26-2-320 C.I.F. and C. & F. Terms**

- (1) The term C.I.F. means that the price includes in a lump sum the cost of the goods and the insurance and freight to the named destination. The term C.& F. or C.F. means that the price so includes cost and freight to the named destination.
- (2) Unless otherwise agreed and even though used only in connection with the stated price and destination, the term C.I.F. destination or its equivalent requires the seller at his own expense and risk to:
  - (a) put the goods into the possession of a carrier at the port for shipment and obtain a negotiable bill or bills of lading covering the entire transportation to the named destination; and
  - (b) load the goods and obtain a receipt from the carrier (which may be contained in the bill of lading) showing that the freight has been paid or provided for; and
  - (c) obtain a policy or certificate of insurance, including any war risk insurance, of a kind and on terms then current at the port of shipment in the usual amount, in the currency of the contract, shown to cover the same goods covered by the bill of lading and providing for payment of loss to the order of the buyer or for the account of whom it may concern; but the seller may add to the price the amount of the premium for any such war risk insurance; and
  - (d) prepare an invoice of the goods and procure any other documents required to effect shipment or to comply with the contract; and
  - (e) forward and tender with commercial promptness all the documents in due form and with any endorsement necessary to perfect the buyer's rights.
- (3) Unless otherwise agreed the term C. & F. or its equivalent has the same effect and imposes upon the seller the same obligations and risks as a C.I.F. term except the obligation as to insurance.
- (4) Under the term C.I.F. or C. & F. unless otherwise agreed the buyer must make payment against tender of the required documents and the seller may not tender nor the buyer demand delivery of the goods in substitution for the documents.

**§26-2-321 C.I.F. or C. & F.: "Net Landed Weights"; "Payment on Arrival"; Warranty of Condition on Arrival**

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

- (1) Where the price is based on or is to be adjusted according to "net landed weights," "delivered weights," "out turn" quantity or quality or the like, unless otherwise agreed the seller must reasonably estimate the price. The payment due on tender of the documents

called for by the contract is the amount so estimated, but after final adjustment of the price a settlement must be made with commercial promptness.

- (2) An agreement described in §26-2-321(1) or any warranty of quality or condition of the goods on arrival places upon the seller the risk of ordinary deterioration, shrinkage and the like in transportation but has no effect on the place or time of identification to the contract for sale or delivery or on the passing of the risk of loss.
- (3) Unless otherwise agreed where the contract provides for payment on or after arrival of the goods the seller must before payment allow such preliminary inspection as is feasible; but if the goods are lost delivery of the documents and payment are due when the goods should have arrived.

**§26-2-322 Delivery “Ex-Ship”**

- (1) Unless otherwise agreed a term for delivery of goods “Ex-Ship” (which means from the carrying vessel) or in equivalent language is not restricted to a particular ship and requires delivery from a ship which has reached a place at the named port of destination where goods of the kind are usually discharged.
- (2) Under such a term unless otherwise agreed:
  - (a) the seller must discharge all liens arising out of the carriage and furnish the buyer with a direction which puts the carrier under a duty to deliver the goods; and
  - (b) the risk of loss does not pass to the buyer until the goods leave the ship’s tackle or are otherwise properly unloaded.

**§26-2-323 Form of Bill of Lading Required in Overseas Shipment; “Overseas”**

- (1) Where the contract contemplates overseas shipment and contains a term C.I.F. or C. & F. or F.O.B. vessel, the seller unless otherwise agreed must obtain a negotiable bill of lading stating that the goods have been loaded on board or, in the case of a term C.I.F. or C. & F., received for shipment.
- (2) Where in a case within §26-2-323(1) a bill of lading has been issued in a set of parts, unless otherwise agreed if the documents are not to be sent from abroad the buyer may demand tender of the full set; otherwise only one part of the bill of lading need be tendered. Even if the agreement expressly requires a full set:
  - (a) due tender of a single part is acceptable within the provisions of this chapter on cure of improper delivery (§26-2-508); and
  - (b) even though the full set is demanded, if the documents are sent from abroad the person tendering an incomplete set may nevertheless require payment upon furnishing an indemnity which the buyer in good faith deems adequate.
- (3) A shipment by water or by air or a contract contemplating such shipment is “overseas” insofar as by usage of trade or agreement it is subject to the commercial, financing or shipping practices characteristic of international deep-water commerce.

**§26-2-324 "No Arrival, No Sale" Term**

Under a term "No Arrival, No Sale" or terms of like meaning, unless otherwise agreed:

- (1) the seller must properly ship conforming goods and if they arrive by any means he must tender them on arrival but he assumes no obligation that the goods will arrive unless he has caused the non-arrival; and
- (2) where without fault of the seller the goods are in part lost or have so deteriorated as no longer to conform to the contract or arrive after the contract time, the buyer may proceed as if there had been casualty to identified goods (§26-2-613).

**§26-2-325 "Letter of Credit" Term; "Confirmed Credit"**

- (1) Failure of the buyer seasonably to furnish an agreed letter of credit is a breach of the contract for sale.
- (2) The delivery to seller of a proper letter of credit suspends the buyer's obligation to pay. If the letter of credit is dishonored, the seller may on seasonable notification to the buyer require payment directly from him.
- (3) Unless otherwise agreed the term "letter of credit" or "banker's credit" in a contract for sale means an irrevocable credit issued by a financing agency of good repute and, where the shipment is overseas, of good international repute. The term "confirmed credit" means that the credit must also carry the direct obligation of such an agency which does business in the seller's financial market.

**§26-2-326 Sale on Approval and Sale or Return; Consignment Sales and Rights of Creditors**

- (1) Unless otherwise agreed, if delivered goods may be returned by the buyer even though they conform to the contract, the transaction is:
  - (a) a "Sale on Approval" if the goods are delivered primarily for use, and
  - (b) a "Sale or Return" if the goods are delivered primarily for resale.
- (2) Except as provided in §26-2-326(3), goods held on approval are not subject to the claims of the buyer's creditors until acceptance; goods held on sale or return are subject to such claims while in the buyer's possession.
- (3) Where goods are delivered to a person for sale and such person maintains a place of business at which he deals in goods of the kind involved, under a name other than the name of the person making delivery, then with respect to claims of creditors of the person conducting the business the goods are deemed to be on sale or return. The provisions of this subsection are applicable even though an agreement purports to reserve title to the person making delivery until payment or resale or uses such words as "on consignment" or "on memorandum." However, this subsection is not applicable if the person making delivery:

- (a) complies with an applicable law providing for a consignor's interest or the like to be evidenced by a sign; or
  - (b) establishes that the person conducting the business is generally known by his creditors to be substantially engaged in selling the goods of others; or
  - (c) complies with the filing provisions of the Chapter on Secured Transactions (Chapter 9).
- (4) Any "or return" term of a contract for sale is to be treated as a separate contract for sale within the statute of frauds section of this Chapter (§26-2-201) and as contradicting the sale aspect of the contract within the provisions of this chapter on parole or extrinsic evidence (§26-2-202).

**§26-2-327 Special Incidents of Sale on Approval and Sale or Return**

- (1) Under a sale on approval unless otherwise agreed:
  - (a) although the goods are identified to the contract the risk of loss and the title do not pass to the buyer until acceptance; and
  - (b) use of the goods consistent with the purpose of trial is not acceptance but failure seasonably to notify the seller of election to return the goods is acceptance, and if the goods conform to the contract acceptance of any part is acceptance of the whole; and
  - (c) after due notification of election to return, the return is at the seller's risk and expense but a merchant buyer must follow any reasonable instructions.
- (2) Under a sale or return unless otherwise agreed:
  - (a) the option to return extends to the whole or any commercial unit of the goods while in substantially their original condition, but must be exercised seasonably; and
  - (b) the return is at the buyer's risk and expense.

**§26-2-328 Sale by Auction**

- (1) In a sale by auction if goods are put up in lots, each lot is the subject of a separate sale.
- (2) A sale by auction is complete when the auctioneer so announces by the fall of the hammer or in other customary manner. Where a bid is made while the hammer is falling in acceptance of a prior bid the auctioneer may in his discretion reopen the bidding or declare the goods sold under the bid on which the hammer was falling.
- (3) Such a sale is with reserve unless the goods are in explicit terms put up without reserve. In an auction with reserve the auctioneer may withdraw the goods at any time until he announces completion of the sale. In an auction without reserve, after the auctioneer calls

for bids on an article or lot, that article or lot cannot be withdrawn unless no bid is made within a reasonable time. In either case a bidder may retract his bid until the auctioneer's announcement of completion of the sale, but a bidder's retraction does not revive any previous bid.

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

## PART 4

### TITLE, CREDITORS AND GOOD FAITH PURCHASES

#### §26-2-401 Passing of Title; Reservation for Security; Limited Application of This Section

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

- (1) title to goods cannot pass under a contract for sale prior to their identification to the contract (§26-2-501), and unless otherwise explicitly agreed the buyer acquires by their identification a special property as limited by this code. Any retention or reservation by the seller of the title (property) in goods shipped or delivered to the buyer is limited in effect to a reservation of a security interest. Subject to these provisions and to the provisions of the Chapter on Secured Transactions (Chapter 9), title to goods passes from the seller to the buyer in any manner and on any conditions explicitly agreed on by the parties.
- (2) Unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods, despite any reservation of a security interest and even though a document of title is to be delivered at a different time or place; and in particular and despite any reservation of a security interest by the bill of lading:
  - (a) if the contract requires or authorizes the seller to send the goods to the buyer but does not require him to deliver them at destination, title passes to the buyer at the time and place of shipment; but
  - (b) if the contract requires delivery at destination, title passes on tender there.
- (3) Unless otherwise explicitly agreed where delivery is to be made without moving the goods,
  - (a) if the seller is to deliver a document of title, title passes at the time when and the place where he delivers such documents; or
  - (b) if the goods are at the time of contracting already identified and no documents are to be delivered, title passes at the time and place of contracting.
- (4) A rejection or other refusal by the buyer to receive or retain the goods, whether or not justified, or a justified revocation of acceptance reverts title to the goods in the seller. Such reversion occurs by operation of law and is not a "Sale."

#### §26-2-402 Rights of Seller's Creditors Against Sold Goods

- (1) Except as provided in §26-2-402 (2)(3), rights of unsecured creditors of the seller with respect to goods which have been identified to a contract for sale are subject to the buyer's rights to recover the goods under this chapter (§§26-2-502 and 26-2-716).

- (2) A creditor of the seller may treat a sale or an identification of goods to a contract for sale as void if as against him a retention of possession by the seller is fraudulent under any rule of law of the state where the goods are situated, except that retention of possession in good faith and current course of trade by a merchant-seller for a commercially reasonable time after a sale or identification is not fraudulent.
- (3) Nothing in this Chapter shall be deemed to impair the rights of creditors of the seller:
  - (a) under the provisions of the Chapter on Secured Transactions (Chapter 9);
  - (b) where identification to the contract or delivery is made not in current course of trade but in satisfaction of or as security for a preexisting claim for money, security or the like and is made under circumstances which under any rule of law of the jurisdiction where the goods are situated would apart from this Chapter constitute the transaction a fraudulent transfer or voidable preference.

**§26-2-403 Power to Transfer; Good Faith Purchase of Goods; “Entrusting”**

- (1) A purchaser of goods acquires all title which his transferor had or had power to transfer except that a purchaser of a limited interest acquires rights only to the extent of the interest purchased. A person with voidable title has power to transfer a good title to a good faith purchaser for value. When goods have been delivered under a transaction of purchase the purchaser has such power even though:
  - (a) the transferor was deceived as to the identity of the purchaser, or
  - (b) the delivery was in exchange for a check which is later dishonored, or
  - (c) it was agreed that the transaction was to be a “Cash Sale,” or
  - (d) the delivery was procured through fraud punishable as larcenous under the criminal law.
- (2) Any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in ordinary course of business.
- (3) “Entrusting” includes any delivery and any acquiescence in retention of possession regardless of any condition expressed between the parties to the delivery or acquiescence and regardless of whether the procurement of the entrusting or the possessor’s disposition of the goods have been such as to be a larcenous under the criminal law.
- (4) The rights of other purchasers of goods and of lien creditors are governed by the Chapters on Secured Transactions (Chapter 9) and Documents of Title (Chapter 7).

## PART 5

### PERFORMANCE

#### §26-2-501 **Insurable Interest in Goods; Manner of Identification of Goods**

- (1) The buyer obtains a special property and an insurable interest in goods by identification of existing goods as goods to which the contract refers even though the goods so identified are nonconforming and he has an option to return or reject them. Such identification can be made at any time and in any manner explicitly agreed to by the parties. In the absence of explicit agreement identification occurs:
  - (a) when the contract is made if it is for the sale of goods already existing and identified;
  - (b) if the contract is for the sale of future goods other than those described in Paragraph (c), when goods are shipped, marked or otherwise designated by the seller as goods to which the contract refers;
  - (c) when the crops are planted or otherwise become growing crops or the young are conceived if the contract is for the sale of unborn young to be born within twelve (12) months after contracting or for the sale of crops to be harvested within twelve (12) months or the next normal harvest season after contracting, whichever is longer.
- (2) The seller retains an insurable interest in goods so long as title to or any security interest in the goods remains in him and where the identification is by the seller alone he may until default or insolvency or notification to the buyer that the identification is final substitute other goods for those identified.
- (3) Nothing in this section impairs any insurable interest recognized under any other statute or rule of law.

#### §26-2-502 **Buyer's Right to Goods on Seller's Insolvency**

- (1) Subject to §26-2-502(2) and even though the goods have not been shipped a buyer who has a part or all of the price of goods in which he has a special property under the provisions of §26-2-501 may on making and keeping good a tender of any unpaid portion of their price recover them from the seller if the seller becomes insolvent within ten (10) days after receipt of the first installment on their price.
- (2) If the identification creating his special property has been made by the buyer he acquires the right to recover the goods only if they conform to the contract for sale.

#### §26-2-503 **Manner of Seller's Tender of Delivery**

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

- (a) tender must be at a reasonable hour, and if it is of goods they must be kept available for the period reasonably necessary to enable the buyer to take possession; but
  - (b) unless otherwise agreed the buyer must furnish facilities reasonably suited to the receipt of the goods.
- (2) Where the case is within §26-2-504 respecting shipment tender requires that the seller comply with its provisions.
- (3) Where the seller is required to deliver at a particular destination tender requires that he comply with §26-2-503(1) and also in any appropriate case tender documents as described in §26-2-503(4)(5) of this section.
- (4) Where goods are in the possession of a bailee and are to be delivered without being moved:
- (a) tender requires that the seller either tender a negotiable document of title covering such goods or procure acknowledgment by the bailee of the buyer's right to possession of the goods; but
  - (b) tender to the buyer of a nonnegotiable document of title or of a written direction to the bailee to deliver is sufficient tender unless the buyer seasonably objects, and receipt by the bailee of notification of the buyer's rights fixes those rights as against the bailee and all third persons; but risk of loss of the goods and of any failure by the bailee to honor the nonnegotiable document of title or to obey the direction remains on the seller until the buyer has had a reasonable time to present the document or direction, and a refusal by the bailee to honor the document or to obey the direction defeats the tender.
- (5) Where the contract requires the seller to deliver documents:
- (a) he must tender all such documents in correct form, except as provided in this chapter with respect to bills of lading in a set [§26-2-323(2)]; and
  - (b) tender through customary banking channels is sufficient and dishonor of a draft accompanying the documents constitutes nonacceptance or rejection.

**§26-2-504 Shipment by Seller**

- (1) Where the seller is required or authorized to send the goods to the buyer and the contract does not require him to deliver them at a particular destination, then unless otherwise agreed he must:
- (a) put the goods in the possession of such a carrier and make such a contract for their transportation as may be reasonable having regard to the nature of the goods and other circumstances of the case; and
  - (b) obtain and promptly deliver or tender in due form any document necessary to enable the buyer to obtain possession of the goods or otherwise required by the agreement or by usage of trade; and

- (c) promptly notify the buyer of the shipment.
- (2) Failure to notify the buyer under Paragraph (c) or to make a proper contract Paragraph (a) is a ground for rejection only if material delay or loss ensues.

**§26-2-505 Seller's Shipment Under Reservation**

- (1) Where the seller has identified goods to the contract by or before shipment:
  - (a) his procurement of a negotiable bill of lading to his own order or otherwise reserves in him a security interest in the goods. His procurement of the bill to the order of a financing agency or of the buyer indicates in addition only the seller's expectation of transferring that interest to the person named.
  - (b) a nonnegotiable bill of lading to himself or his nominee reserves possession of the goods as security but except in a case of conditional delivery (§26-2-507(2)) a nonnegotiable bill of lading naming a buyer as consignee reserves no security interest even though the seller retains possession of the bill of lading.
- (2) When shipment by the seller with reservation of a security interest is in violation of the contract for sale, it constitutes an improper contract for transportation within §26-2-504 but impairs neither the rights given to the buyer by shipment and identification of the goods to the contract nor the seller's powers as a holder of a negotiable document.

**§26-2-506 Rights of Financing Agency**

- (1) A financing agency by paying or purchasing for value a draft which relates to a shipment of goods acquires to the extent of the payment or purchase and in addition to its own rights under the draft and any document of title securing it any rights of the shipper in the goods including the right to stop delivery and the shipper's right to have the draft honored by the buyer.
- (2) The right to reimbursement of a financing agency which has in good faith honored or purchased the draft under commitment to or authority from the buyer is not impaired by subsequent discovery of defects with reference to any relevant document which was apparently regular on its face.

**§26-2-507 Effect of Seller's Tender; Delivery on Condition**

- (1) Tender of delivery is a condition to the buyer's duty to accept the goods and, unless otherwise agreed, to his duty to pay for them. Tender entitles the seller to acceptance of the goods and to payment according to the contract.
- (2) Where payment is due and demanded on the delivery to the buyer of goods or documents of title, his right as against the seller to retain or dispose of them is conditional upon his making the payment due.

**§26-2-508 Cure by Seller of Improper Tender or Delivery; Replacement**

- (1) Where any tender or delivery by the seller is rejected because nonconforming and the time for performance has not yet expired, the seller may seasonably notify the buyer of his intention to cure and may then within the contract time make a conforming delivery.
- (2) Where the buyer rejects a nonconforming tender which the seller had reasonable grounds to believe would be acceptable with or without money allowance the seller may if he seasonably notifies the buyer have a further reasonable time to substitute a conforming tender.

**§26-2-509 Risk of Loss in the Absence of Breach**

- (1) Where the contract requires or authorizes the seller to ship the goods by carrier:
  - (a) if it does not require him to deliver them at a particular destination, the risk of loss passes to the buyer when the goods are duly delivered to the carrier even though the shipment is under reservation (§26-2-505); but
  - (b) if it does require him to deliver them at a particular destination and the goods are there duly tendered while in the possession of the carrier, the risk of loss passes to the buyer when the goods are there duly so tendered as to enable the buyer to take delivery.
- (2) Where the goods are held by a bailee to be delivered without being moved, the risk of loss passes to the buyer:
  - (a) on his receipt of a negotiable document of title covering the goods; or
  - (b) on acknowledgment by the bailee of the buyer's right to possession of the goods; or
  - (c) after his receipt of a nonnegotiable document of title or other written direction to deliver, as provided in (§26-2-503(4)(b)).
- (3) In any case not within §26-2-509(1) or (2), the risk of loss passes to the buyer on his receipt of the goods if the seller is a merchant; otherwise the risk passes to the buyer on tender of delivery.
- (4) The provisions of this section are subject to contrary agreement of the parties and to the provisions of this Chapter on sale on approval (§26-2-327) and on effect of breach on risk of loss (§26-2-510).

**§26-2-510 Effect of Breach on Risk of Loss**

- (1) Where a tender or delivery of goods so fails to conform to the contract as to give a right of rejection the risk of their loss remains on the seller until cure or acceptance.
- (2) Where the buyer rightfully revokes acceptance he may to the extent of any deficiency in his effective insurance coverage treat the risk of loss as having rested on the seller from the beginning.

- (3) Where the buyer as to conforming goods already identified to the contract for sale repudiates or is otherwise in breach before risk of their loss has passed to him, the seller may to the extent of any deficiency in his effective insurance coverage treat the risk of loss as resting on the buyer for a commercially reasonable time.

**§26-2-511 Tender of Payment by Buyer; Payment by Check**

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

**§26-2-512 Payment by Buyer Before Inspection**

- (1) Where the contract requires payment before inspection, nonconformity of the goods does not excuse the buyer from so making payment unless:
  - (a) the nonconformity appears without inspection; or
  - (b) despite tender of the required documents the circumstances would justify injunction against honor under §26-5-109(2).
- (2) Payment pursuant to §26-2-512(1) does not constitute an acceptance of goods or impair the buyer's right to inspect or any of his remedies.

**§26-2-513 Buyer's Right to Inspection of Goods**

- (1) Unless otherwise agreed and subject to §26-2-513(3), where goods are tendered or delivered or identified to the contract for sale, the buyer has a right before payment or acceptance to inspect them at any reasonable place and time and in any reasonable manner. When the seller is required or authorized to send the goods to the buyer, the inspection may be after their arrival.
- (2) Expenses of inspection must be borne by the buyer but may be recovered from the seller if the goods do not conform and are rejected.
- (3) Unless otherwise agreed and subject to the provisions of this Chapter on C.I.F. contracts (§26-2-321(3)), the buyer is not entitled to inspect the goods before payment of the price when the contract provides:
  - (a) for delivery "C.O.D." or on other like terms; or
  - (b) for payment against documents of title, except where such payment is due only after the goods are to become available for inspection.

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

**§26-2-514      When Documents Deliverable on Acceptance; When on Payment**

Unless otherwise agreed documents against which a draft is drawn are to be delivered to the drawee on acceptance of the draft if it is payable more than three (3) days after presentment; otherwise, only on payment.

**§26-2-515      Preserving Evidence of Goods in Dispute**

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

## PART 6

### BREACH, REPUDIATION AND EXCUSE

#### §26-2-601 Buyer's Rights on Improper Delivery

- (1) Subject to the provisions of this Chapter on breach in installment contracts (§26-2-612) and unless otherwise agreed under the sections on contractual limitations of remedy (§§26-2-718 and 26-2-719), if the goods or the tender of delivery fail in any respect to conform to the contract, the buyer may:
  - (a) reject the whole; or
  - (b) accept the whole; or
  - (c) accept any commercial unit or units and reject the rest.

#### §26-2-602 Manner and Effect of Rightful Rejection

- (1) Rejection of goods must be within a reasonable time after their delivery or tender. It is ineffective unless the buyer seasonably notifies the seller.
- (2) Subject to the provisions of the two (2) following sections on rejected goods (§§26-2-603 and 26-2-604):
  - (a) after rejection any exercise of ownership by the buyer with respect to any commercial until is wrongful as against the seller; and
  - (b) if the buyer has before rejection taken physical possession of goods in which he does not have a security interest under the provisions of this Chapter (§26-2-711(3)), he is under a duty after rejection to hold them with reasonable care at the seller's disposition for a time sufficient to permit the seller to remove them; but
  - (c) the buyer has no further obligations with regard to goods rightfully rejected.
- (3) The seller's rights with respect to goods wrongfully rejected are governed by the provisions of this chapter on seller's remedies in general (§26-2-703).

#### §26-2-603 Merchant Buyer's Duties as to Rightfully Rejected Goods

- (1) Subject to any security interest in the buyer (§26-2-711(3)), when the seller has no agent or place of business at the market of rejection a merchant buyer is under a duty after rejection of goods in his possession or control to follow any reasonable instructions received from the seller with respect to the goods in this possession or control to follow any reasonable instructions received from the seller with respect to the goods and in the absence of such instructions to make reasonable efforts to sell them for the seller's account if they are perishable or threaten to decline in value speedily. Instructions are not reasonable if on demand indemnity for expenses is not forthcoming.
- (2) When the buyer sells goods under §26-2-603(1), he is entitled to reimbursement from the seller or out of the proceeds for reasonable expenses of caring for and selling them, and if the expenses

include no selling commission then to such commission as is usual in the trade or if there is none to a reasonable sum not exceeding ten percent (10%) on the gross proceeds.

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

**§26-2-604 Buyer's Options as to Salvage of Rightfully Rejected Goods**

Subject to the provisions of §26-2-603 on perishables if the seller gives no instructions within a reasonable time after notification of rejection the buyer may store the rejected goods for the seller's account or reship them to him or resell them for the seller's account with reimbursement as provided in §26-2-603. Such action is not acceptance or conversion.

**§26-2-605 Waiver of Buyer's Objections by Failure to Particularize**

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

- (a) where the seller could have cured it if stated seasonably; or
- (b) between merchants when the seller has after rejection made a request in writing for a full and final written statement of all defects on which the buyer proposes to rely.

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

**§26-2-606 What Constitutes Acceptance of Goods**

(1) Acceptance of goods occurs when the buyer:

- (a) after a reasonable opportunity to inspect the goods signifies to the seller that the goods are conforming or that he will take or retain them in spite of their nonconformity; or
- (b) fails to make an effective rejection (§26-2-602(1)), but such acceptance does not occur until the buyer has had a reasonable opportunity to inspect them; or
- (c) does any act inconsistent with the seller's ownership; but if such act is wrongful as against the seller it is an acceptance only if ratified by him.

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

**§26-2-607 Effect of Acceptance; Notice of Breach; Burden of Establishing Breach After Acceptance; Notice of Claim or Litigation to Person Answerable**

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

(2) Acceptance of goods by the buyer precludes rejection of the goods accepted and if made with knowledge of nonconformity cannot be revoked because of it unless the acceptance

was on the reasonable assumption that the nonconformity would be seasonably cured but acceptance does not of itself impair any other remedy provided by this Chapter for nonconformity.

- (3) Where a tender has been accepted:
  - (a) the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy; and
  - (b) if the claim is one for infringement or the like (§26-2-312(3)) and the buyer is sued as a result of such a breach he must so notify the seller within a reasonable time after he receives notice of the litigation or be barred from any remedy over for liability established by the litigation.
- (4) The burden is on the buyer to establish any breach with respect to the goods accepted.
- (5) There the buyer is sued for breach of a warranty or other obligation for which his seller is answerable over:
  - (a) he may give his seller written notice of the litigation. If the notice states that the seller may come in and defend and that if the seller does not do so he will be bound in any action against him by his buyer by any determination of fact common to the two (2) litigations, then unless the seller after reasonable receipt of the notice does come in and defend he is so bound.
  - (b) If the claim is one for infringement or the like (§26-2-312(3)) the original seller may demand in writing that his buyer turn over to him control of the litigation including settlement or else be barred from any remedy over and if he also agrees to bear all expense and to satisfy any adverse judgment, then unless the buyer after reasonable receipt of the demand does turn over control the buyer is so barred.
- (6) The provisions of §26-2-607(3), (4) and (5) apply to any obligation of a buyer to hold the seller harmless against infringement or the like (§26-2-312(3)).

**§26-2-608 Revocation of Acceptance in Whole or in Part**

- (1) The buyer may revoke his acceptance of a lot or commercial unit whose nonconformity substantially impairs its value to him if he has accepted it:
  - (a) on the reasonable assumption that its nonconformity would be cured and it has not been seasonably cured; or
  - (b) Without discovery of such nonconformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances.
- (2) Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of

the goods, which is not caused by their own defects. It is not effective until the buyer notifies the seller of it.

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

#### **§26-2-609 Right to Adequate Assurance of Performance**

- (1) A contract for sale imposes an obligation on each party that the other's expectation of receiving due performance will not be impaired. When reasonable grounds for insecurity arise with respect to the performance of either party the other may in writing demand adequate assurance of due performance and until he receives such assurance may if commercially reasonable suspend any performance for which he has not already received the agreed return.
- (2) Between merchants the reasonableness of ground for insecurity and the adequacy of any assurance offered shall be determined according to commercial standards.
- (3) Acceptance of any improper delivery or payment does not prejudice the aggrieved party's right to demand adequate assurance of future performance.
- (4) After receipt of a justified demand failure to provide within a reasonable time not exceeding thirty (30) days such assurance of due performance as is adequate under the circumstances of the particular case is a repudiation of the contract.

#### **§26-2-610 Anticipatory Repudiation**

- (1) When either party repudiates the contract with respect to a performance not yet due the loss of which will substantially impair the value of the contract to the other, the aggrieved party may:
  - (a) for a commercially reasonable time await performance by the repudiating party;  
or
  - (b) resort to any remedy for breach (§§26-2-703 or 26-2-711), event though he has notified the repudiating party that he would await the latter's performance and has urged retraction; and
  - (c) in either case suspend his own performance or proceed in accordance with the provisions of this Chapter on the seller's right to identify goods to the contract notwithstanding breach or to salvage unfinished goods (§26-2-704).

#### **§26-2-611 Retraction of Anticipatory Repudiation**

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

- (2) Retraction may be by any method which clearly indicates to the aggrieved party that the repudiating party intends to perform, but must include any assurance justifiably demanded under the provisions of this chapter (§26-2-609).
- (3) Retraction reinstates the repudiating party's rights under the contract with due excuse and allowance to the aggrieved party for any delay occasioned by the repudiation.

**§26-2-612 "Installment Contract"; Breach**

- (1) An "installment contract" is one which requires or authorizes the delivery of goods in separate lots to be separately accepted, even though the contract contains a clause "each delivery is a separate contract" or its equivalent.
- (2) The buyer may reject any installment which is nonconforming if the nonconformity substantially impairs the value of that installment and cannot be cured or if the nonconformity is a defect in the required documents; but if the nonconformity does not fall within §26-2-612(3) and the seller give adequate assurance of its cure the buyer must accept that installment.
- (3) Whenever nonconformity or default with respect to one (1) or more installments substantially impairs the value of the whole contract there is a breach of the whole. But the aggrieved party reinstates the contract if he accepts a nonconforming installment without seasonably notifying of cancellation or if he brings an action with respect only to past installments or demands performance as to future installments.

**§26-2-613 Casualty to Identified Goods**

- (1) Where the contract requires for its performance goods identified when the contract is made, and the goods suffer casualty without fault of either party before the risk of loss passes to the buyer, or in a proper case under a "No Arrival, No Sale" term (§26-2-324) then:
  - (a) if the loss is total the contract is avoided; and
  - (b) if the loss is partial or the goods have so deteriorated as no longer to conform to the contract the buyer may nevertheless demand inspection and at his option either treat the contract as avoided or accept the goods with due allowance from the contract price for the deterioration or the deficiency in quantity but without further right against the seller.

**§26-2-614 Substituted Performance**

- (1) Where without fault of either party the agreed berthing, loading, or unloading facilities fail or an agreed type of carrier becomes unavailable or the agreed manner of delivery otherwise becomes commercially impracticable but a commercially reasonable substitute is available, such substitute performance must be tendered and accepted.
- (2) If the agreed means or manner of payment fails because of domestic or foreign governmental regulation, the seller may withhold or stop delivery unless the buyer provides a means or manner of payment which is commercially a substantial equivalent.

If delivery has already been taken, payment by the means or in the manner provided by the regulation discharges the buyer's obligation unless the regulation is discriminatory, oppressive or predatory.

**§26-2-615 Excuse by Failure of Presupposed Conditions**

- (1) Except as far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance:
  - (a) delay in delivery or nondelivery in whole or in part by a seller who complies with Paragraphs (b) and (c), or failure to take delivery as provided for under the contract on the part of a buyer who complies with Paragraph (d), is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the nonoccurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.
  - (b) Where the causes mentioned in Paragraph (a) affect only a part of the seller's capacity to perform, he must allocate production and deliveries among his customers but may at his option include regular customers not then under contract as well as his own requirements for further manufacture. He may so allocate in any manner which is fair and reasonable.
  - (c) The seller must notify the buyer seasonably that there will be delay or nondelivery and, when allocation is required under Paragraph (b), of the estimated quota thus made available for the buyer.
  - (d) The buyer must notify the seller seasonably that there will be a delay or total inability to take delivery, and where practicable, state the contingency which as occurred causing such delay or inability.

**§26-2-616 Procedure on Notice Claiming Excuse**

- (1) Where the buyer received notification of a material or indefinite delay or an allocation justified under §26-2-615 he may be written notification to the seller as to any delivery concerned, and where the prospective deficiency substantially impairs the value of the whole contract under the provisions of this Chapter relating to breach of installment contracts (§26-2-612), then also as to the whole.
  - (a) terminate and thereby discharge any unexecuted portion of the contract; or
  - (b) modify the contract by agreeing to take his available quota in substitution.
- (2) If after receipt of such notification from the seller the buyer fails so to modify the contract within a reasonable time not exceeding thirty (30) days the contract lapses with respect to any deliveries affected.
- (3) The provisions of this section may not be negated by agreement except insofar as the seller has assumed a greater obligation under §26-2-615.

**§26-2-617      Acts of God, etc.**

Deliveries may be suspended by either party in case of Act of God, war, riots, fire, explosion, flood, strike, lockout, injunction, inability to obtain fuel, power, raw materials, labor, containers, or transportation facilities, accident, breakage of machinery or apparatus, national defense requirements, or any cause beyond the control of such party, preventing the manufacture, shipment, acceptance, or consumption of a shipment of the goods or of a material upon which the manufacture of the goods is dependent. If, because of any such circumstance, seller is unable to supply the total demand for the goods, seller may allocate its available supply among itself and all of its customers, including those not under contract, in an equitable manner. Such deliveries so suspended shall be cancelled without liability, but the contract shall otherwise remain unaffected.

## **PART 7**

### **REMEDIES**

#### **§26-2-701 Remedies for Breach of Collateral Contracts Not Impaired**

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

#### **§26-2-702 Seller's Remedies on Discovery of Buyer's Insolvency**

- (1) Where the seller discovers the buyer to be insolvent he may refuse delivery except for cash including payment for all goods theretofore delivered under the contract, and stop delivery under this Chapter (§26-2-705).
- (2) Where the seller discovers that the buyer has received goods on credit while insolvent he may reclaim the goods upon demand made within ten (10) days after the receipt, but if misrepresentation of solvency has been made to the particular seller in writing within three (3) months before delivery the ten-day limitation does not apply. Except as provided in this subsection the seller may not base a right to reclaim goods on the buyer's fraudulent or innocent misrepresentation of solvency or of intent to pay.
- (3) The seller's right to reclaim under §26-2-702(2) is subject to the rights of a buyer in ordinary course or other good faith purchaser under this Chapter (§26-2-403). Successful reclamation of goods excludes all other remedies with respect to them.

#### **§26-2-703 Seller's Remedies in General**

Where the buyer wrongfully rejects or revokes acceptance of goods or fails to make a payment due on or before delivery or repudiates with respect to a part or the whole, then with respect to any goods directly affected and, if the breach is of the whole contract (§26-2-612), then also with respect to the whole undelivered balance, the aggrieved seller may:

- (a) withhold delivery of such goods;
- (b) stop delivery by any bailee as hereafter provided (§26-2-705);
- (c) proceed under §26-2-704 respecting goods still unidentified to the contract;
- (d) resell and recover damages as hereafter provided (§26-2-706);
- (e) recover damages for nonacceptance (§26-2-708) or in a proper case the price (§26-2-709);
- (f) cancel.

#### **§26-2-704 Seller's Right to Identify Goods to the Contract Notwithstanding Breach or to Salvage Unfinished Goods**

- (1) An aggrieved seller under the preceding section may:

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

**§26-2-705 Seller's Stoppage of Delivery in Transit or Otherwise**

- (1) The seller may stop delivery of goods in the possession of a carrier or other bailee when he discovers the buyer to be insolvent (§26-2-702) and may stop delivery of carload, truckload, planeload or larger shipments of express or freight when the buyer repudiates or fails to make a payment due before the delivery or if for any other reason the seller has a right to withhold or reclaim the goods.
- (2) As against such buyer the seller may stop delivery until:
- (a) receipt of the goods by the buyer; or
  - (b) acknowledgments to the buyer by any bailee of the goods except a carrier that the bailee holds the goods for the buyer; or
  - (c) such acknowledgment to the buyer by a carrier by reshipment or as warehouseman; or
  - (d) negotiation to the buyer of any negotiable document of title covering the goods.
- (3)
- (a) To stop delivery the seller must so notify as to enable the bailee by reasonable diligence to prevent delivery of the goods.
  - (b) After such notification the bailee must hold and deliver the goods according to the directions of the seller but the seller is liable to the bailee for any ensuing charges or damages.
  - (c) If a negotiable document of title has been issued for goods the bailee is not obliged to obey a notification to stop until surrender of the document.
  - (d) A carrier who has issued a nonnegotiable bill of lading is not obliged to obey a notification to stop received from a person other than the consignor.

**§26-2-706 Seller's Resale Including Contract for Resale**

- (1) Under the conditions stated in §26-2-703 on seller's remedies, the seller may resell the goods concerned or the undelivered balance thereof. Where the resale is made in good faith and in a commercially reasonable manner the seller may recover the difference between the resale price and the contract price together with any incidental damages allowed under the provisions of this Chapter (§26-2-710), but less expenses saved in consequence of the buyer's breach.
- (2) Except as otherwise provided in §26-2-706(3) or unless otherwise agreed resale may be at public or private sale including sale by way of one (1) or more contracts to sell or of identification to an existing contract of the seller. Sale may be as a unit or in parcels and at any time and place and on any terms but every aspect of the sale including the method, manner, time, place and terms must be commercially reasonable. The resale must be reasonably identified as referring to the broken contract, but it is not necessary that the goods be in existence of that any or all of them have been identified to the contract before the breach.
- (3) Where the resale is at private sale the seller must give the buyer reasonable notification of this intention to resell.
- (4) Where the resale is at public sale:
  - (a) only identified goods can be sold except where there is a recognized market for a public sale of futures in goods of the kind; and
  - (b) it must be made at a usual place or market for public sale if one is reasonably available and except in the case of goods which are perishable or threaten to decline in value speedily the seller must give the buyer reasonable notice of the time and place of the resale; and
  - (c) if the goods are not to be within the view of those attending the sale the notification of sale must state the place where the goods are located and provide for their reasonable inspection by prospective bidder; and
  - (d) the seller may buy.
- (5) A purchaser who buys in good faith at a resale takes the goods free of any rights of the original buyer even though the seller fails to comply with one (1) or more of the requirements of this section.
- (6) The seller is not accountable to the buyer for any profit made on any resale. A person in the position of a seller (§26-2-707) or a buyer who has rightfully rejected or justifiably revoked acceptance must account for any excess over the amount of his security interest, as hereinafter defined (§26-2-711(3)).

#### **§26-2-707**

#### **"Person in the Position of a Seller"**

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

- (2) A person in the position of a seller may as provided in this Chapter withhold or stop delivery (§26-2-705) and resell (§26-2-706) and recover incidental damages (§26-2-710).

**§26-2-708 Seller's Damages for Non-Acceptance or Repudiation**

- (1) Subject to §26-2-708(2) and to the provisions of this Chapter with respect to proof of market price (§26-2-723), the measure of damages for non-acceptance or repudiation by the buyer is the difference between the market price at the time and place for tender and the unpaid contract price together with any incidental damages provided in this Chapter (§26-2-710), but less expenses saved in consequence of the buyer's breach.
- (2) If the measure of damages provided in §26-2-708(1) is inadequate to put the seller in a good a position as performance would have done then the measure of damages is the profit (including reasonable overhead) which the seller would have made from full performance by the buyer, together with any incidental damages provided in this Chapter (§26-2-710), due allowance for costs reasonably incurred and due credit for payments or proceeds of resale.

**§26-2-709 Action for the Price**

- (1) When the buyer fails to pay the price as it becomes due the seller may recover, together with any incidental damages under the next section, the price:
  - (a) of goods accepted or of conforming goods lost or damaged within a commercially reasonable time after risk of their loss has passed to the buyer; and
  - (b) of goods identified to the contract if the seller is unable after reasonable effort to resell them at a reasonable price or the circumstances reasonably indicate that such effort will be unavailing.
- (2) Where the seller sues for the price he must hold for the buyer any goods which have been identified to the contract and are still in his control except that if resale becomes possible he may resell them at any time prior to the collection of the judgment. The net proceeds of any such resale must be credited to the buyer and payment of the judgment entitles him to any goods not resold.
- (3) After the buyer has wrongfully rejected or revoked acceptance of the goods or has failed to make a payment due or has repudiated (§26-2-610), a seller who is held not entitled to the price under this section shall nevertheless be awarded damages for non-acceptance under §26-2-708.

**§26-2-710 Seller's Incidental Damages**

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

**§26-2-711 Buyer's Remedies in General; Buyer's Security Interest in Rejected Goods**

- (1) Where the seller fails to make delivery or repudiates or the buyer rightfully rejects or justifiably revokes acceptance then with respect to any goods involved, and with respect to the whole if the breach goes to the whole contract (§26-2-612), the buyer may cancel and whether or not he has done so may in addition to recovering so much of the price as has been paid:
  - (a) “Cover” and have damages under §26-2-712 as to all the goods affected whether or not they have been identified to the contract; or
  - (b) recover damages for nondelivery as provided in this Chapter (§26-2-713).
- (2) Where the seller fails to deliver or repudiates the buyer may also:
  - (a) if the goods have been identified recover them as provided in this Chapter (§26-2-502); or
  - (b) in a proper case obtain specific performance or replevy the goods as provided in this Chapter (§26-2-716).
- (3) On rightful rejection or justifiable revocation of acceptance a buyer has a security interest in goods in his possession or control for any payments made on their price and any expenses reasonably incurred in their inspection, receipt, transportation, care and custody and may hold such goods and resell them in like manner as an aggrieved seller (§26-2-706).

**§26-2-712 “Cover”; Buyer’s Procurement of Substitute Goods**

- (1) After a breach within §26-2-711 the buyer may “Cover” by making in good faith and without unreasonable delay any reasonable purchase of or contract to purchase goods in substitution for those due from the seller.
- (2) The buyer may recover from the seller as damages the difference between the cost of cover and the contract price together with any incidental or consequential damages as hereinafter defined (§26-2-715), but less expenses saved in consequence of the seller’s breach.
- (3) Failure of the buyer to effect cover within this section does not bar him from any other remedy.

**§26-2-713 Buyer’s Damages for Non-Delivery or Repudiation**

- (1) Subject to the provisions of this Chapter with respect to proof of market price (§26-2-723), the measure of damages for nondelivery or repudiation by the seller is the difference between the market price at the time when the buyer learned of the breach and the contract price together with any incidental and consequential damages provided in this Chapter (§26-2-715), but less expenses saved in consequence of the seller’s breach.
- (2) Market price is to be determined as of the place for tender or, in cases in rejection after arrival or revocation of acceptance, as of the place of arrival.

**§26-2-714 Buyer's Damages for Breach in Regard to Accepted Goods**

- (1) Where the buyer has accepted goods and given notification (§26-2-607) he may recover as damages for any nonconformity of tender the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable.
- (2) The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.
- (3) In a proper case any incidental and consequential damages under §26-2-715 may also be recovered.

**§26-2-715 Buyer's Incidental and Consequential Damages**

- (1) Incidental damages resulting from the seller's breach include expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach.
- (2) Consequential damages resulting from the seller's breach include:
  - (a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and
  - (b) injury to person or property proximately resulting from any breach of warranty.

**§26-2-716 Buyer's Right to Specific Performance or Replevin**

- (1) Specific performance may be decreed where the goods are unique or in other proper circumstances.
- (2) The decree for specific performance may include such terms and conditions as to payment of the price, damages, or other relief as the court may deem just.
- (3) The buyer has a right of replevin for goods identified to the contract if after reasonable effort he is unable to effect cover for such goods or the circumstances reasonably indicate that such effort will be unavailing or if the goods have been shipped under reservation and satisfaction of the security interest in them has been made or tendered.

**§26-2-717 Deduction of Damages from the Price**

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

**§26-2-718 Liquidation or Limitation of Damages; Deposits**

- (1) Damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void as a penalty.
- (2) Where the seller justifiably withholds delivery of goods because of the buyer's breach, the buyer is entitled to restitution of any amount by which the sum of his payments exceed:
  - (a) the amount to which the seller entitled by virtue of terms liquidating the seller's damages in accordance with §26-2-718(1), or
  - (b) in the absence of such terms, twenty percent (20%) of the value of the total performance for which the buyer is obligated under the contract or five hundred dollars (\$500.00), whichever is smaller.
- (3) The buyer's right to restitution under §26-2-718(2) is subject to offset to the extent that the seller establishes:
  - (a) a right to recover damages under the provisions of this Chapter other than §26-2-718(1), and
  - (b) the amount of value of any benefits received by the buyer directly or indirectly by reason of the contract.
- (4) Where a seller has received payment in goods their reasonable value or the proceeds of their resale shall be treated as payments for the purposes of §26-2-718(2); but if the seller has notice of the buyer's breach before reselling goods received in part performance, his resale is subject to the conditions laid down in this Chapter on resale by an aggrieved seller (§26-2-706).

**§26-2-719 Contractual Modification or Limitation of Remedy**

- (1) Subject to the provisions of §26-2-719(2), (3), and (4) of this section and of §26-2-718 on liquidation and limitation of damages.
  - (a) The agreement may provide for remedies in addition to or in substitution for those provided in this Chapter and may limit or alter the measure of damages recoverable under this Chapter, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of nonconforming goods or parts; and
  - (b) resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.
- (2) Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Code.
- (3) Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case

of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.

- (4) Any limitation of remedies which would deprive the buyer of a remedy to which he may be entitled for breach of an implied warranty of merchantability or fitness for a particular purpose shall be prohibited. The provisions of this subsection do not apply to computer hardware, computer software, and services performed on computer hardware and computer software, which are sold between merchants.

**§26-2-720 Effect of “Cancellation” or “Rescission” on Claims for Antecedent Breach**

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

**§26-2-721 Remedies for Fraud**

Remedies for material misrepresentation or fraud include all remedies available under this Chapter for nonfraudulent breach. Neither rescission or a claim for rescission of the contract for sale nor rejection or return of the goods shall bar or be deemed inconsistent with a claim for damages or other remedy.

**§26-2-722 Who Can Sue Third Parties for Injury to Goods**

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

**§26-2-723 Proof of Market Price: Time and Place**

- (1) If an action based on anticipatory repudiation comes to trial before the time for performance with respect to some or all of the goods, any damages based on market price (§§26-2-708 or 26-2-713) shall be determined according to the price of such goods prevailing at the time when the aggrieved party learned of the repudiation.
- (2) If evidence of a price prevailing at the times or places described in this Chapter is not readily available the price prevailing within any reasonable time before or after the time

described or at any other place which in commercial judgment or under usage of trade would serve as a reasonable substitute for the one described may be used, making any proper allowance for the cost of transporting the goods to or from such other place.

- (3) Evidence of a relevant price prevailing at a time or place other than the one described in this Chapter offered by one party is not admissible unless and until he has given the other party such notice as the court finds sufficient to prevent unfair surprise.

**§26-2-724 Admissibility of Market Quotations**

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

**§26-2-725 Statute of Limitations in Contracts for Sale**

- (1) An action for breach of any contract for sale must be commenced within six (6) years after the cause of action has accrued.
- (2) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.
- (3) Where an action commenced within the time limited by §26-2-725(1) is so terminated as to leave available a remedy by another action for the same breach such other action may be commenced after the expiration of the time limited and within six (6) months after the termination of the first action unless the termination resulted from voluntary discontinuance or from dismissal for failure or neglect to prosecute.
- (4) This section does not alter the law on tolling of the statute of limitations nor does it apply to causes of action which have accrued before this code becomes effective.

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## PART I

### GENERAL PROVISIONS

#### §26-2A-101 Short Title

This Chapter shall be known and may be cited as the Uniform Commercial Code – Leases.

#### §26-2A-102 Scope

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

#### §26-2A-103 Definitions and Index of Definitions

- (1) In this Chapter unless the context otherwise requires:
  - (a) “Buyer in Ordinary Course of Business” means a person who in good faith and without knowledge that the sale to him is in violation of the ownership rights or security interest or leasehold interest of a third party in the goods, buys in ordinary course from a person in the business of selling goods of that kind but does not include a pawnbroker. “Buying” may be for cash or by exchange of other property or on secured or unsecured credit and includes receiving goods or documents of title under a preexisting contract for sale but does not include a transfer in bulk or as security for or in total or partial satisfaction of a money debt.
  - (b) “Cancellation” occurs when either party puts an end to the lease contract for default by the other party.
  - (c) “Commercial Unit” means such a unit of goods as by commercial usage is a single whole for purposes of lease and division of which materially impairs its character or value on the market or in use. A commercial unit may be a single article, as a machine, or a set of articles, as a suite of furniture or a line of machinery, or a quantity, as a gross or carload, or any other unit treated in use or in the relevant market as a single whole.
  - (d) “Conforming” goods or performance under a lease contract means goods or performance that are in accordance with the obligations under the lease contract.
  - (e) “Consumer Lease” means a lease that a lessor regularly engaged in the business of leasing or selling makes to a lessee who is an individual and who takes under the lease the lease contract, excluding payments for options to renew or buy, do not exceed twenty-five thousand dollars (\$25,000.00).
  - (f) “Fault” means wrongful act, omission, breach or default.
  - (g) “Finance Lease” means a lease with respect to which:
    - (i) the lessor does not select, manufacture, or supply the goods;

- (ii) the lessor acquires the goods or the right to possession and use of the goods in connection with the lease; and
- (iii) one of the following occurs:
  - (A) the lessee receives a copy of the contract by which the lessor acquired the goods or the right to possession and use of the goods before signing the lease contract;
  - (B) the lessee's approval of the contract by which the lessor acquired the goods or the right to possession and use of the goods is a condition to effectiveness of the lease contract;
  - (C) the lessee, before signing the lease contract, receives an accurate and complete statement designating the promises and warranties, and any disclaimers of warranties, limitations or modifications of remedies, or liquidated damages, include those of a third party, such as the manufacturer of the goods, provided to the lessor by the person supplying the goods in connection with or as part of the contract by which the lessor acquired the goods or the right to possession and use of the goods; or
  - (D) if the lease is not a consumer lease, the lessor, before the lessee signs the lease contract, informs the lessee in writing:
    - (a) of the identity of the person supplying the goods to the lessor, unless the lessee has selected that person and directed the lessor to acquire the goods or the right to possession and use of the goods from that person,
    - (b) that the lessee is entitled under this chapter to the promises and warranties, including those of any third party, provided to the lessor by the person supplying the goods in connection with or as part of the contract by which the lessor acquired the goods or the right to possession and use of the goods; and
    - (c) that the lessee may communicate with the person supplying the goods to the lessor and receive an accurate and complete statement of those promises and warranties, including any disclaimers and limitations of them or of remedies.
- (h) "Goods" means all things that are movable at the time of identification to the lease contract, or are fixtures (§26-2A-309), but the term does not include money, documents, instruments, accounts chattel paper, general intangibles or minerals or the like, including oil and gas, before extraction. The term also includes the unborn young of animals.
- (i) "Installment Lease Contract" means a lease contract that authorizes or requires the delivery of goods in separate lots to be separately accepted, even though the lease contract contains a clause "each delivery is a separate lease" or its equivalent.

- (j) “Lease” means a transfer of the right to possession and use of goods for a term in return for consideration, but a sale, including a sale on approval or a sale or return, or retention or creation of a security interest is not a lease. Unless the context clearly indicates otherwise, the term includes a sublease.
- (k) “Lease Agreement” means the bargain, with respect to the lease, of the lessor and lessee in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance as provided in this Chapter. Unless the context clearly indicates otherwise, the term includes a sublease agreement.
- (l) “Lease Contract” means the total legal obligation that results from the lease agreement as affected by this Chapter and any other applicable rules of law. Unless the context clearly indicates otherwise, the term includes a sublease contract.
- (m) “Leasehold Interest” means the interest of the lessor or the lessee under a lease contract.
- (n) “Lessee” means a person who acquires the right to possession and use of goods under a lease. Unless the context clearly indicates otherwise, the term includes a sublease.
- (o) “Lessee in Ordinary Course of Business” means a person who in good faith and without knowledge that the lease to him is in violation of the ownership rights or security interest or leasehold interest of a third party in the goods leases in ordinary course from a person in the business of selling or leasing goods of that kind but does not include a pawnbroker. “Leasing” may be for cash or by exchange of other property or on secured or unsecured credit and includes receiving goods or documents of title under a preexisting lease contract but does not include a transfer in bulk or as security for or in total or partial satisfaction of a money debt.
- (p) “Lessor” means a person who transfers the right to possession and use of goods under a lease. Unless the context clearly indicates otherwise, the term includes a sublessor.
- (q) “Lessor’s Residual Interest” means the lessor’s interest in the goods after expiration, termination or cancellation of the lease contract.
- (r) “Lien” means a charge against or interest in goods to secure payment of a debt or performance of an obligation, but the term does not include a security interest.
- (s) “Lot” means a parcel or single article that is the subject matter of a separate lease or delivery, whether or not it is sufficient to perform the lease contract.
- (t) “Merchant lessee” means a lessee that is a merchant with respect to goods of the kind subject to the lease.
- (u) “Present Value” means the amount as of a date certain of one or more sums payable in the future, discounted to the date certain. The discount is determined

by the interest rate specified by the parties if the rate was not manifestly unreasonable at the time the transaction was entered into; otherwise, the discount is determined by a commercially reasonable rate that takes into account the facts and circumstances of each case at the time the transaction was entered into.

- (v) "Purchase" includes taking by sale, lease, mortgage, security interest, pledge, gift or any other voluntary transaction creating an interest in goods.
  - (w) "Sublease" means a lease of goods the right to possession and use of which was acquired by the lessor as a lessee under an existing lease.
  - (x) "Supplier" means a person from whom a lessor buys or leases goods to be leased under a finance lease.
  - (y) "Supply Contract" means a contract under which a lessor buys or leases goods to be leased.
  - (z) "Termination" occurs when either party pursuant to a power created by agreement or law puts an end to the lease contract otherwise than for default.
- (2) Other definitions applying to this chapter and the sections in which they appear are:

"Accessions."	§26-2A-310(1).
"Construction Mortgage."	§26-2A-309(1)(d).
"Encumbrance."	§26-2A-309(1)(e).
"Fixtures."	§26-2A-309(1)(a).
"Fixture Filing."	§26-2A-309(1)(b).
"Purchase Money Lease."	§26-2A-309(1)(c).

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

"Account."	§26-9-106
"Between Merchants."	§26-2-104(3)
"Buyer."	§26-2-103(1)(a)
"Chattel Paper."	§26-9-105(1)(b)
"Consumer Goods."	§26-9-109(1)
"Document."	§26-9-105(1)(f)
"Entrusting."	§26-2-403(3)
"General Intangibles."	§26-9-106
"Good Faith."	§26-2-103(1)(b)
"Instrument."	§26-9-105(1)(i)
"Merchant."	§26-2-104(1)
"Mortgage."	§26-9-105(1)(j)
"Pursuant to Commitment."	§26-9-105(1)(k)
"Receipt."	§26-2-103(1)(c)
"Sale."	§26-2-106(1)
"Sale on Approval."	§26-2-326
"Sale or Return."	§26-2-326
"Seller."	§26-2-103(1)(d)

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

**§26-2A-104 Leases Subject to Other Law**

- (1) A lease, although subject to this Chapter, is also subject to any applicable:
  - (a) certificate of title statute of this state, including, but not limited to, those pertaining to motor vehicles in Chapter 21, Title 63, Mississippi Code of 1972;
  - (b) certificate of title statute of another jurisdiction (§26-2A-105); or
  - (c) consumer protection statute of the State of Mississippi.
- (2) In case of conflict between this Chapter, other than §§26-2A-105, 26-2A-304(3) and 26-2A-305(3), and a statute or decision referred to in §26-2A-104(1), the statute or decision controls.
- (3) Failure to comply with an applicable law has only the effect specified therein.

**§26-2A-105 Territorial Application of Chapter to Goods Covered by Certificate of Title**

Subject to the provisions of §§26-2A-304(3) and 26-2A-305(3), with respect to goods covered by a certificate of title issued under a statute of this state or of another jurisdiction, compliance and the effect of compliance or noncompliance with a certificate of title statute are governed by the law (including the conflict of laws rules) of the jurisdiction issuing the certificate until the earlier of:

- (1) surrender of the certificate; or
- (2) four (4) months after the goods are removed from that jurisdiction and thereafter until a new certificate of title is issued by another jurisdiction.

**§26-2A-106 Limitation on Power of Parties to Consumer Lease to Choose Applicable Law and Judicial Forum**

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

**§26-2A-107 Waiver or Renunciation of Claim or Right after Default**

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

**§26-2A-108 Unconscionability**

- (1) If the court as a matter of law finds a lease contract or any clause of a lease contract to have been unconscionable at the time it was made, the court may refuse to enforce the lease contract, or it may enforce the remainder of the lease contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.
- (2) With respect to a consumer lease, if the court as a matter of law finds that a lease contract or any clause of a lease contract has been induced by unconscionable conduct or that unconscionable conduct has occurred in the collection of a claim arising from a lease contract the court may grant appropriate relief.
- (3) Before making a find of unconscionability under §26-2A-108(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 §26-2A-108(1) or (2), the court shall award reasonable attorney's fees to the lessee.
  - (b) If the court does not find unconscionability and the lessee claiming unconscionability has brought or maintained an action he knew to be groundless, the court shall award reasonable attorney's fees to the party against whom the claim is made.
  - (c) In determining attorney's fees, the amount of the recovery on behalf of the claimant under §26-2A-108(1)(2) is not controlling.

**§26-2A-109 Option to Accelerate at Will**

- (1) A term providing that one (1) party or his successor in interest may accelerate payment or performance or require collateral or additional collateral "at will" or "when he deems himself insecure" or in words of similar import must be construed to mean that he has power to do so only if he in good faith believes that the prospect of payment or performance is impaired.
- (2) With respect to a consumer lease, the burden of establishing good faith under §26-2A-109(1) is on the party who exercised the power; otherwise the burden of establishing lack of good faith is on the party against whom the power has been exercised.

## PART 2

### FORMATION AND CONSTRUCTION OF LEASE CONTRACT

#### §26-2A-201 Statute of Frauds

- (1) A lease contract is not enforceable by way of action or defense unless:
  - (a) the total payments to be made under the lease contract, excluding payments for options to renew or buy, are less than one thousand dollars (\$1,000.00); or
  - (b) there is a writing, signed by the party against whom enforcement is sought or by that party's authorized agent, sufficient to indicate that a lease contract has been made between the parties and to describe the goods leased and the lease term.
- (2) Any description of leased goods or of the lease term is sufficient and satisfies §26-2A-201(1)(b), whether or not it is specific, if it reasonably identifies what is described.
- (3) A writing is not insufficient because it omits or incorrectly states a term agreed upon, but the lease contract is not enforceable under §26-2A-201(1)(b) beyond the lease term and the quantity of goods shown in the writing.
- (4) A lease contract that does not satisfy the requirements of §26-2A-201(1), but which is valid in other respects, is enforceable:
  - (a) if the goods are to be specially manufactured or obtained for the lessee and are not suitable for lease or sale to others in the ordinary course of the lessor's business, and the lessor, before notice of repudiation is received and under circumstances that reasonably indicate that the goods are for the lessee, has made either a substantial beginning of their manufacture or commitments for their procurement;
  - (b) if the party against whom enforcement is sought admits in that party's pleading, testimony or otherwise in court that a lease contract was made, but the lease contract is not enforceable under this provision beyond the quantity of goods admitted; or
  - (c) with respect to goods that have been received and accepted by the lessee.
- (5) The lease term under a lease contract referred to in §26-2A-201(4) is:
  - (a) if there is a writing signed by the party against whom enforcement is sought or by that party's authorized agent specifying the lease term, the term so specified;
  - (b) if the party against whom enforcement is sought admits in that party's pleading, testimony or otherwise in court a lease term, the term so admitted; or
  - (c) a reasonable lease term.

#### §26-2A-202 Final Written Expression: Parol or Extrinsic Evidence

- (1) Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented:
  - (a) by course of dealing or usage of trade or by course of performance; and
  - (b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

**§26-2A-203 Seals Inoperative**

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

**§26-2A-204 Formation in General**

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

**§26-2A-205 Firm Offers**

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

**§26-2A-206 Offer and Acceptance in Formation of Lease Contract**

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

**§26-2A-207 Course of Performance or Practical Construction**

- (1) If a lease contract involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection is relevant to determine the meaning of the lease agreement.
- (2) The express terms of a lease agreement and any course of performance, as well as any course of dealing and usage of trade, must be construed whenever reasonable as consistent with each other; but if that construction is unreasonable, express terms control course of performance, course of performance controls both course of dealing and usage of trade, and course of dealing controls usage of trade.
- (3) Subject to the provisions of §26-2A-208 on modification and waiver, course of performance is relevant to show a waiver or modification of any term inconsistent with the course of performance.

**§26-2A-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 §26-2A-208(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.

**§26-2A-209 Lessee under Finance Lease as Beneficiary of Supply Contract**

- (1) The benefit of a supplier's promises to the lessor under the supply contract and of all warranties, whether express or implied, including those of any third party provided in connection with or as part of the supply contract, extends to the lessee to the extent of the lessee's leasehold interest under a finance lease related to the supply contract, but is subject to the terms of the warranty and of the supply contract and all defenses or claims arising therefrom.
- (2) The extension of the benefit of a supplier's promises and of warranties to the lessee (§26-2A-209(1)) does not:
  - (a) modify the rights and obligations of the parties to the supply contract, whether arising therefrom or otherwise, or
  - (b) impose any duty or liability under the supply contract on the lessee.

- (3) Any modification or rescission of the supply contract by the supplier and the lessor is effective between the supplier and the lessee unless, before the modification or rescission, the supplier has received notice that the lessee has entered into a finance lease related to the supply contract. If the modification or rescission is effective between the supplier and the lessee, the lessor is deemed to have assumed, in addition to the obligations of the lessor to the lessee under the lease contract, promises of the supplier to the lessor and warranties that were so modified or rescinded as they existed and were available to the lessee before modification or rescission.
- (4) In addition to the extension of the benefit of the supplier's promises and of warranties to the lessee under §26-2A-209(1), the lessee retains all rights that the lessee may have against the supplier which arise from an agreement between the lessee and the supplier or under other law.

**§26-2A-210 Express Warranties**

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

**§26-2A-211 Warranties Against Interference and Against Infringement; Lessee's Obligation Against Infringement**

- (1) There is in a lease contract a warranty that for the lease term no person holds a claim to or interest in the goods that arose from an act or omission of the lessor, other than a claim by way of infringement or the like, which will interfere with the lessee's enjoyment of its leasehold interest.
- (2) Except in a finance lease there is in a lease contract by a lessor who is a merchant regularly dealing in goods of the kind a warranty that the goods are delivered free of the rightful claim of any person by way of infringement or the like.
- (3) A lessee who furnishes specifications to a lessor or a supplier shall hold the lessor and the supplier harmless against any claim by way of infringement or the like that arises out of compliance with the specifications.

**§26-2A-212 Implied Warranty of Merchantability**

- (1) Except in a finance lease, a warranty that the goods will be merchantable is implied in a lease contract if the lessor is a merchant with respect to goods of that kind.
- (2) Goods to be merchantable must be at least such as:
  - (a) pass without objection in the trade under the description in the lease agreement;
  - (b) in the case of fungible goods, are of fair average quality within the description;
  - (c) are fit for the ordinary purposes for which goods of that type are used;
  - (d) run, within the variation permitted by the lease agreement, of even kind, quality and quantity within each unit and among all units involved;
  - (e) Are adequately contained, packaged and labeled as the lease agreement may require; and
  - (f) Conform to any promises or affirmations of fact made on the container or label.
- (3) Other implied warranties may arise from course of dealing or usage of trade.

**§26-2A-213 Implied Warranty of Fitness for Particular Purpose**

Except in a finance lease, if the lessor at the time the lease contract is made has reason to know of any particular purpose for which the goods are required and that the lessee is relying on the lessor's skill or judgment to select or furnish suitable goods, there is in the lease contract an implied warranty that the goods will be fit for that purpose.

**§26-2A-214 [Reserved]**

**§26-2A-215 Cumulation and Conflict of Warranties Express or Implied**

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

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

**§26-2A-216 Third-Party Beneficiaries of Express and Implied Warranties**

A warranty to or for the benefit of a lessee under this Chapter, whether express or implied, extends to any natural person who 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.

**§26-2A-217 Identification**

- (1) Identification of goods as goods to which a lease contract refers may be made at any time and in any manner explicitly agreed to by the parties. In the absence of explicit agreement, identification occurs:
  - (a) when the lease contract is made if the lease contract is for a lease of goods that are existing and identified;
  - (b) when the goods are shipped, marked or otherwise designated by the lessor as goods to which the lease contract refers, if the lease contract is for a lease of goods that are not existing and identified; or
  - (c) when the young are conceived, if the lease contract is for a lease of unborn young of animals.

**§26-2A-218 Insurance and Proceeds**

- (1) A lessee obtains an insurable interest when existing goods are identified to the lease contract even though the goods identified are nonconforming and the lessee has an option to reject them.
- (2) If a lessee has an insurable interest only by reason of the lessor's identification of the goods, the lessor, until default or insolvency or notification to the lessee that identification is final, may substitute other goods for those identified.
- (3) Notwithstanding a lessee's insurable interest under §26-2A-218(1)(2), the lessor retains an insurable interest until an option to buy has been exercised by the lessee and risk of loss has passed to the lessee.
- (4) Nothing in this section impairs any insurable interest recognized under any other statute or rule of law.
- (5) The parties by agreement may determine that one or more parties have an obligation to obtain and pay for insurance covering the goods and by agreement may determine the beneficiary of the proceeds of the insurance.

**§26-2A-219 Risk of Loss**

- (1) Except in the case of a finance lease, risk of loss is retained by the lessor and does not pass to the lessee. In the case of a finance lease, risk of loss passes to the lessee.
- (2) Subject to the provisions of this Chapter on the effect of default on risk of loss (§26-2A-220), if risk of loss is to pass to the lessee and the time of passage is not stated, the following rules apply:
  - (a) if the lease contract requires or authorizes the goods to be shipped by carrier:
    - (i) and it does not require delivery at a particular destination, the risk of loss passes to the lessee when the goods are duly delivered to the carrier; but
    - (ii) if it does require delivery at a particular destination and the goods are there duly tendered while in the possession of the carrier, the risk of loss passes to the lessee when the goods are there duly so tendered as to enable the lessee when the goods are there duly so tendered as to enable the lessee to take delivery.
  - (b) If the goods are held by a bailee to be delivered without being moved, the risk of loss passes to the lessee on acknowledgment by the bailee of the lessee's right to possession of the goods.
  - (c) In any case not within §26-2A-219(a) or (b), the risk of loss passes to the lessee on the lessee's receipt of the goods if the lessor, or, in the case of a finance lease, the supplier, is a merchant; otherwise the risk passes to the lessee on tender of delivery.

**§26-2A-220 Effect of Default on Risk of Loss**

- (1) Where risk of loss is to pass to the lessee and the time of passage is not stated:
  - (a) if a tender or delivery of goods so fails to conform to the lease contract as to give a right of rejection, the risk of their loss remains with the lessor, or, in the case of a finance lease, the supplier, until cure or acceptance.
  - (b) If the lessee rightfully revokes acceptance, he, to the extent of any deficiency in his effective insurance coverage, may treat the risk of loss as having remained with the lessor from the beginning.
- (2) Whether or not risk of loss is to pass to the lessee, if the lessee as to conforming goods already identified to a lease contract repudiates or is otherwise in default under the lease contract, the lessor, or, in the case of a finance lease, the supplier, to the extent of any deficiency in his effective insurance coverage may treat the risk of loss as resting on the lessee for a commercially reasonable time.

**§26-2A-221 Casualty to Identified Goods**

- (1) If a lease contract requires goods identified when the lease contract is made, and the goods suffer casualty without fault of the lessee, the lessor or the supplier before delivery, or the goods suffer casualty before risk of loss passes to the lessee pursuant to the lease agreement or §26-2A-219, then:
  - (a) if the loss is total, the lease contract is avoided; and
  - (b) if the loss is partial or the goods have so deteriorated as to no longer conform to the lease contract, the lessee may nevertheless demand inspection and at his option either treat the lease contract as avoided or, except in a finance lease that is not a consumer lease, accept the goods with due allowance from the rent payable for the balance of the lease term for the deterioration or the deficiency in quantity but without further right against the lessor.

## PART 3

### EFFECT OF LEASE CONTRACT

#### §26-2A-301 Enforceability of Lease Contract

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

#### §26-2A-302 Title To and Possession of Goods

Except as otherwise provided in this Chapter, each provision of this Chapter applies whether the lessor or a third party has title to the goods, and whether the lessor, the lessee or a third party has possession of the goods, notwithstanding any statute or rule of law that possession or the absence of possession is fraudulent.

#### §26-2A-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 Chapter 9, Secured Transactions, by reason of §26-9-102(1)(b).
- (2) Except as provided in §26-2A-303 (3) and (4), a provision in a lease agreement which:
  - (i) prohibits the voluntary or involuntary transfer, including a transfer by sale, sublease, creation or enforcement of a security interest, or attachment, levy, or other judicial process, of an interest of a party under the lease contract or of the lessor's residual interest in the goods, or
  - (ii) makes such a transfer an event of default, gives rise to the rights and remedies provided in §26-2A-303(5), but a transfer that is prohibited or is an event of default under the lease agreement is otherwise effective.
- (3) A provision in a lease agreement which:
  - (i) prohibits the creation or enforcement of a security interest in an interest of a party under the lease contract or in the lessor's residual interest in the goods, or
  - (ii) makes such transfer an event of default, is not enforceable unless, and then only to the extent that, there is an actual transfer by the lessee of the lessee's right of possession or use of the goods in violation of the provision or an actual delegation of a material performance of either party to the lease contract in violation of the provision. Neither the granting nor the enforcement of a security interest in (i) the lessor's interest under the lease contract; or (ii) the lessor's residual interest in the goods is a transfer that materially impairs the prospect of obtaining return performance by, materially changes the duty of, or materially increases the burden or risk imposed on, the lessee within the purview of

§26-2A-303(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 §26-2A-303(5).
- (5) Subject to §26-2A-303(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 the party waives the default or otherwise agrees, has the rights and remedies described in §26-2A-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.

**§26-2A-304 Subsequent Lease of Goods by Lessor**

- (1) Subject to §26-2A-303, a subsequent lessee from a lessor of goods under an existing lease contract obtains, to the extent of the leasehold interest transferred, the leasehold interest in the goods that the lessor had or had power to transfer, and except as provided in §26-2A-304(2) and §26-2A-527(4), takes subject to the existing lease contract. A lessor with voidable title has power to transfer a good leasehold interest to a good faith subsequent lessee for value, but only to the extent set forth in the preceding sentence. If goods have been delivered under a transaction of purchase, the lessor has that power even though:
  - (a) the lessor's transferor was deceived as to the identity of the lessor;
  - (b) the delivery was in exchange for a check which is later dishonored;
  - (c) it was agreed that the transaction was to be a "Cash Sale"; or
  - (d) the delivery was procured through fraud punishable as larcenous under the criminal law.
- (2) A subsequent lessee in the ordinary course of business from a lessor who is a merchant dealing in goods of that kind to whom the goods were entrusted by the existing lessee of that lessor before the interest of the subsequent lessee became enforceable against that lessor obtains, to the extent of the leasehold interest transferred, all of that lessor's and the existing lessee's rights to the goods, and takes free of the existing lessee's rights to the goods, and takes free of the existing lease contract.
- (3) A subsequent lessee from the lessor of goods that are subject to an existing lease contract and are covered by a certificate of title issued under a statute of this state or of another jurisdiction takes no greater rights than those provided both by this section and by certificate of title statute.

**§26-2A-305 Sale or Sublease of Goods by Lessee**

- (1) Subject to the provisions of §26-2A-303, a buyer or sublessee from the lessee of goods under an existing lease contract obtains, to the extent of the interest transferred, the leasehold interest in the goods that the lessee had or had power to transfer, and except as provided in §26-2A-305(2) and §26-2A-511(4), takes subject to the existing lease contract. A lessee with a voidable leasehold interest has power to transfer a good leasehold interest to a good faith buyer for value or a good faith sublessee for value, but only to the extent set forth in the preceding sentence. When goods have been delivered under a transaction of lease the lessee has that power even though:
  - (a) the lessor was deceived as to the identity of the lessee;
  - (b) the delivery was in exchange for a check which is later dishonored; or
  - (c) the delivery was procured through fraud punishable as larcenous under the criminal law.
- (2) A buyer in the ordinary course of business or a sublessee in the ordinary course of business from a lessee who is a merchant dealing in goods of that kind to whom the goods were entrusted by the lessor obtains, to the extent of the interest transferred, all of the lessor's and lessee's rights to the goods, and takes free of the existing lease contract.

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

**§26-2A-306 Priority of Certain Liens Arising by Operation of Law**

If a person in the ordinary course of his business furnishes services or materials with respect to goods subject to a lease contract, a lien upon those goods in the possession of that person given by statute or rule of law for those materials or services takes priority over any interest of the lessor or lessee under the lease contract or this Chapter unless the lien is created by statute and the statute provides otherwise or unless the lien is created by rule of law and the rule of law provides otherwise.

**§26-2A-307 Priority of Liens Arising by Attachment or Levy On, Security Interests In, and Other Claims to Goods**

- (1) Except as otherwise provided in §26-2A-306, a creditor of a lessee takes subject to the lease contract.
- (2) Except as otherwise provided in §26-2A-307(3)(4) and in §§26-2A-306 and 26-2A-308, a creditor of a lessor takes subject to the lease contract unless:
  - (a) the creditor holds a lien that attached to the goods before the lease contract became enforceable;
  - (b) the creditor holds a security interest in the goods and the lessee did not give value and receive delivery of the goods without knowledge of the security interest; or
  - (c) the creditor holds a security interest in the goods which were perfected (§26-9-303) before the lease contract became enforceable.
- (3) A lessee in the ordinary course of business takes the leasehold interest free of a security interest in the goods created by the lessor even though the security interest is perfected (§26-9-303) and the lessee knows of its existence.
- (4) A lessee other than a lessee in the ordinary course of business takes the leasehold interest free of a security interest to the extent that it secures future advances made after the secured party acquires knowledge of the lease or more than forty-five (45) days after the lease contract becomes enforceable, whichever first occurs, unless the future advances are made pursuant to a commitment entered into without knowledge of the lease and before the expiration of the forty-five (45) day period.

**§26-2A-308 Special Rights of Creditors**

- (1) A creditor of a lessor in possession of goods subject to a lease contract may treat the lease contract as void if as against the creditor retention of possession by the lessor is fraudulent under any statute or rule of law, but retention of possession in good faith and current

course of trade by the lessor for a commercially reasonable time after the lease contract becomes enforceable is not fraudulent.

- (2) Nothing in this Chapter impairs the rights of creditors of a lessor if the lease contract:
  - (a) becomes enforceable, not in current course of trade but in satisfaction of or as security for a preexisting claim for money, security, or the like, and
  - (b) is made under circumstances which under any statute or rule of law apart from this Chapter would constitute the transaction a fraudulent transfer or voidable preference.
- (3) A creditor of a seller may treat a sale or an identification of goods to a contract for sale as void if as against the creditor retention of possession by the seller is fraudulent under any statute or rule of law, but retention of possession of the goods pursuant to a lease contract entered into by the seller as lessee and the buyer as lessor in connection with the sale or identification of the goods is not fraudulent if the buyer bought for value and in good faith.

**§26-2A-309 Lessor's and Lessee's Rights When Goods Become Fixtures**

- (1) In this section:
  - (a) goods are "Fixtures" when they become so related to particular real estate that an interest in them arises under real estate law;
  - (b) a "Fixture Filing" is the filing, in the office where a mortgage on the real estate would be filed or recorded, of a financing statement covering goods that are or are to become fixtures and conforming to the requirements of §26-9-402(5);
  - (c) a lease is a "Purchase Money Lease" unless the lessee has possession or use of the goods or the right to possession or use of the goods before the lease agreement is enforceable;
  - (d) a mortgage is a "Construction Mortgage" to the extent it secures an obligation incurred for the construction of an improvement on land including the acquisition cost of the land, if the recorded writing so indicates; and
  - (e) "Encumbrance" includes real estate mortgages and other liens on real estate and all other rights in real estate that are not ownership interests.
- (2) Under this Chapter a lease may be of goods that are fixtures or may continue in goods that become fixtures, but no lease exists under this Chapter of ordinary building materials incorporated into an improvement on land.
- (3) This Chapter does not prevent creation of a lease of fixtures pursuant to real estate law.
- (4) the perfected interest of a lessor of fixtures has priority over a conflicting interest of an encumbrancer or owner of the real estate if:
  - (a) the lease is a purchase money lease, the conflicting interest of the encumbrancer or owner arises before the goods become fixtures, the interest of the lessor is

perfected by a fixture filing before the goods become fixtures or within ten (10) days thereafter, and the lessee has an interest of record in the real estate or is in possession of the real estate; or

- (b) The interest of the lessor is perfected by a fixture filing before the interest of the encumbrancer or owner is of record, the lessor's interest has priority over any conflicting interest of a predecessor in title of the encumbrancer or owner, and the lessee has an interest of record in the real estate or is in possession of the real estate.
- (5) The interest of a lessor of fixtures, whether or not perfected, has priority over the conflicting interest of an encumbrancer or owner of the real estate if:
- (a) the fixtures are readily removable factory or office machines, readily removable equipment that is not primarily used or leased for use in the operation of the real estate, or readily removable replacements of domestic appliances that are goods subject to a consumer lease, and before the goods become fixtures the lease contract is enforceable; or
  - (b) the conflicting interest is lien on the real estate obtained by legal or equitable proceedings after the lease contract is enforceable; or
  - (c) the encumbrancer or owner has consented in writing to the lease or has disclaimed an interest in the goods as fixtures; or
  - (d) the lessee has a right to remove the goods as against the encumbrancer or owner. If the lessee's right to remove terminates, the priority of the interest of the lessor continues for a reasonable time.
- (6) Notwithstanding §26-2A-309(4)(a) but otherwise subject to §26-2A-309(4)(5), the interest of a lessor of fixtures, including the lessor's residual interest, is subordinate to the conflicting interest of an encumbrancer of the real estate under a construction mortgage recorded before the goods become fixtures if the goods become fixtures before the completion of the construction. To the extent given to refinance a construction mortgage, the conflicting interest of an encumbrancer of the real estate under a mortgage has this priority to the same extent as the encumbrancer of the real estate under the construction mortgage.
- (7) In cases not within the preceding subsections, priority between the interest of a lessor of fixtures, including the lessor's residual interest, and the conflicting interest of an encumbrancer or owner of the real estate who is not the lessee is determined by the priority rules governing conflicting interests in real estate.
- (8) If the interest of a lessor of fixtures, including the lessor's residual interest, has priority over all conflicting interests of all owners and encumbrancers of the real estate, the lessor or the lessee may (i) on default, expiration, termination or cancellation of the lease agreement but subject to the lease agreement and this Chapter, or (ii) if necessary to enforce other rights and remedies of the lessor or lessee under this Chapter, remove the goods from the real estate, free and clear of all conflicting interests of all owners and encumbrancers of the real estate, but the lessor or lessee must reimburse any encumbrancer or owner of the real estate who is not the lessee and who has not otherwise

agreed for the cost of repair of any physical injury, but not for any diminution in value of the real estate caused by the absence of the goods removed or by any necessity of replacing them. A person entitled to reimbursement may refuse permission to remove until the party seeking removal gives adequate security for the performance of this obligation.

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

### **§26-2A-310 Lessor's and Lessee's Rights When Goods Become Accessions**

- (1) Goods are "Accessions" when they are installed in or affixed to other goods.
- (2) The interest of a lessor or a lessee under a lease contract entered into before the goods became accessions is superior to all interests in the whole except as stated in §26-2A-310(4).
- (3) The interest of a lessor or a lessee under a lease contract entered into at the time or after the goods became accessions is superior to all subsequently acquired interests in the whole except as stated in §26-2A-310(4) but is subordinate to interests in the whole existing at the time the lease contract was made unless the holders of such interests in the whole have in writing consented to the lease or disclaimed an interest in the goods as part of the whole.
- (4) The interest of a lessor or a lessee under a lease contract described in §26-2A-310(2) or (3) is subordinate to the interest of:
  - (a) a buyer in the ordinary course of business or a lessee in the ordinary course of business of any interest in the whole acquired after the goods became accessions; or
  - (b) a creditor with a security interest in the whole perfected before the lease contract was made to the extent that the creditor makes subsequent advances without knowledge of the lease contract.
- (5) When under §26-2A-310(2) or (3) and (4) a lessor or a lessee of accessions holds an interest that is superior to all interests in the whole, the lessor or the lessee may:
  - (a) on default, expiration, termination, or cancellation of the lease contract by the other party but subject to the provisions of the lease contract and this Chapter; or
  - (b) if necessary to enforce his other rights and remedies under this Chapter, remove the goods from the whole, free and clear of all interests in the whole, but he must reimburse any holder of an interest in the whole who is not the lessee and who has not otherwise agreed for the cost of repair of any physical injury but not for any diminution in value of the whole caused by the absence of the goods removed or by any necessity for replacing them. A person entitled to

reimbursement may refuse permission to remove until the party seeking removal gives adequate security for the performance of this obligation.

**§26-2A-311 Priority Subject to Subordination**

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

## PART 4

### PERFORMANCE OF LEASE CONTRACT: REPUDIATED, SUBSTITUTED AND EXCUSSED

#### §26-2A-401 **Insecurity: Adequate Assurance of Performance**

- (1) A lease contract imposes an obligation on each party that the other's expectation of receiving due performance will not be impaired.
- (2) If reasonable grounds for insecurity arise with respect to the performance of either party, the insecure party may demand in writing adequate assurance of due performance. Until the insecure party receives that assurance, if commercially reasonable the insecure party may suspend any performance for which he has not already received the agreed return.
- (3) A repudiation of the lease contract occurs if assurance of due performance adequate under the circumstances of the particular case is not provided to the insecure party within a reasonable time, not to exceed thirty (30) days after receipt of a demand by the other party.
- (4) Between merchants, the reasonableness of grounds for insecurity and the adequacy of any assurance offered must be determined according to commercial standards.
- (5) Acceptance of any nonconforming delivery or payment does not prejudice the aggrieved party's right to demand adequate assurance of future performance.

#### §26-2A-402 **Anticipatory Repudiation**

- (1) If either party repudiates a lease contract with respect to a performance not yet due under the lease contract, the loss of which performance will substantially impair the value of the lease contract to the other, the aggrieved party may:
  - (a) for a commercially reasonable time, await retraction of repudiation and performance by the repudiating party;
  - (b) make demand pursuant to §26-2A-401 and await assurance of future performance adequate under the circumstances of the particular case; or
  - (c) resort to any right or remedy upon default under the lease contract or this chapter, even though the aggrieved party has notified the repudiating party that the aggrieved party would await the repudiating party's performance and assurance and has urged retraction. In addition, whether or not the aggrieved party is pursuing one of the foregoing remedies, the aggrieved party may suspend performance or, if the aggrieved party is the lessor, proceed in accordance with the provisions of this Chapter on the lessor's right to identify goods to the lease contract notwithstanding default or to salvage unfinished goods (§26-2A-524).

#### §26-2A-403 **Retraction of Anticipatory Repudiation**

- (1) Until the repudiating party's next performance is due, the repudiating party can retract the repudiation unless, since the repudiation, the aggrieved party has cancelled the lease contract or materially changed the aggrieved party's position or otherwise indicated that the aggrieved party considers the repudiation final.
- (2) Retraction may be by any method that clearly indicates to the aggrieved party that the repudiating party intends to perform under the lease contract and includes any assurance demanded under §26-2A-401.
- (3) Retraction reinstates a repudiating party's rights under a lease contract with due excuse and allowance to the aggrieved party for any delay occasioned by the repudiation.

**§26-2A-404 Substituted Performance**

- (1) If without fault of the lessee, the lessor and the supplier, the agreed berthing, loading, or unloading facilities fail or the agreed type of carrier becomes unavailable or the agreed manner of delivery otherwise becomes commercially impracticable, but a commercially reasonable substitute is available, the substitute performance must be tendered and accepted.
- (2) If the agreed means or manner of payment fails because of domestic or foreign governmental regulation:
  - (a) The lessor may withhold or stop delivery or cause the supplier to withhold or stop delivery unless the lessee provides a means of payment that is commercially a substantial equivalent; and
  - (b) If delivery has already been taken, payment by the means or in the manner provided by the regulation discharges the lessee's obligation unless the regulation is discriminatory, oppressive, or predatory.

**§26-2A-405 Excused Performance**

- (1) Subject to §26-2A-404 on substituted performance, the following rules apply:
  - (a) delay in delivery or nondelivery in whole or in part by a lessor or a supplier who complies with Paragraphs (b) and (c) is not a default under the lease contract if performance as agreed has been made impracticable by the occurrence of a contingency the nonoccurrence of which was a basic assumption on which the lease contract was made or by compliance with good faith with any applicable foreign or domestic governmental regulation or order, whether or not the regulation or order later proves to be invalid.
  - (b) If the causes mentioned in Paragraph (a) affect only part of the lessor's or the supplier's capacity to perform, he shall allocate production and deliveries among his customers but at his option may include regular customers not then under contract for sale or lease as well as his own requirements for further manufacture. He may so allocate in any manner that is fair and reasonable.

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

**§26-2A-406 Procedure on Excused Performance**

(1) If the lessee receives notification of a material or indefinite delay or an allocation justified under §26-2A-405, the lessee may by written notification to the lessor as to any goods involved, and with respect to all of the goods if under an installment lease contract the value of the whole lease contract is substantially impaired (§26-2A-510):

- (a) terminate the lease contract (§26-2A-505(2)); or
- (b) except in a finance lease that is not a consumer lease, modify the lease contract by accepting the available quota in substitution, with due allowance from the rent payable for the balance of the lease term for the deficiency but without further right against the lessor.

(2) If, after receipt of a notification from the lessor under §26-2A-405, the lessee fails so to modify the lease agreement within a reasonable time not exceeding thirty (30) days, the lease contract lapses with respect to any deliveries affected.

**§26-2A-407 Irrevocable Promises; Finance Leases**

- (1) In the case of a finance lease that is not a consumer lease the lessee's promises under the lease contract become irrevocable and independent upon the lessee's acceptance of the goods.
- (2) A promise that has become irrevocable and independent under §26-2A-407(1):
  - (a) is effective and enforceable between the parties, and by or against third parties including assignees of the parties; and
  - (b) is not subject to cancellation, termination, modification, repudiation, excuse or substitution without the consent of the party to whom the promise runs.
- (3) This section does not affect the validity under any other law of a covenant in any lease contract making the lessee's promises irrevocable and independent upon the lessee's acceptance of the goods.

## **PART 5**

### **ARTICLE A-C**

#### **ARTICLE A DEFAULT IN GENERAL**

#### **ARTICLE B DEFAULT IN GENERAL**

#### **ARTICLE C DEFAULT BY LESEE**

##### **§26-2A-501 Default: Procedure**

- (1) Whether the lessor or the lessee is in default under a lease contract is determined by the lease agreement and this Chapter.
- (2) If the lessor or the lessee is in default under the lease contract, the party seeking enforcement has rights and remedies as provided in this chapter and, except as limited by this Chapter, as provided in the lease agreement.
- (3) If the lessor or the lessee is in default under the lease contract, the party seeking enforcement may reduce the party's claim to judgment, or otherwise enforce the lease contract by self-help or any available judicial procedure or nonjudicial procedure, including administrative proceeding, arbitration, or the like, in accordance with this Chapter.
- (4) Except as otherwise provided in §26-1-106(1) or this Chapter or the lease agreement, the rights and remedies referred to in §26-2A-502(2)(3) are cumulative.
- (5) If the lease agreement covers both real property and goods, the party seeking enforcement may proceed under this part as to the goods, or under other applicable law as to both the real property and the goods in accordance with that party's rights and remedies in respect of the real property, in which case this part does not apply.

##### **§26-2A-502 Notice After Default**

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

##### **§26-2A-503 Modification or Impairment of Rights and Remedies**

- (1) Except as otherwise provided in this Chapter, the lease agreement may include rights and remedies for default in addition to or in substitution for those provided in this chapter and may limit or alter the measure of damages recoverable under this chapter.

- (2) Resort to a remedy provided under this Chapter or in the lease agreement is optional unless the remedy is expressly agreed to be exclusive. If circumstances cause an exclusive or limited remedy to fail of its essential purpose, or provision for an exclusive remedy is unconscionable, remedy may be had as provided in this Chapter.
- (3) Consequential damages may be liquidated under §26-2A-504, or may otherwise be limited, altered or excluded unless the limitation, alteration or exclusion is unconscionable. Limitation, alteration or exclusion of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation, alteration or exclusion of damages where the loss is commercial is not prima facie unconscionable.
- (4) Rights and remedies on default by the lessor or the lessee with respect to any obligation or promise collateral or ancillary to the lease contract are not impaired by this Chapter.

**§26-2A-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 §26-2A-504(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 Chapter.
- (3) If the lessor justifiably withholds or stops delivery of goods because of the lessee's default or insolvency (§26-2A-525 or 26-2A-526), the lessee is entitled to restitution of any amount by which the sum of his payments exceeds:
  - (a) the amount to which the lessor is entitled by virtue of terms liquidating the lessor's damages in accordance with §26-2A-504(1); or
  - (b) in the absence of those terms, twenty percent (20%) of the then present value of the total rent the lessee was obligated to pay for the balance of the lease term, or, in the case of a consumer lease, the lesser of such amount or five hundred dollars (\$500.00).
- (4) A lessee's right to restitution under subsection (3) is subject to offset to the extent the lessor establishes:
  - (a) a right to recover damages under the provisions of this Chapter other than §26-2A-504(1) of this section; and
  - (b) The amount or value of any benefits received by the lessee directly or indirectly by reason of the lease contract.

**§26-2A-505 Cancellation and Termination and Effect of Cancellation, Termination, Rescission, or Fraud on Rights and Remedies**

- (1) On cancellation of the lease contract, all obligations that are still executory on both sides are discharged, but any right based on prior default or performance survives, and the canceling party also retains any remedy for default of the whole lease contract or any unperformed balance.
- (2) On termination of the lease contract, all obligations that are still executory on both sides are discharged but any right based on prior default or performance survives.
- (3) Unless the contrary intention clearly appears, expressions of “cancellation,” “rescission,” or the like of the lease contract may not be construed as a renunciation or discharge of any claim in damages for an antecedent default.
- (4) Rights and remedies for material misrepresentation or fraud include all rights and remedies available under this Chapter for default.
- (5) Neither rescission nor a claim for rescission of the lease contract nor rejection or return of the goods may bar or be deemed inconsistent with a claim for damages or other right or remedy.

**§26-2A-506 Statute of Limitations**

- (1) An action for default under a lease contract, including breach of warranty or indemnity, must be commenced within four (4) years after the cause of action accrued. By the original lease contract the parties may reduce the period of limitation to not less than one (1) year.
- (2) A cause of action for default accrues when the act of omission on which the default or breach of warranty is based or should have been discovered by the aggrieved party, or when the default occurs, whichever is later. A cause of action for indemnity accrues when the act or omission on which the claim for indemnity is based or should have been discovered by the indemnified party, whichever is later.
- (3) If an action commenced within the time limited by §26-2A-506(1) is so terminated as to leave available a remedy by another action for the same default or breach of warranty or indemnity, the other action may be commenced after the expiration of the time limited and within six (6) months after the termination of the first action unless the termination resulted from voluntary discontinuance or from dismissal for failure or neglect to prosecute.
- (4) This section does not alter the law on tolling of the statute of limitations nor does it apply to causes of action that have accrued before this Chapter becomes effective.

**§26-2A-507 Proof of Market Rent: Time and Place**

- (1) Damages based on market rent (§26-2A-519 or 26-2A-528) are determined according to the rent for the use of the goods concerned for a lease term identical to the remaining lease

term of the original lease agreement and prevailing at the times specified in §§26-2A-519 and 26-2A-528.

- (2) If evidence of rent for the use of the goods concerned for a lease term identical to the remaining lease term of the original lease agreement and prevailing at the times or places described in this Chapter is not readily available, the rent prevailing within any reasonable time before or after the time described or at any other place or for a different lease term which in commercial judgment or under usage of trade would serve as a reasonable substitute for the one described may be used, making any proper allowance for the difference, including the cost of transporting the goods to or from the other place.
- (3) Evidence of a relevant rent prevailing at a time or place or for a lease term other than the one described in this chapter offered by one (1) party is not admissible unless and until he has given the other party notice the court finds sufficient to prevent unfair surprise.
- (4) If the prevailing rent or value of any goods regularly leased in any established market is in issue, reports in official publications or trade journals or in newspapers or periodicals of general circulation published as the reports of that market are admissible in evidence. The circumstances of the preparation of the report may be shown to affect its weight but not its admissibility.

**§26-2A-508 Lessee's Remedies**

- (1) If a lessor fails to deliver the goods in conformity to the lease contract (§26-2A-509) or repudiates the lease contract (§26-2A-402), or a lessee rightfully rejects the goods (§26-2A-509) or justifiably revokes acceptance of the goods (§26-2A-527), then with respect to any goods involved, and with respect to all of the goods if under an installment lease contract the value of the whole lease contract is substantially impaired (§26-2A-510), the lessor is in default under the lease contract and the lessee may:
  - (a) cancel the lease contract (§26-2A-505(1));
  - (b) recover so much of the rent and security as has been paid and is just under the circumstances;
  - (c) cover and recover damages as to all goods affected whether or not they have been identified to the lease contract (§§26-2A-518 and 26-2A-520), or recover damages for nondelivery (§§26-2A-519 and 26-2A-520);
  - (d) exercise any other rights or pursue any other remedies provided in the lease contract.
- (2) If a lessor fails to deliver the goods in conformity to the lease contract or repudiates the lease contract, the lessee may also:
  - (a) if the goods have been identified, recover them (§26-2A-522); or
  - (b) in a proper case, obtain specific performance or replevy the goods (§26-2A-521).

- (3) If a lessor is otherwise in default under a lease contract, the lessee may exercise the rights and pursue the remedies provided in the lease contract, which may include a right to cancel the lease, and in §26-2A-519(3).
- (4) If a lessor has breached a warranty, whether express or implied, the lessee may recover damages (§26-2A-519(4)).
- (5) On rightful rejection or justifiable revocation of acceptance, a lessee has a security interest in goods in the lessee's possession or control for any rent and security that has been paid and any expenses reasonably incurred in their inspection, receipt, transportation and care and custody and may hold those goods and dispose of them in good faith and in a commercially reasonable manner, subject to §26-2A-527(5).
- (6) Subject to the provisions of §26-2A-407, a lessee, on notifying the lessor of the lessee's intention to do so, may deduct all or any part of the damages resulting from any default under the lease contract from any part of the rent still due under the same lease contract.

**§26-2A-509 Lessee's Rights On Improper Delivery; Rightful Rejection**

- (1) Subject to the provisions of §26-2A-510 on default in installment lease contracts, if the goods or the tender or delivery fail in any respect to conform to the lease contract, the lessee may reject or accept the goods or accept any commercial unit or units and reject the rest of the goods.
- (2) Rejection of goods is ineffective unless it is within a reasonable time after tender or delivery of the goods and the lessee seasonably notifies the lessor.

**§26-2A-510 Installment Lease Contracts: Rejection and Default**

- (1) Under an installment lease contract a lessee may reject any delivery that is nonconforming if the nonconformity substantially impairs the value of that delivery and cannot be cured or the nonconformity is a defect in the required documents; but if the nonconformity does not fall within §26-2A-510(2) and the lessor or the supplier gives adequate assurance of its cure, the lessee must accept that delivery.
- (2) Whenever nonconformity or default with respect to one or more deliveries substantially impairs the value of the installment lease contract as a whole there is a default with respect to the whole. But, the aggrieved party reinstates the installment lease contract as a whole if the aggrieved party accepts a nonconforming delivery without seasonably notifying of cancellation or brings an action with respect only to past deliveries or demands performance as to future deliveries.

**§26-2A-511 Merchant Lessee's Duties as to Rightfully Rejected Goods**

- (1) Subject to any security interest of a lessee (§26-2A-508(5)), if a lessor or a supplier has no agent or place of business at the market of rejection, a merchant lessee, after rejection of goods in his possession or control, shall follow any reasonable instructions received from the lessor or the supplier with respect to the goods. In the absence of those instructions, a merchant lessee shall make reasonable efforts to sell, lease, or otherwise dispose of the

goods for the lessor's account if they threaten to decline in value speedily. Instructions are not reasonable if on demand indemnity for expenses is not forthcoming.

- (2) If a merchant lessee (§26-2A-511(1)) or any other lessee (§26-2A-512) disposes of goods, he is entitled to reimbursement either from the lessor or the supplier or out of the proceeds for reasonable expenses of caring for and disposing of the goods and, if the expenses include no disposition commission, to such commission as is usual in the trade, or if there is none, to a reasonable sum not exceeding ten percent (10%) of the gross proceeds.
- (3) In complying with this section or §26-2A-512, the lessee is held only to good faith. Good faith conduct hereunder is neither acceptance or conversion nor the basis of an action for damages.
- (4) A purchaser who purchases in good faith from a lessee pursuant to this section or §26-2A-512 takes the goods free of any rights of the lessor and the supplier even though the lessee fails to comply with one or more of the requirements of this Chapter.

**§26-2A-512 Lessee's Duties as to Rightfully Rejected Goods**

- (1) Except as otherwise provided with respect to goods that threaten to decline in value speedily (§26-2A-511) and subject to any security interest of a lessee (§26-2A-508(5)):
  - (a) the lessee, after rejection of goods in the lessee's possession, shall hold them with reasonable care at the lessor's or the supplier's disposition for a reasonable time after the lessee's seasonable notification of rejection;
  - (b) if the lessor or the supplier gives no instructions within a reasonable time after notification of rejection, the lessee may store the rejected goods for the lessor's or the supplier's account or ship them to the lessor or the supplier or dispose of them for the lessor's or the supplier's account with reimbursement in the manner provided in §26-2A-511; but
  - (c) the lessee has no further obligations with regard to goods rightfully rejected.
- (2) Action by the lessee pursuant to §26-2A-512(1) is not acceptance or conversion.

**§26-2A-513 Cure by Lessor of Improper Tender of Delivery; Replacement**

- (1) If any tender or delivery by the lesser or the supplier is rejected because nonconforming and the time for performance has not yet expired, the lessor or the supplier may seasonably notify the lessee of the lessor's or the supplier's intention to cure and may then make a conforming delivery within the time provided in the lease contract.
- (2) If the lessee rejects a nonconforming tender that the lessor or the supplier had reasonable grounds to believe would be acceptable with or without money allowance, the lessor or the supplier may have a further reasonable time to substitute a conforming tender if he seasonably notifies the lessee.

**§26-2A-514 Waiver of Lessee's Objections**

- (1) In rejecting goods, a lessee's failure to state a particular defect that is ascertainable by reasonable inspection precludes the lessee from relying on the defect to justify rejection or to establish default:
  - (a) if, stated seasonably, the lessor or the supplier could have cured it (§26-2A-513); or
  - (b) between merchants if the lessor or the supplier after rejection has made a request in writing for a full and final written statement of all defects on which the lessee proposes to rely.
- (2) A lessee's failure to reserve rights when paying rent or other consideration against documents precludes recovery of the payment for defects apparent on the face of the documents.

**§26-2A-515 Acceptance of Goods**

- (1) Acceptance of goods occurs after the lessee has had a reasonable opportunity to inspect the goods and:
  - (a) the lessee signifies or acts with respect to the goods in a manner that signifies to the lessor or the supplier that the goods are conforming or that the lessee will take or retain them in spite of their nonconformity; or
  - (b) the lessee fails to make an effective rejection of the goods (§26-2A-509(2)).
- (2) Acceptance of a part of any commercial unit is acceptance of that entire unit.

**§26-2A-516 Effect of Acceptance of Goods; Notice of Default; Burden of Establishing Default After Acceptance; Notice of Claim or Litigation to Person Answerable Over**

- (1) A lessee must pay rent for any goods accepted in accordance with the lease contract, with due allowance for goods rightfully rejected or not delivered.
- (2) A lessee's acceptance of goods precludes rejection of the goods accepted. In the case of a finance lease, if made with knowledge of a nonconformity, acceptance cannot be revoked because of it. In any other case, if made with knowledge of a nonconformity, acceptance cannot be revoked because of it unless the acceptance was on the reasonable assumption that the nonconformity would be seasonably cured. Acceptance does not of itself impair any other remedy provided by this Chapter or the lease agreement for nonconformity.
- (3) If a tender has been accepted:
  - (a) within a reasonable time after the lessee discovers or should have discovered any default, the lessee shall notify the lessor and the supplier, if any, or be barred from any remedy against the party not notified;
  - (b) except in the case of a consumer lease, within a reasonable time after the lessee receives notice of litigation for infringement or the like (§26-2A-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 (2) litigations, then unless the person notified after reasonable 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 (§26-2A-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 reasonable receipt of the demand does turn over control the lessee is so barred.
- (5) §26-2A-516(3)(4) apply to any obligation of a lessee to hold the lessor or the supplier harmless against infringement or the like (§26-2A-211).

#### **§26-2A-517 Revocation of Acceptance of Goods**

- (1) A lessee may revoke acceptance of a lot or commercial unit whose nonconformity substantially impairs its value to the lessee if the lessee has accepted it:
- (a) except in the case of a finance lease, on the reasonable assumption that its nonconformity would be cured and it has not been seasonably cured; or
  - (b) without discovery of the nonconformity if the lessee's acceptance was reasonably induced either by the lessor's assurances or, except in the case of a finance lease, by the difficulty of discovery before acceptance.
- (2) Except in the case of a finance lease that is not a consumer lease, a lessee may revoke acceptance of a lot or commercial unit if the lessor defaults under the lease contract and the default substantially impairs the value of that lot or commercial unit to the lessee.
- (3) If the lease agreement so provides, the lessee may revoke acceptance of a lot or commercial unit because of other defaults by the lessor.
- (4) Revocation of acceptance must occur within a reasonable time after the lessee discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by the nonconformity. Revocation is not effective until the lessee notifies the lessor.
- (5) A lessee who so revokes has the same rights and duties with regard to the goods involved as if the lessee had rejected them.

**§26-2A-518 Cover; Substitute Goods**

- (1) After a default by a lessor under the lease contract of the type described in §26-2A-508(1), or, if agreed, after other default by the lessor, the lessee may cover by making any purchase or lease of or contract to purchase or lease goods in substitution for those due from the lessor.
- (2) Except as otherwise provided with respect to damages liquidated in the lease agreement (§26-2A-504) or otherwise determined pursuant to agreement of the parties (§§26-1-102(3) and 26-2A-503), if a lessee's cover is by a lease agreement substantially similar to the original lease agreement and the new lease agreement is made in good faith and in a commercially reasonable manner, the lessee may recover from the lessor as damages:
  - (i) the present value, as of the date of the commencement of the term of the new lease agreement, of the rent under the new lease agreement applicable to that period of the new lease term which is comparable to the then remaining term of the original lease agreement minus the present value as of the same date of the total rent for the then remaining lease term of the original lease agreement; and
  - (ii) any incidental or consequential damages, less expenses saved in consequence of the lessor's default.
- (3) If a lessor's cover is by lease agreement that for any reason does not qualify for treatment under §26-2A-518(2), or is by purchase or otherwise, the lessee may recover from the lessor as if the lessee had elected not to cover and §26-2A-519 governs.

**§26-2A-519 Lessee's Damages for Nondelivery, Repudiation, Default and Breach of Warranty in Regard to Accepted Goods**

- (1) Except as otherwise provided with respect to damages liquidated in the lease agreement (§26-2A-504) or otherwise determined pursuant to agreement of the parties (§§26-1-102(3) and 26-2A-503), if a lessee elects not to cover or a lessee elects to cover and the cover is by lease agreement that for any reason does not qualify for treatment under §26-2A-518(2), or is by purchase or otherwise, the measure of damages for nondelivery or repudiation by the lessor or for rejection or revocation of acceptance by the lessee is the present value, as of the date of the default, of the then market rent minus the present value as of the same date of the original rent, computed for the remaining lease term of the original lease agreement, together with incidental and consequential damages, less expenses saved in consequent of the lessor's default.
- (2) Market rent is to be determined as of the place for tender or, in cases of rejection after arrival or revocation of acceptance, as of the place of arrival.
- (3) Except as otherwise agreed, if the lessee has accepted goods and given notification (§26-2A-516(3)), the measure of damages for nonconforming tender or delivery or other default by a lessor is the loss resulting in the ordinary course of events from the lessor's default as determined in any manner that is reasonable together with incidental and consequential damages, less expenses saved in consequence of the lessor's default.

- (4) Except as otherwise agreed, the measure of damages for breach of warranty is the present value at the time and place of acceptance of the difference between the value of the use of the goods accepted and the value if they had been as warranted for the lease term, unless special circumstances show proximate damages of a different amount, together with incidental and consequential damages, less expenses saved in consequence of the lessor's default or breach of warranty.

**§26-2A-520 Lessee's Incidental and Consequential Damages**

- (1) Incidental damages resulting from a lessor's default include expenses reasonably incurred in inspection, receipt, transportation, and care and custody of goods rightfully rejected or goods the acceptance of which is justifiably revoked, any commercially reasonable charges, expenses or commissions in connection with effecting cover, and any other reasonable expense incident to the default.
- (2) Consequential damages resulting from a lessor's default include:
  - (a) Any loss resulting from general or particular requirements and needs of which the lessor at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and
  - (b) Injury to person or property proximately resulting from any breach of warranty.

**§26-2A-521 Lessee's Right to Specific Performance or Replevin**

- (1) Specific performance may be decreed if the goods are unique or in other proper circumstances.
- (2) A decree for specific performance may include any terms and conditions as to payment of the rent, damages, or other relief that the court deems just.
- (3) A lessee has a right of replevin, detinue, sequestration, claim and delivery, or the like for goods identified to the lease contract if after reasonable effort the lessee is unable to effect cover for those goods or the circumstances reasonably indicate that the effort will be unavailing.

**§26-2A-522 Lessee's Right to Goods on Lessor's Insolvency**

- (1) Subject to §26-2A-522(2) and even though the goods have not been shipped, a lessee who has paid a part or all of the rent and security for goods identified to a lease contract (§26-2A-217) on making and keeping good a tender of any unpaid portion of the rent and security due under the lease contract may recover the goods identified from the lessor if the lessor becomes insolvent within ten (10) days after receipt of the first installment of rent and security.
- (2) A lessee acquires the right to recover goods identified to a lease contract only if they conform to the lease contract.

**§26-2A-523 Lessor's Remedies**

- (1) If a lessee wrongfully rejects or revokes acceptance of goods or fails to make a payment when due or repudiates with respect to a party or the whole, then, with respect to any goods involved, and with respect to all of the goods if under an installment lease contract the value of the whole lease contract is substantially impaired (§26-2A-510), the lessee is in default under the lease contract and the lessor may:
  - (a) cancel the lease contract (§26-2A-505(1));
  - (b) proceed respecting goods not identified to the lease contract (§26-2A-524);
  - (c) withhold delivery of the goods and take possession of goods previously delivered (§26-2A-525);
  - (d) stop delivery of the goods by any bailee (§26-2A-526);
  - (e) dispose of the goods and recover damages (§26-2A-527), or retain the goods and recover damages (§26-2A-528), or in a proper case recover rent (§26-2A-529);
  - (f) exercise any other rights or pursue any other remedies provided in the lease contract.
- (2) If a lessor does not fully exercise a right or obtain a remedy to which the lessor is entitled under §26-2A-523(1), the lessor may recover the loss resulting in the ordinary course of events from the lessee's default as determined in any reasonable manner, together with incidental damages, less expenses saved in consequence of the lessee's default.
- (3) If a lessee is otherwise in default under a lease contract, the lessor may exercise the rights and pursue the remedies provided in the lease contract, which may include a right to cancel the lease. In addition, unless otherwise provided in the lease contract:
  - (a) if the default substantially impairs the value of the lease contract to the lessor, the lessor may exercise the rights and pursue the remedies provided in §26-2A-523(1) or (2); or
  - (b) If the default does not substantially impair the value of the lease contract to the lessor, the lessor may recover as provided in subsection (2).

**§26-2A-524 Lessor's Right to Identify Goods to Lease Contract**

- (1) A lessor aggrieved under §26-2A-523(1) may:
  - (a) identify to the lease contract conforming goods not already identified if at the time the lessor learned of the default they were in the lessor's or the supplier's possession or control; and

- (b) dispose of goods (§26-2A-527(1)) that demonstrably have been intended for the particular lease contract even though those goods are unfinished.
- (2) If the goods are unfinished, in the exercise of reasonable commercial judgment for the purposes of avoiding loss and of effective realization, an aggrieved lessor or the supplier may either complete manufacture and wholly identify the goods to the lease contract or cease manufacture and lease, sell, or otherwise dispose of the goods for scrap or salvage value or proceed in any other reasonable manner.

**§26-2A-525 Lessor's Right to Possession of Goods**

- (1) If a lessor discovers the lessee to be insolvent, the lessor may refuse to deliver the goods.
- (2) After a default by the lessee under the lease contract of the type described in §26-2A-523(1) or 26-2A-523(3)(a) or, if agreed, after other default by the lessee, the lessor has the right to take possession of the goods. If the lease contract so provides, the lessor may require the lessee to assemble the goods and make them available to the lessor at a place to be designated by the lessor which is reasonably convenient to both parties. Without removal, the lessor may render unusable any goods employed in trade or business, and may dispose of goods on the lessee's premises (§26-2A-527).
- (3) The lessor may proceed under §26-2A-525(2) without judicial process if it can be done without breach of the peace or the lessor may proceed by action.

**§26-2A-526 Lessor's Stoppage of Delivery in Transit or Otherwise**

- (1) A lessor may stop delivery of goods in the possession of a carrier or other bailee if the lessor delivers the lessee to be insolvent and may stop delivery of carload, truckload, planeload, or larger shipments of express or freight if the lessee repudiates or fails to make a payment due before delivery, whether for rent, security or otherwise under the lease contract, or for any other reason the lessor has a right to withhold or take possession of the goods.
- (2) In pursuing its remedies under §26-2A-526(1), the lessor may stop delivery until:
  - (a) receipt of the goods by the lessee;
  - (b) acknowledgment to the lessee by any bailee of the goods, except a carrier, that the bailee hold the goods for the lessee; or
  - (c) such an acknowledgment to the lessee by a carrier via reshipment or as warehouseman.
- (3)
  - (a) To stop delivery, a lessor shall so notify as to enable the bailee by reasonable diligence to prevent delivery of the goods.

- (b) After notification, the bailee shall hold and deliver the goods according to the directions of the lessor, but the lessor is liable to the bailee for any ensuing charges or damages.
- (c) A carrier who has issued a nonnegotiable bill of lading is not obliged to obey a notification to stop received from a person other than the consignor.

**§26-2A-527 Lessor's Rights to Dispose of Goods**

- (1) After a default by a lessee under the lease contract of the type described in §26-2A-523(1) and 26-2A-523(3)(a) or after the lessor refuses to deliver or takes possession of goods (§26-2A-525 or 26-2A-526), or, if agreed, after other default by a lessee, the lessor may dispose of the goods concerned or the undelivered balance thereof by lease, sale or otherwise.
- (2) Except as otherwise provided with respect to damages liquidated in the lease agreement (§26-2A-504) or otherwise determined pursuant to agreement of the parties (§26-1-102(3) and 26-2A-503), if the disposition is by lease agreement substantially similar to the original lease agreement and the new lease agreement is made in good faith and in a commercially reasonable manner, the lessor may recover from the lessee as damages:
  - (i) accrued and unpaid rent as of the date of the commencement of the term of the new lease agreement,
  - (ii) the present value, as of the same date, of the total rent for the then remaining lease term of the original lease agreement minus the present value, as of the same date, of the rent under the new lease agreement applicable to that period of the new lease term which is comparable to the then remaining term of the original lease agreement, and
  - (iii) any incidental damages allowed under §26-2A-530, less expenses saved in consequence of the lessee's default.
- (3) If the lessor's disposition is by lease agreement that for any reason does not qualify for treatment under subsection (2), or is by sale or otherwise, the lessor may recover from the lessee as if the lessor may recover from the lessee as if the lessor had elected not to dispose of the goods and §26-2A-528 governs.
- (4) A subsequent buyer or lessee who buys or leases from the lessor in good faith for value as a result of a disposition under this section takes the goods free of the original lease contract and any rights of the original lessee even though the lessor fails to comply with one or more of the requirements of this Chapter.
- (5) The lessor is not accountable to the lessee for any profit made on any disposition. A lessee who has rightfully rejected or justifiably revoked acceptance shall account to the lessor for any excess over the amount of the lessee's security interest (§26-2A-508(5)).

**§26-2A-528 Lessor's Damages for Nonacceptance, Failure to Pay, Repudiation or Other Default**

- (1) Except as otherwise provided with respect to damages liquidated in the lease agreement (§26-2A-504) or otherwise determined pursuant to agreement of the parties (§§26-1-102(3) and 26-2A-503), if a lessor elects to retain the goods or a lessor elects to dispose of the goods and the disposition is by lease agreement that for any reason does not qualify for treatment under §26-2A-527(2), or is by sale or otherwise, the lessor may recover from the lessee as damages for a default of the type described in §26-2A-523(1) or 26-2A-523(3)(a), or, if agreed, for other default of the lessee, (i) accrued and unpaid rent as of the date of default if the lessee has never taken possession of the goods, or, if the lessee has taken possession of the goods, as of the date the lessor repossesses the goods or an earlier date on which the lessee makes a tender of the goods to the lessor, (ii) the present value as of the date determined under clause (i) of the total rent for the then remaining lease term of the original lease agreement minus the present value as of the same date of the market rent at the place where the goods are located computed for the same lease term, and (iii) any incidental damages allowed under §26-2A-530, less expenses saved in consequent of the lessee's default.
- (2) If the measure of damages provided in §26-2A-528(1) is inadequate to put a lessor in as good a position as performance would have, the measure of damages is the present value of the profit, including reasonable overhead, the lessor would have made from full performance by the lessee, together with any incidental damages allowed under §26-2A-530, due allowance for costs reasonably incurred and due credit for payments or proceeds of disposition.

**§26-2A-529 Lessor's Action for the Rent**

- (1) After default by the lessee under the lease contract of the type described in §26-2A-523(1) or 26-2A-523(3)(a) or, if agreed, after other default by the lessee, if the lessor complies with §26-2A-529(2), the lessor may recover from the lessee as damages:
  - (a) For goods accepted by the lessee and not repossessed by or tendered to the lessor, and for conforming goods lost or damaged within a commercially reasonable time after risk of loss passes to the lessee (§26-2A-219):
    - (i) accrued and unpaid rent as of the date of entry of judgment in favor of the lessor;
    - (ii) the present value as of the same date of the rent for the then remaining lease term of the lease agreement; and
    - (iii) any incidental damages allowed under §26-2A-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 §26-2A-530, less expenses saved in consequence of the lessee's default.

- (2) Except as provided in §26-2A-529(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 §26-2A-529(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 §26-2A-527 or §26-2A-528, and the lessor will cause an appropriate credit to be provided against a judgment for damages to the extent that the amount of the judgment exceeds the recovery available pursuant to §26-2A-527 or §26-2A-528.
- (4) Payment of the judgment for damages obtained pursuant to §26-2A-529(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 (§26-2A-402), a lessor who is held not entitled to rent under this section must nevertheless be awarded damages for nonacceptance under §§26-2A-527 and 26-2A-528.

**§26-2A-530 Lessor's Incidental Damages**

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

**§26-2A-531 Standing to Sue Third Parties for Injury to Goods**

- (1) If a third party so deals with goods that have been identified to a lease contract as to cause actionable injury to a party to the lease contract:
  - (a) the lessor has a right of action against the third party; and
    - (i) has a security interest in the goods;
    - (ii) has an insurable interest in the goods; or
  - (b) the lessee also has a right of action against the third party if the lessee:
    - (iii) bears the risk of loss under the lease contract or has since the injury assumed that risk as against the lessor and the goods have been converted or destroyed.
- (2) If at the time of the injury the party plaintiff did not bear the risk of loss as against the other party to the lease contract and there is no arrangement between them for disposition

of the recovery, his suit or settlement, subject to his own interest, is as a fiduciary for the other party to the lease contract.

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

**§26-2A-532 Lessor's Rights to Residual Interest**

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

**CHAPTER 3  
NEGOTIABLE INSTRUMENTS (NOT ADOPTED)**

**CHAPTER 4  
BANK DEPOSITS AND COLLECTIONS (NOT ADOPTED)**

**CHAPTER 4A  
FUNDS TRANSFERS (NOT ADOPTED)**

**CHAPTER 5  
UNIFORM COMMERCIAL CODE – REVISED**

**ARTICLE 5. LETTERS OF CREDIT**

<b>§26-5-101</b>	<b>Short Title</b>
<b>§26-5-102</b>	<b>Definitions</b>
<b>§26-5-103</b>	<b>Scope</b>
<b>§26-5-104</b>	<b>Formal Requirements</b>
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<b>§26-5-106</b>	<b>Issuance, Amendment, Cancellation and Duration</b>
<b>§26-5-107</b>	<b>Confirmer, Nominated Person and Adviser</b>
<b>§26-5-108</b>	<b>Issuer’s Rights and Obligations</b>
<b>§26-5-109</b>	<b>Fraud and Forgery</b>
<b>§26-5-110</b>	<b>Warranties</b>
<b>§26-5-111</b>	<b>Remedies</b>
<b>§26-5-112</b>	<b>Transfer of Letter of Credit</b>
<b>§26-5-113</b>	<b>Transfer by Operation of Law</b>
<b>§26-5-114</b>	<b>Assignment of Proceeds</b>
<b>§26-5-115</b>	<b>State of Limitations</b>
<b>§26-5-116</b>	<b>Choice of Law and Forum</b>
<b>§26-5-117</b>	<b>Subrogation of Issuer, Applicant and Nominated Person</b>

<b>§26-5-101</b>	<b>Short Title</b>
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This Chapter may be cited as Uniform Commercial Code – Revised Article 5. Letters of Credit.

<b>§26-5-102</b>	<b>Definitions</b>
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- (1) In this Chapter:
  - (a) “Adviser” means a person who, at the request of the issuer, a confirmer, or another adviser, notifies or requests another adviser to notify the beneficiary that a letter of credit has been issued, confirmed or amended.
  - (b) “Applicant” means a person at whose request or for whose account a letter of credit is issued. The term includes a person who requests an issuer to issue a letter of credit on behalf of another if the person making the request undertakes an obligation to reimburse the issuer.

- (c) “Beneficiary” means a person who under the terms of a letter of credit is entitled to have its complying presentation honored. The term includes a person to whom drawing rights have been transferred under a transferable letter of credit.
- (d) “Confirmer” means a nominated person who undertakes, at the request or with the consent of the issuer, to honor a presentation under a letter of credit issued by another.
- (e) “Dishonor” of a letter of credit means failure timely to honor or to take an interim action, such as acceptance of a draft, that may be required by the letter of credit.
- (f) “Document” means a draft or other demand, document of title, investment security, certificate, invoice, or other record, statement, or representation of fact, law, right, or opinion:
  - (i) which is presented in a written or other medium permitted by the letter of credit or, unless prohibited by the letter of credit, by the standard practice referred to in §26-5-108(5), and
  - (ii) which is capable of being examined for compliance with the terms and conditions of the letter of credit. A document may not be oral.
- (g) “Good faith” means honesty in fact in the conduct or transaction concerned.
- (h) “Honor” of a letter of credit means performance of the issuer’s undertaking in the letter of credit to pay or deliver an item of value. Unless the letter of credit otherwise provides, “honor” occurs:
  - (i) upon payment;
  - (ii) if the letter of credit provides for acceptance, upon acceptance of a draft and, at maturity, its payment; or
  - (iii) if the letter of credit provides for incurring a deferred obligation, upon incurring the obligation and, at maturity, its performance.
- (i) “Issuer” means a bank or other person that issues a letter of credit, but does not include an individual who makes an engagement for personal, family or household purposes.
- (j) “Letter of Credit” means a definite undertaking that satisfies the requirements of §26-5-104 by an issuer to a beneficiary at the request or for the account of an applicant or, in the case of a financial institution, to itself or for its own account, to honor a documentary presentation by payment or delivery of an item of value.
- (k) “Nominated Person” means a person whom the issuer:
  - (i) designates or authorizes to pay, accept, negotiate or otherwise give value under a letter of credit; and
  - (ii) undertakes by agreement or custom and practice to reimburse.

- (l) “Presentation” means delivery of a document to an issuer or nominated person for honor or giving of value under a letter of credit.
  - (m) “Presenter” means a person making a presentation as or on behalf of a beneficiary or nominated person.
  - (n) “Record” means information that is inscribed on a tangible medium, or that is stored in an electronic or other medium and is retrievable in perceivable form.
  - (o) “Successor of a beneficiary” means a person who succeeds to substantially all of the rights of a beneficiary by operation of law, including a corporation with or into which the beneficiary has been merged or consolidated, an administrator, executor, personal representative, trustee in bankruptcy, debtor in possession, liquidator and receiver.
- (2) Other definitions applying to this Chapter or from the Mississippi Code of 1972, as amended, and the sections in which they appear are:
- “Accept” or “Acceptance” See Miss. Code Ann. §75-3-409  
“Value” See Miss. Code Ann. §75-3-303, 75-4-211]
- (3) Chapter 1 contains certain additional general definitions and principles of construction and interpretation applicable throughout this Chapter.

**§26-5-103      Scope**

- (1) This Chapter applies to Letters of Credit and to certain rights and obligations arising out of transactions involving Letters of Credit.
- (2) The statement of a rule in this Chapter does not by itself require, imply, or negate application of the same or a different rule to a situation not provided for, or to a person not specified, in this Chapter.
- (3) With the exception of this subsection, §26-5-103(1)(4), §§26-5-102(1)(i) and (j), 26-5-106(5), and 26-5-114(5), and except to the extent prohibited in §§26-1-102(3) and 26-5-117(d), the effect of this chapter may be varied by agreement or by a provision stated or incorporated by reference in an undertaking. A term in an agreement or undertaking generally excusing liability or generally limiting remedies for failure to perform obligations is not sufficient to vary obligations prescribed by this Chapter.
- (4) Rights and obligations of an issuer to a beneficiary or a nominated person under a Letter of Credit are independent of the existence, performance or nonperformance of a contract or arrangement out of which the letter of credit arises or which underlies it, including contracts or arrangements between the issuer and the applicant and between the applicant and the beneficiary.

**§26-5-104      Formal Requirements**

A Letter of Credit, confirmation, advice, transfer, amendment or cancellation may be issued in any form that is a record and is authenticated:

- (1) by a signature, or
- (2) in accordance with the agreement of the parties or the standard practice referred to in §26-5-108(5).

**§26-5-105 Consideration**

Consideration is not required to issue, amend, transfer or cancel a Letter of Credit, advice or confirmation.

**§26-5-106 Issuance, Amendment, Cancellation and Duration**

- (1) A Letter of Credit is issued and becomes enforceable according to its terms against the issuer when the issuer sends or otherwise transmits it to the person requested to advise or to the beneficiary. A letter of credit is revocable only if it so provides.
- (2) After a Letter of Credit is issued, rights and obligations of a beneficiary, applicant, confirmer and issuer are not affected by an amendment or cancellation to which that person has not consented except to the extent the letter of credit provides that it is revocable or that the issuer may amend or cancel the Letter of Credit without that consent.
- (3) If there is no stated expiration date or other provision that determines its duration, a letter of credit expires one (1) year after its stated date of issuance or, if none is stated, after the date on which it is issued.
- (4) A Letter of Credit that states that it is perpetual expires five (5) years after its stated date of issuance, or if none is stated, after the date on which it is issued.

**§26-5-107 Confirmer, Nominated Person and Adviser**

- (1) A confirmer is directly obligated on a Letter of Credit and has the rights and obligations of an issuer to the extent of its confirmation. The confirmer also has rights against and obligations to the issuer as if the issuer were an applicant and the confirmer had issued the Letter of Credit at the request and for the account of the issuer.
- (2) A nominated person who is not a confirmer is not obligated to honor or otherwise give value for a presentation.
- (3) A person requested to advise may decline to act as an adviser. An adviser who is not a confirmer is not obligated to honor or give value for a presentation. An adviser undertakes to the issuer and to the beneficiary accurately to advise the terms of the letter of credit, confirmation, amendment or advice received by that person and undertakes to the beneficiary to check the apparent authenticity of the request to advise. Even if the advice is inaccurate, the letter of credit, confirmation or amendment is enforceable as issued.
- (4) A person who notifies a transferee beneficiary of the terms of a Letter of Credit, confirmation, amendment or advice has the rights and obligations of an adviser under §26-

5-107(3). The terms in the notice to the transferee beneficiary may differ from the terms in any notice to the transferor beneficiary to the extent permitted by the Letter of Credit, confirmation, amendment or advice received by the person who so notifies.

**§26-5-108 Issuer's Rights and Obligations**

- (1) Except as otherwise provided in §26-5-109, an issuer shall honor a presentation that, as determined by the standard practice referred to in §26-5-108(5), appears on its face strictly to comply with the terms and conditions of the Letter of Credit. Except as otherwise provided in §26-5-113 and unless otherwise agreed with the applicant, an issuer shall dishonor a presentation that does not appear so to comply.
- (2) An issuer has a reasonable time after presentation, but not beyond the end of the seventh business day of the issuer after the day of its receipt of documents:
  - (a) to honor;
  - (b) if the letter of credit provides for honor to be completed more than seven (7) business days after presentation, to accept a draft or incur a deferred obligation; or
  - (c) to give notice to the presenter of discrepancies in the presentation.
- (3) Except as otherwise provided in §26-5-108(4), an issuer is precluded from asserting as a basis for dishonor any discrepancy if timely notice is not given, or any discrepancy not stated in the notice if timely notice is given.
- (4) Failure to give the notice specified in §26-5-108(2) or to mention fraud, forgery or expiration in the notice does not preclude the issuer from asserting as a basis for dishonor fraud or forgery as described in §26-5-109(1) or expiration of the Letter of Credit before presentation.
- (5) An issuer shall observe standard practice of financial institutions that regularly issue Letters of Credit. Determination of the issuers observance of the standard practice is a matter of interpretation for the court. The court shall offer the parties a reasonable opportunity to present evidence of the standard practice.
- (6) An issuer is not responsible for:
  - (a) the performance or nonperformance of the underlying contract, arrangement or transaction;
  - (b) an act or omission of others; or
  - (c) observance or knowledge of the usage of a particular trade other than the standard practice referred to in §26-5-108(5).
- (7) If an undertaking constituting a letter of credit under §26-5-102(1)(j) contains nondocumentary conditions, an issuer shall disregard the nondocumentary conditions and treat them as if they were not stated.

- (8) An issuer that has dishonored a presentation shall return the documents or hold them at the disposal of, and send advice to that effect to, the presenter.
- (9) An issuer that has honored a presentation as permitted or required by this article:
  - (a) is entitled to be reimbursed by the applicant in immediately available funds not later than the date of its payment of funds;
  - (b) takes the documents free of claims of the beneficiary or presenter;
  - (c) is precluded from asserting a right of recourse on a draft under any applicable law;
  - (d) Except as otherwise provided in §§26-5-110 and 26-5-117, is precluded from restitution of money paid or other value given by mistake to the extent the mistake concerns discrepancies in the documents or tender which are apparent on the face of the presentation; and
  - (e) Is discharged to the extent of its performance under the letter of credit unless the issuer honored a presentation in which a required signature of a beneficiary was forged.

**§26-5-109 Fraud and Forgery**

- (1) If a presentation is made that appears on its face strictly to comply with the terms and conditions of the Letter of Credit, but a required document is forged or materially fraudulent, or honor of the presentation would facilitate a material fraud by the beneficiary on the issuer or applicant:
  - (a) the issuer shall honor the presentation, if honor is demanded by:
    - (i) a nominated person who has given value in good faith and without notice of forgery or material fraud;
    - (ii) a confirmer who has honored its confirmation in good faith;
    - (iii) a holder in due course of a draft drawn under the letter of credit which was taken after acceptance by the issuer or nominated person; or
    - (iv) an assignee of the issuer's or nominated person's deferred obligation that was taken for value and without notice of forgery or material fraud after the obligation was incurred by the issuer or nominated person; and
  - (b) the issuer, acting in good faith, may honor or dishonor the presentation in any other case.
- (2) If an applicant claims that a required document is forged or materially fraudulent or that honor of the presentation would facilitate a material fraud by the

beneficiary on the issuer or applicant, a court of competent jurisdiction may temporarily or permanently enjoin the issuer from honoring a presentation or grant similar relief against the issuer or other persons only if the court finds that:

- (a) the relief is not prohibited under the law applicable to an accepted draft or deferred obligation incurred by the issuer;
- (b) a beneficiary, issuer or nominated person who may be adversely affected is adequately protected against loss that it may suffer because the relief is granted;
- (c) all of the conditions to entitle a person to the relief under the law of this jurisdiction have been met; and
- (d) on the basis of the information submitted to the court, the applicant is more likely than not to succeed under its claim of forgery or material fraud and the person demanding honor does not qualify for protection under §26-5-109 (1)(a).

**§26-5-110 Warranties**

- (1) If its presentation is honored, the beneficiary warrants:
  - (a) to the issuer, any other person to whom presentation is made, and the applicant that there is no fraud or forgery of the kind described in §26-5-109(1); and
  - (b) to the applicant that the drawing does not violate any agreement between the applicant and beneficiary or any other agreement intended by them to be augmented by the letter of credit.
- (2) The warranties in §26-5-110(1) are in addition to warranties arising under any applicable law because of the presentation or transfer of documents covered by any of those articles.

**§26-5-111 Remedies**

- (1) If an issuer wrongfully dishonors or repudiates its obligation to pay money under a letter of credit before presentation, the beneficiary, successor or nominated person presenting on its own behalf may recover from the issuer the amount that is the subject of the dishonor or repudiation. If the issuer's obligation under the Letter of Credit is not for the payment of money, the claimant may obtain specific performance or, at the claimant's election, recover an amount equal to the value of performance from the issuer. In either case, the claimant may also recover incidental but not consequential damages. The claimant is not obligated to take action to avoid damages that might be due from the issuer under this subsection. If, although not obligated to do so, the claimant avoids damages, the claimant's recovery from the issuer must be reduced by the amount of damages avoided. The issuer has the burden of proving the amount of damages avoided. In the case of repudiation the claimant need not present any document.

- (2) If an issuer wrongfully dishonors a draft or demand presented under a Letter of Credit or honors a draft or demand in breach of its obligation to the applicant, the applicant may recover damages resulting from the breach, including incidental but not consequential damages, less any amount saved as a result of the breach.
- (3) If an adviser or nominated person other than a confirmer breaches an obligation under this chapter or an issuer breaches an obligation not covered in §26-5-111 (1) or (2), a person to whom the obligation is owed may recover damages resulting from the breach, including incidental but not consequential damages, less any amount saved as a result of the breach. To the extent of the confirmation, a confirmer has the liability of an issuer specified in this subsection and §26-5-111(1) and (2).
- (4) An issuer, nominated person, or adviser who is found liable under §26-5-111(1), (2) or (3) shall pay interest on the amount owed thereunder from the date of wrongful dishonor or other appropriate date.
- (5) Reasonable attorney's fees and other expenses of litigation must be awarded to the prevailing party in an action in which a remedy is sought under this Chapter.
- (6) Damages that would otherwise be payable by a party for breach of an obligation under this article may be liquidated by agreement or undertaking, but only in an amount or by a formula that is reasonable in light of the harm anticipated.

**§26-5-112      Transfer of Letter of Credit**

- (1) Except as otherwise provided in §26-5-113, unless a Letter of Credit provides that it is transferable, the right of a beneficiary to draw or otherwise demand performance under a letter of credit may not be transferred.
- (2) Even if a Letter of Credit provides that it is transferable, the issuer may refuse to recognize or carry out a transfer if:
  - (a) the transfer would violate applicable law; or
  - (b) the transferor or transferee has failed to comply with any requirement stated in the Letter of Credit or any other requirement relating to transfer imposed by the issuer which is within the standard practice referred to in §26-5-108(5) or is otherwise reasonable under the circumstances.

**§26-5-113      Transfer by Operation of Law**

- (1) A successor of a beneficiary may consent to amendments, sign and present documents, and receive payment or other items of value in the name of the beneficiary without disclosing its status as a successor.
- (2) A successor of a beneficiary may consent to amendments, sign and present documents, and receive payment or other items of value in its own name as the disclosed successor of the beneficiary. Except as otherwise provided in §26-5-113(5), an issuer shall recognize a disclosed successor of a beneficiary as beneficiary in full substitution for its predecessor upon compliance with the

requirements for recognition by the issuer of a transfer of drawing rights by operation of law under the standard practice referred to in §26-5-108(5) or, in the absence of such a practice, compliance with other reasonable procedures sufficient to protect the issuer.

- (3) An issuer is not obliged to determine whether a purported successor is a successor of a beneficiary or whether the signature of a purported successor is genuine or authorized.
- (4) Honor of a purported successor's apparently complying presentation under §26-5-113(1) or (2) has the consequences specified in §26-5-108(8) even if the purported successor is not the successor of a beneficiary. Documents signed in the name of the beneficiary or of a disclosed successor by a person who is neither the beneficiary nor the successor of the beneficiary are forged documents for the purposes of §26-5-109.
- (5) An issuer whose rights of reimbursement are not covered by §26-5-113(4) or substantially similar law and any confirmer or nominated person may decline to recognize a presentation under §26-5-113 (2).
- (6) A beneficiary whose name is changed after the issuance of a Letter of Credit has the same rights and obligations as a successor of a beneficiary under this section.

**§26-5-114 Assignment of Proceeds**

- (1) In this section, "Proceeds of a Letter of Credit" means the cash, check, accepted draft, or other item of value paid or delivered upon honor or giving of value by the issuer or any nominated person under the Letter of Credit. The term does not include a beneficiary's drawing rights or documents presented by the beneficiary.
- (2) A beneficiary may assign its right to part or all of the proceeds of a Letter of Credit. The beneficiary may do so before presentation as a present assignment of its right to receive proceeds contingent upon its compliance with the terms and conditions of the Letter of Credit.
- (3) An issuer or nominated person need not recognize an assignment of Proceeds of a Letter of Credit until it consents to the assignment.
- (4) An issuer or nominated person has no obligation to give or withhold its consent to an assignment of Proceeds of a Letter of Credit, but consent may not be unreasonably withhold if the assignee possesses and exhibits the Letter of Credit and presentation of the Letter of Credit is a condition to honor.
- (5) Rights of a transferee beneficiary or nominated person are independent of the beneficiary's assignment of the Proceeds of a Letter of Credit and are superior to the assignee's right to the proceeds.
- (6) Neither the rights recognized by this section between an assignee and an issuer, transferee beneficiary, or nominated person nor the issuer's or nominated person's payment of proceeds to an assignee or a third person affect the rights between the assignee and any person other than the issuer, transferee beneficiary, or nominated person. The mode of

creating and perfecting a security interest in or granting an assignment of a beneficiary's rights to proceeds is governed by Chapter 9 or other law. Against persons other than the issuer, transferee beneficiary, or nominated person, the rights and obligations arising upon the creation of a security interest or other assignment of a beneficiary's right to proceeds and its perfection are governed by Chapter 9 or other law.

**§26-5-115 Statute of Limitations**

An action to enforce a right or obligation arising under this Chapter must be commenced within one (1) year after the expiration date of the relevant Letter of Credit or one (1) year after the cause of action accrues, whichever occurs later. A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach.

**§26-5-116 Choice of Law and Forum**

- (1) The liability of an issuer, nominated person or adviser for action or omission is governed by the law of the jurisdiction chosen by an agreement in the form of a record signed or otherwise authenticated by the affected parties in the manner provided in §26-5-104 or by a provision in the person's Letter of Credit, confirmation or other undertaking. The jurisdiction whose law is chosen need not bear any relation to the transaction.
- (2) Unless §26-5-116(1) applies, the liability of an issuer, nominated person or adviser for action or omission is governed by the law of the jurisdiction in which the person is located. The person is considered to be located at the address indicated in the person's undertaking. If more than one address is indicated, the person is considered to be located at the address from which the person's undertaking was issued. For the purpose of jurisdiction, choice of law and recognition of interbranch Letters of Credit, but not enforcement of a judgment, all branches of a bank are considered separate juridical entities and a bank is considered to be located at the place where its relevant branch is considered to be located under this subsection.
- (3) Except as otherwise provided in this subsection, the liability of an issuer, nominated person or adviser is governed by any rules of custom or practice, such as the Uniform Customs and Practice for Documentary Credits, to which the letter of credit, confirmation or other undertaking is expressly made subject. If:
  - (i) this Chapter would govern the liability of an issuer, nominated person or adviser under §26-5-116(1) or (2);
  - (ii) the relevant undertaking incorporates rules of custom or practice; and
  - (iii) there is conflict between this Chapter and those rules as applied to that undertaking, those rules govern except to the extent of any conflict with the nonvariable provisions specified in §26-5-103(3).
- (4) If there is conflict between this Chapter and any other applicable law, this chapter governs.
- (5) The forum for settling disputes arising out of an undertaking within this chapter may be chosen in the manner and with the binding effect that governing law may be chosen in accordance with §26-5-116(1).

**§26-5-117 Subrogation of Issuer, Applicant and Nominated Person**

- (1) An issuer that honors a beneficiary's presentation is subrogated to the rights of the beneficiary to the same extent as if the issuer were a secondary obligor of the underlying obligation owed to the beneficiary and of the applicant to the same extent as if the issuer were the secondary obligor of the underlying obligation owed to the applicant.
- (2) An applicant that reimburses an issuer is subrogated to the rights of the issuer against any beneficiary, presenter or nominated person to the same extent as if the applicant were the secondary obligor of the obligations owed to the issuer and has the rights of subrogation of the issuer to the rights of the beneficiary stated in §26-5-117(1).
- (3) A nominated person who pays or gives value against a draft or demand presented under a Letter of Credit is subrogated to the rights of:
  - (a) the issuer against the applicant to the same extent as if the nominated person were a secondary obligor of the obligation owed to the issuer by the applicant.
  - (b) the beneficiary to the same extent as if the nominated person were a secondary obligor of the underlying obligation owed to the applicant.
  - (c) the applicant to the same extent as if the nominated person were a secondary obligor of the underlying obligation owed to the applicant.
- (4) Notwithstanding any agreement or term to the contrary, the rights of subrogation stated in §26-5-117(a) and (b) do not arise until the issuer honors the letter of credit or otherwise pays and the rights in §26-5-117(c) do not arise until the nominated person pays or otherwise gives value. Until then, the issuer, nominated person and the applicant do not derive under this section present or prospective rights forming the basis of a claim, defense or excuse.

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**WAREHOUSE RECEIPTS AND BILLS OF LADING  
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- §26-7-601 Lost and Missing Documents
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## PART I

### GENERAL

#### §26-7-101 Short Title

This Chapter shall be known and may be cited as Uniform Commercial Code – Documents of Title.

#### §26-7-102 Definitions and Index of Definitions

- (1) In this Chapter, unless the context otherwise requires:
  - (a) “Bailee” means the person who by a warehouse receipt, bill of lading or other document of title acknowledges possession of goods and contract to deliver them.
  - (b) “Consignee” means the person named in a bill to whom or to whose order the bill promises delivery.
  - (c) “Consignor” means the person named in a bill as the person from whom the goods have been received for shipment.
  - (d) “Delivery Order” means a written order to deliver goods directed to a warehouseman, carrier or other person who in the ordinary course of business issues warehouse receipts or bill of lading.
  - (e) “Document” means document of title as defined in the general definitions in Chapter 1 (§26-1-201).
  - (f) “Goods” means all things which are treated as movable for the purposes of a contract of storage or transportation.
  - (g) “Issuer” means a bailee who issues a document except that in relation to an unaccepted delivery order it means the person who orders the possessor of goods to deliver. Issuer includes any person for whom an agent or employee purports to act in issuing a document if the agent or employee has real or apparent authority to issue documents, notwithstanding that the issuer received no goods or that the goods were misdescribed or that in any other respect the agent or employee violated his instructions.
  - (h) “Warehouseman” is a person engaged in the business of storing goods for hire.
- (2) Other definitions applying to this Chapter or to specified parts thereof, and the sections in which they appear are:

“Duly Negotiate”	§26-7-501
“Person Entitled Under the Document”	§26-7-403(4)
- (3) Definitions in other chapters applying to this Chapter and the sections in which they appear are:

“Contract for Sale”	§26-2-106
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“Overseas”	§26-2-323
“Receipt of Goods”	§26-2-103

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

**§26-7-103 Relation of Chapter to Treaty, Statute, Tariff, Classification or Regulation**

To the extent that any treaty or statute of the United States, regulatory statute of this Tribe or the State of Mississippi or tariff, classification or regulation filed or issued pursuant thereto is applicable, the provisions of this Chapter are subject thereto.

**§26-7-104 Negotiable and Non-Negotiable Warehouse Receipt, Bill of Lading or Other Document of Title**

- (1) A warehouse receipt, bill of lading or other document of title is negotiable:
  - (a) if by its terms the goods are to be delivered to bearer or to the order of a named person; or
  - (b) where recognized in overseas trade, if it runs to a named person or assigns.
- (2) Any other document is nonnegotiable. A bill of lading in which it is stated that the goods are consigned to a named person is not made negotiable by a provision that the goods are to be delivered only against a written order signed by the same or another named person.

**§26-7-105 Construction Against Negative Implication**

The omission from either Part 2 or Part 3 of this chapter of a provision corresponding to a provision made in the other part does not imply that a corresponding rule of law is not applicable.

## PART 2

### WAREHOUSE RECEIPTS, SPECIAL PROVISIONS

#### §26-7-201 Who May Issue a Warehouse Receipt; Storage Under Government Bond

- (1) A warehouse receipt may be issued by any warehouseman.
- (2) Where goods including distilled spirits and agricultural commodities are stored under a statute requiring a bond against withdrawal or a license for the issuance of receipts in the nature of warehouse receipts, a receipt issued for the goods has like effect as a warehouse receipt even though issued by a person who is the owner of the goods and is not a warehouseman.

#### §26-7-202 Form of Warehouse Receipt; Essential Terms; Optional Terms

- (1) A warehouse receipt need not be in any particular form.
- (2) Unless a warehouse receipt embodies within its written or printed terms each of the following, the warehouseman is liable for damages caused by the omission to a person injured thereby:
  - (a) the location of the warehouse where the goods are stored;
  - (b) the date of issue of the receipt;
  - (c) the consecutive number of the receipt;
  - (d) a statement whether the goods received will be delivered to the bearer, to a specified person, or to a specified person or his order;
  - (e) the rate of storage of handling charges, except that where goods are stored under a field warehousing arrangement a statement of that fact is sufficient on a nonnegotiable receipt;
  - (f) a description of the goods or of the packages containing them;
  - (g) the signature of the warehouseman, which may be made by his authorized agent;
  - (h) if the receipt is issued for goods of which the warehouseman is owner, either solely or jointly or in common with others, the fact of such ownership; and
  - (i) a statement of the amount of advances made and of liabilities incurred for which the warehouseman claims a lien or security interest (§26-7-209). If the precise amount of such advances made or of such liabilities incurred is, at the time of the issue of the receipt, unknown to the warehouseman or to his agent who issues it, a statement of the fact that advances have been made or liabilities incurred and the purpose thereof is sufficient.

- (3) A warehouseman may insert in this receipt any other terms which are not contrary to the provisions of this code and do not impair his obligation of delivery (§26-7-403) or his duty of care (§26-7-204). Any contrary provisions shall be ineffective.

**§26-7-203 Liability for Non-Receipt or Misdescription**

A party to or purchaser for value in good faith of a document of title other than a bill of lading relying in either case upon the description therein of the goods may recover from the issuer damages caused by the nonreceipt or misdescription of the goods, except to the extent that the document conspicuously indicates that the issuer does not know whether any part or all of the goods in fact were received or conform to the description, as where the description is in terms of marks or labels or kind, quantity or condition, or the receipt or description is qualified by “contents, condition and quality unknown, “said to contain” or the like, if such indication be true, or the party or purchaser otherwise has notice.

**§26-7-204 Duty of Care; Contractual Limitation of Warehouseman’s Liability**

- (1) A warehouseman is liable for damages for loss of or injury to the goods caused by his failure to exercise such care in regard to them as a reasonably careful man would exercise under like circumstances but unless otherwise agreed he is not liable for damages which could not have been avoided by the exercise of such care.
- (2) Damages may be limited by a term in the warehouse receipt or storage agreement limiting the amount of liability in case of loss or damage, and setting forth a specific liability per article or item, or value per unit of weight, beyond which the warehouseman shall not be liable; provided, however, that such liability may on written request of the bailor at the time of signing such storage agreement or within a reasonable time after receipt of the warehouse receipt be increased on part or all of the goods thereunder, in which event increased rates may be charged based on such increased valuation, but that no such increase shall be permitted contrary to a lawful limitation of liability contained in the warehouseman’s tariff, if any. No such limitation is effective with respect to the warehouseman’s liability for conversion to his own use.
- (3) Reasonable provisions as to the time and manner of presenting claims and instituting actions based on the bailment may be included in the warehouse receipt or tariff.

**§26-7-205 Title Under Warehouse Receipt Defeated in Certain Cases**

A buyer in the ordinary course of business of fungible goods sold and delivered by a warehouseman who is also in the business of buying and selling such goods takes free of any claim under a warehouse receipt even though it has been duly negotiated.

**§26-7-206 Termination of Storage at Warehouseman’s Option**

- (1) A warehouseman may on notifying the person on whose account the goods are held and any other person known to claim an interest in the goods require payment of any charges and removal of the goods from the warehouse at the termination of the period of storage fixed by the document, or, if no period is fixed, within a stated period not less than thirty (30) days after the notification. If the goods are not removed before the date specified in

the notification, the warehouseman may sell them in accordance with the provisions of the section on enforcement of a warehouseman's lien (§26-7-210).

- (2) If a warehouseman in good faith believes that the goods are about to deteriorate or decline in value to less than the amount of his lien within the time prescribed in §26-7-206(1) for notification, advertisement and sale, the warehouseman may specify in the notification any reasonable shorter time for removal of the goods and in case the goods are not removed, may sell them at public sale held not less than one (1) week after a single advertisement or posting.
- (3) If as a result of a quality or condition of the goods of which the warehouseman had no notice at the time of deposit the goods are a hazard to other property or to the warehouse or to persons, the warehouseman may sell the goods at public or private sale without advertisement on reasonable notification to all persons known to claim an interest in the goods. If the warehouseman after a reasonable effort is unable to sell the goods he may dispose of them in any lawful manner and shall incur no liability by reason of such disposition.
- (4) The warehouseman must deliver the goods to any person entitled to them under this Chapter upon due demand made at any time prior to sale or other disposition under this section.
- (5) The warehouseman may satisfy his lien from the proceeds of any sale or disposition under this section but must hold the balance for delivery on the demand of any person to whom he would have been bound to deliver the goods.

**§26-7-207 Goods Must Be Kept Separate; Fungible Goods**

- (1) Unless the warehouse receipt otherwise provides, a warehouseman must keep separate the goods covered by each receipt so as to permit at all times identification and delivery of those goods except that different lots of fungible goods may be commingled.
- (2) Fungible goods so commingled are owned in common by the persons entitled thereto and the warehouseman is severally liable to each owner for that owner's share. Where because of overissue a mass of fungible goods is insufficient to meet all the receipts which the warehouseman has issued against it, the persons entitled include all holders to whom overissued receipts have been duly negotiated.

**§26-7-208 Altered Warehouse Receipts**

Where a blank in a negotiable warehouse receipt has been filled in without authority, a purchaser for value and without notice of the want of authority may treat the insertion as authorized. Any other unauthorized leaves any receipt enforceable against the issuer according to its original tenor.

**§26-7-209 Lien of Warehouseman**

- (1) A warehouseman has a lien against a bailor on the goods covered by a warehouse receipt or on the proceeds thereof in his possession for charges for storage or transportation (including demurrage and terminal charges), insurance, labor, or charges present or future in relation to the goods, and for expenses necessary for preservation of the goods or

reasonably incurred in their sale pursuant to law. If the person on whose account the goods are held is liable for like charges or expenses in relation to other goods whenever deposited and it is stated in the receipt that a lien is claimed for charges and expenses in relation to other goods, the warehouseman also has a lien against him for such charges and expenses whether or not the other goods have been delivered by the warehouseman. But against a person to whom a negotiable warehouse receipt is duly negotiated a warehouseman's lien is limited to charges in an amount or at a rate specified on the receipt or if no charges are so specified then to a reasonable charge for storage of the goods covered by the receipt subsequent to the date of the receipt.

- (2) The warehouseman may also reserve a security interest against the bailor for a maximum amount specified on the receipt for charges other than those specified in §26-7-209(1), such as for money advanced and interest. Such a security interest is governed by the Chapter on Secured Transactions (Chapter 9).
- (3) A warehouseman's lien for charges and expenses under §26-7-209(1) or a security interest under §26-7-209(2) is also effective against any person who so entrusted the bailor with possession of the goods that a pledge of them by him to a good faith purchaser for value would have been valid but is not effective against a person as to whom the document confers no right in the goods covered by it under §26-7-503.
- (4) A warehouseman loses his lien on any goods which he voluntarily delivers or which he unjustifiably refuses to deliver.

#### **§26-7-210 Enforcement of Warehouseman's Lien**

- (1) Except as provided in §26-7-210(2), a warehouseman's lien may be enforced by public or private sale of the goods in block or in parcels, at any time or place and on any terms which are commercially reasonable, after notifying all persons known to claim an interest in the goods. Such notification must include a statement of the amount due, the nature of the proposed sale and the time and place of any public sale. The fact that a better price could have been obtained by a sale at a different time or in a different method from that selected by the warehouseman is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner. If the warehouseman either sells the goods in the usual manner in any recognized market therefore, or if he sells at the price current in such market at the time of his sale, or if he has otherwise sold in conformity with commercially reasonable practices among dealers in the type of goods sold, he has sold in a commercially reasonable manner. A sale of more goods than apparently necessary to be offered to insure satisfaction of the obligation is not commercially reasonable except in cases covered by the preceding sentence.
- (2) A warehouseman's lien on goods other than goods stored by a merchant in the course of his business may be enforced only as follows:
  - (a) all persons known to claim an interest in the goods must be notified.
  - (b) The notification must be delivered in person or sent by registered or certified letter to the last known address of any person to be notified.
  - (c) The notification must include an itemized statement of the claim, a description of the goods subject to the lien, a demand for payment within a specified time not

less than ten (10) days after receipt of the notification, and a conspicuous statement that unless the claim is paid within that time the goods will be advertised for sale and sold by auction at a specified time and place.

- (d) The sale must conform to the terms of the notification.
  - (e) The sale must be held at the nearest suitable place to that where the goods are held or stored.
  - (f) After the expiration of the time given in the notification, an advertisement of the sale must be published once a week for two (2) weeks consecutively in a newspaper of general circulation where the sale is to be held. The advertisement must include a description of the goods, the name of the person on whose account they are being held, and the time and place of the sale. The sale must take place at least fifteen (15) days after the first publication. If there is no newspaper of general circulation where the sale is to be held, the advertisement must be posted at least ten (10) days before the sale in not less than six (6) conspicuous places in the neighborhood of the proposed sale.
- (3) Before any sale pursuant to this section any person claiming a right in the goods may pay the amount necessary to satisfy the lien and the reasonable expenses incurred under this section. In that event the goods must be sold, but must be retained by the warehouseman subject to the terms of the receipt and this Chapter.
  - (4) The warehouseman may buy at any public sale pursuant to this section.
  - (5) A purchaser in good faith of goods sold to enforce a warehouseman's lien takes the goods free of any rights of persons against whom the lien was valid, despite noncompliance by the warehouseman with the requirements of this section.
  - (6) The warehouseman may satisfy his lien from the proceeds of any sale pursuant to this section but must hold the balance, if any, for delivery on demand to any person to whom he would have been bound to deliver the goods.
  - (7) The rights provided by this section shall be in addition to all other rights allowed by law to a creditor against his debtor.
  - (8) Where a lien is on goods stored by a merchant in the course of his business the lien may be enforced in accordance with either §26-7-210(1) or (2).
  - (9) The warehouseman is liable for damages caused by failure to comply with the requirements for sale under this section and in case of willful violation is liable for conversion.

## **PART 3**

### **BILLS OF LADING; SPECIAL PROVISIONS**

#### **§26-7-301 Liability for Non-Receipt or Misdescription; "Said to Contain"; "Shipper's Load and Count"; Improper Handling**

- (1) A consignee of a nonnegotiable bill who has given value in good faith or a holder to whom a negotiable bill has been duly negotiated relying in either case upon the description therein of the goods, or upon the date therein shown, may recover from the issuer damages caused by the misdating of the bill or the nonreceipt or misdescription of the goods, except to the extent that the document indicates that the issuer does not know whether any part or all of the goods in fact were received or conform to the description, as where the description is in terms of marks or labels or kind, quantity, or condition or the receipt or description is qualified by "contents or condition of contents of packages unknown," "Said to Contain," "Shipper's Weight, Load and Count" or the like, if such indication be true.
- (2) When goods are loaded by an issuer who is a common carrier, the issuer must count the packages of goods if package freight and ascertain the kind and quantity if bulk freight. In such cases "Shipper's Weight, Load and Count" or other words indicating that the description was made by the shipper are ineffective except as to freight concealed by packages.
- (3) When bulk freight is loaded by a shipper who makes available to the issuer adequate facilities for weighing such freight, an issuer who is a common carrier must ascertain the kind and quantity within a reasonable time after receiving the written request of the shipper to do so. In such cases "Shipper's Weight" or other words of like purport are ineffective.
- (4) The issuer may be inserting in the bill the words "Shipper's Weight, Load and Count" or other words of like purport indicate that the goods were loaded by the shipper; and if such statement be true the issuer shall not be liable for damages caused by the improper loading. But their omission does not imply liability for such damages.
- (5) The shipper shall be deemed to have guaranteed to the issuer the accuracy at the time of shipment of the description, marks, labels, number, kind, quantity, condition and weight, as furnished by him; and the shipper shall indemnify the issuer against damage caused by inaccuracies in such particulars. The right of the issuer to such indemnity shall in no way limit his responsibility and liability under the contract of carriage to any person other than the shipper.

#### **§26-7-302 Through Bills of Lading and Similar Documents**

- (1) The issuer of a through bill of lading or other document embodying an undertaking to be performed in part by persons acting as its agents or by connecting carriers is liable to anyone entitled to recover on the document for any breach by such other persons or by a connecting carrier of its obligation under the document but to the extent that the bill covers an undertaking to be performed overseas or in territory not contiguous to the continental United States or an undertaking including matters other than transportation this liability may be varied by agreement of the parties.
- (2) Where goods covered by a through bill of lading or other document embodying an undertaking to be performed in part by persons other than the issuer are received by any such person, he is subject with respect to his own performance while the goods are in his possession to the obligation of the issuer. His obligation is discharged by delivery of the goods to another such person pursuant to the document, and does not include liability for breach by any other such persons or by the issuer.
- (3) The issuer of such through bill of lading or other document shall be entitled to recover from the connecting carrier or such other person in possession of the goods when the breach of the obligation under the document occurred, the amount it may be required to pay to anyone entitled to recover on the document therefore, as may be evidenced by any receipt, judgment, or transcript thereof, and the amount of any expense reasonably incurred by it in defending any action brought by anyone entitled to recover on the document therefore.

**§26-7-303      Diversion; Reconsignment; Change of Instructions**

- (1) Unless the bill of lading otherwise provides, the carrier may deliver the goods to person or destination other than that stated in the bill or may otherwise dispose of the goods on instructions from:
  - (a) the holder of a negotiable bill; or
  - (b) the consignor on a nonnegotiable bill notwithstanding contrary instruction from the consignee; or
  - (c) the consignee on a nonnegotiable bill in the absence of contrary instructions from the consignor, if the goods have arrived at the billed destination or if the consignee is in possession of the bill; or
  - (d) the consignee on a nonnegotiable bill if he is entitled as against the consignor to dispose of them.
- (2) Unless such instructions are noted on a negotiable bill of lading, a person to whom the bill is duly negotiated can hold the bailee according to the original terms.

**§26-7-304      Bills of Lading in a Set**

- (1) Except where customary in overseas transportation, a bill of lading must not be issued in a set of parts. The issuer is liable for damages caused by violation of this subsection.

- (2) Where a bill of lading is lawfully drawn in a set of parts, each of which is numbered and expressed to be valid only if the goods have not been delivered against any other part, the whole of the parts constitute one (1) bill.
- (3) Where a bill of lading is lawfully issued in a set of parts and different parts are negotiated to different persons, the title of the holder to whom the first due negotiation is made prevails as to both the document and the goods even though any later holder may have received the goods from the carrier in good faith and discharged the carrier's obligation by surrender of his part.
- (4) Any person who negotiates or transfers a single part of a bill of lading drawn in a set is liable to holders of that part as if it were the whole set.
- (5) The bailee is obliged to deliver in accordance with

Part 4 of this Chapter against the first presented part of a bill of lading lawfully drawn in a set. Such delivery discharges the bailee's obligation on the whole bill.

**§26-7-305 Destination Bills**

- (1) Instead of issuing a bill of lading to the consignor at the place of shipment a carrier may at the request of the consignor procure the bill to be issued at the destination or at any other place designated in the request.
- (2) Upon request of anyone entitled as against the carrier to control the goods while in transit and on surrender of any outstanding bill of lading or other receipt covering such goods, the issuer may procure a substitute bill to be issued at any place designated in the request.

**§26-7-306 Altered Bills of Lading**

An unauthorized alteration or filling in of a blank in a bill of lading leaves the bill enforceable according to its original tenor.

**§26-7-307 Lien of Carrier**

- (1) A carrier has a lien on the goods covered by a bill of lading for charges subsequent to the date of its receipt of the goods for storage or transportation (including demurrage and terminal charges) and for expenses necessary for preservation of the goods incident to their transportation or reasonably incurred in their sale pursuant to law. But against a purchaser for value of a negotiable bill of lading a carrier's lien is limited to charges stated in the bill or the applicable tariffs, or if no charges are stated then to a reasonable charges.
- (2) A lien for charges and expenses under §26-7-307(1) on goods which the carrier was required by law to receive for transportation is effective against the consignor or any person entitled to the goods unless the carrier had notice that the consignor lacked authority to subject the goods to such charges and expenses. Any other lien under §26-7-307(1) is effective against the consignor and any person who permitted the bailor to have control or possession of the goods unless the carrier had notice that the bailor lacked such authority.

- (3) A carrier loses his lien on any goods which he voluntarily delivers or which he unjustifiably refuses to deliver.

**§26-7-308 Enforcement of Carrier's Lien**

- (1) A carrier's lien may be enforced by public or private sale of the goods, in bloc or in parcels, at any time or place and on any terms which are commercially reasonable, after notifying all persons known to claim an interest in the goods. Such notification must include a statement of the amount due, the nature of the proposed sale and the time and place of any public sale. The fact that a better price could have been obtained by a sale at a different time or in a different method from that selected by the carrier is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner. If the carrier either sells the goods in the usual manner in any recognized market therefore or if he sells at the price current in such market at the time of his sale or if he has otherwise sold in conformity with commercially reasonable practices among dealers in the type of goods sold he has sold in a commercially reasonable manner. A sale of more goods than apparently necessary to be offered to ensure satisfaction of the obligation is not commercially reasonable except in cases covered by the preceding sentence.
- (2) Before any sale pursuant to this section any person claiming a right in the goods may pay the amount necessary to satisfy the lien and the reasonable expenses incurred under this section. In that event the goods must not be sold, but must be retained by the carrier subject to the terms of the bill and this Chapter.
- (3) The carrier may buy at any public sale pursuant to this section.
- (4) A purchaser in good faith of goods sold to enforce a carrier's lien takes the goods free of any rights of persons against whom the lien was valid, despite noncompliance by the carrier with the requirements of this section.
- (5) The carrier may satisfy his lien from the proceeds of any sale pursuant to this section but must hold the balance, if any, for delivery on demand to any person to whom he would have been bound to deliver the goods.
- (6) The rights provided by this section shall be in addition to all other rights allowed by law to a creditor against his debtor.
- (7) The carrier's lien may be enforced in accordance with either §26-7-308(1) or the procedure set forth in subsection (2) of §26-7-210(1) or (2).
- (8) The carrier is liable for damages caused by failure to comply with the requirements for sale under this section and in case of willful violation is liable for conversion.

**§26-7-309 Duty of Care; Contractual Limitation of Carrier's Liability**

- (1) A carrier who issues a bill of lading whether negotiable or nonnegotiable must exercise the degree of care in relation to the goods which a reasonably careful man would exercise under like circumstances. This subsection does not repeal or change any law or rule of

law which imposes liability upon a common carrier for damages not caused by its negligence.

- (2) Damages may be limited by a provision that the carrier's liability shall not exceed a value stated in the document if the carrier's rates are dependent upon value and the consignor by the carrier's tariff is afforded an opportunity to declare a higher value or a value as lawfully provided in the tariff, or where no tariff is filed he is otherwise advised of such opportunity; but no such limitation is effective with respect to the carrier's liability for conversion to its own use.
- (3) Reasonable provisions as to the time and manner of presenting claims and instituting actions based on the shipment may be included in a bill of lading or tariff.

## PART 4

### WAREHOUSE RECEIPTS AND BILL OF LADING. GENERAL OBLIGATION

#### §26-7-401 Irregularities in Issue of Receipt or Bill of Conduct of Issuer

- (1) The obligations imposed by this Chapter on an issuer apply to a document of title regardless of the fact that:
  - (a) the document may not comply with the requirements of this Chapter or of any other law or regulation regarding its issue, form or content; or
  - (b) the issuer may have violated laws regulating the conduct of his business; or
  - (c) the goods covered by the document were owned by the bailee at the time the document was issued; or
  - (d) the person issuing the document does not come within the definition of warehouseman if it purports to be a warehouse receipt.

#### §26-7-402 Duplicate Receipt or Bill; Overissue

Neither a duplicate nor any other document of title purporting to cover goods already represented by an outstanding document of the same issuer confers any right in the goods, except as provided in the case of bills in a set, overissue of documents for fungible goods and substitutes for lost, stolen or destroyed documents. But the issuer is liable for damages caused by his overissue or failure to identify a duplicate document as such by conspicuous notation on its face.

#### §26-7-403 Obligation of Warehouseman or Carrier to Deliver; Excuse

- (1) The bailee must deliver the goods to a person entitled under the document who complies with §26-7-403(2) and (3), unless and to the extent that the bailee establishes any of the following:
  - (a) delivery of the goods to a person whose receipt was rightful as against the claimant;
  - (b) damage to or delay, loss or destruction of the goods for which the bailee is not liable;
  - (c) previous sale or other disposition of the goods in lawful enforcement of a lien or on warehouseman's lawful termination of storage;
  - (d) the exercise by a seller of his right to stop delivery pursuant to the provisions of the Chapter on Sales (§26-2-705);
  - (e) a diversion, reconignment or other disposition pursuant to the provisions of this Chapter (§27-7-303) or tariff regulating such right;

- (f) release, satisfaction or any other fact affording a personal defense against the claimant;
  - (g) any other lawful excuse.
- (2) A person claiming goods covered by a document of title must satisfy the bailee's lien where the bailee so requests or where the bailee is prohibited by law from delivering the goods until the charges are paid.
  - (3) Unless the person claiming is one against whom the document confers no right under §26-7-503(1), he must surrender for cancellation or notation of partial deliveries any outstanding negotiable document covering the goods, and the bailee must cancel the document or conspicuously note the partial delivery thereon or be liable to any person to whom the document is duly negotiated.
  - (4) "Person entitled under the document" means holder in the case of a negotiable document, or the person to whom delivery is to be made by the terms of or pursuant to written instructions under a nonnegotiable document.

**§26-7-404 No Liability for Good Faith Delivery Pursuant to Receipt or Bill**

A bailee who in good faith including observance of reasonable commercial standards has received goods and delivered or otherwise disposed of them according to the terms of the document of title or pursuant to this chapter is not liable therefore. This rule applies even though the person from whom he received the goods had no authority to procure the document or to dispose of the goods and even though the person to whom he delivered the goods had no authority to receive them.

## PART 5

### WAREHOUSE. RECEIPTS AND BILLS OF LADING: NEGOTIATION AND TRANSFER

#### §26-7-501 Form of Negotiation and Requirements of "Due Negotiation"

- (1) A negotiable document of title running to the order of a named person is negotiated by his endorsement and delivery. After his endorsement in blank or to bearer any person can negotiate it by delivery alone.
- (2)
  - (a) A negotiable document of title is also negotiated by delivery along when by its original terms it runs to bearer.
  - (b) When a document running to the order of a named person is delivered to him the effect is the same as if the document had been negotiated.
- (3) Negotiation of a negotiable document of title after it has been endorsed to a specified person requires endorsement by the special endorsee as well as delivery.
- (4) A negotiable document of title is "duly negotiated" when it is negotiated in the manner stated in this section to a holder who purchases it in good faith without notice of any defense against or claim to it on the part of any person and for value, unless it is established that the negotiation is not in the regular course of business or financing or involves receiving the document in settlement or payment of a money obligation.
- (5) Endorsement of a nonnegotiable document neither makes it negotiable nor adds to the transferee's rights.
- (6) The naming in a negotiable bill of a person to be notified of the arrival of the goods does not limit the negotiability of the bill nor constitute notice to a purchaser thereof of any interest of such person in the goods.

#### §26-7-502 Rights Acquired by Due Negotiation

- (1) Subject to the following section and to the provisions of §26-7-205 on fungible goods, a holder to whom a negotiable document of title has been duly negotiated acquires thereby:
  - (a) title to the document;
  - (b) title to the goods;
  - (c) all rights accruing under the law of agency or estoppel, including rights to goods delivered to the bailee after the document was issued; and
  - (d) the direct obligation of the issuer to hold or deliver the goods according to the terms of the document free of any defense or claim by him except those arising under the terms of the document or under this Chapter. In the case of a delivery order the bailee's obligation accrues only upon acceptance and the obligation

acquired by the holder is that the issuer and any endorser will procure the acceptance of the bailee.

- (2) Subject to the following section, title and rights so acquired are not defeated by any stoppage of the goods represented by the document or by surrender of such goods by the bailee, and are not impaired even though the negotiation or any prior negotiation constituted a breach of duty or even though any person has been deprived of possession of the document by misrepresentation, fraud, accident, mistake, duress, loss, theft or conversion, or even though a previous sale or other transfer of the goods or document has been made to a third person.

**§26-7-503 Document of Title to Goods Defeated in Certain Cases**

- (1) A document of title confers no right in goods against a person who before issuance of the document had a legal interest or a perfected security interest in them and who neither:
  - (a) delivered or entrusted them or any document of title covering them to the bailor or his nominee with actual or apparent authority to ship, store or sell or with power to obtain delivery under this Chapter §26-7-403 or with power of disposition under this code (§§26-2-403 and 26-9-307) or other statute or rule of law; nor
  - (b) acquiesced in the procurement by the bailor or his nominee of any document of title.
- (2) Title to goods based upon an unaccepted delivery order is subject to the rights of anyone to whom a negotiable warehouse receipt or bill of lading covering the goods has been duly negotiated. Such a title may be defeated under the next section to the same extent as the rights of the issuer or a transferee from the issuer.
- (3) Title to goods based upon a bill of lading issued to a freight forwarder is subject to the rights of anyone to whom a bill issued by the freight forwarder is duly negotiated; but delivery by the carrier in accordance with Part 4 of this Chapter pursuant to its own bill of lading discharges the carrier's obligation to deliver.

**§26-7-504 Rights Acquired in the Absence of Due Negotiation; Effect of Diversion; Seller's Stoppage of Delivery**

- (1) A transferee of a document, whether negotiable or nonnegotiable, to whom the document has been delivered but not duly negotiated, acquires the title and rights which his transferor had or had actual authority to convey.
- (2) In the case of nonnegotiable document, until but not after the bailee receives notification of the transfer, the rights of the transferee may be defeated:
  - (a) by those creditors of the transferor who could treat the sale as void under §26-2-402; or
  - (b) by a buyer from the transferor in ordinary course of business if the bailee has delivered the goods to the buyer or received notification of his rights; or

- (c) as against the bailee by good faith dealings of the bailee with the transferor.
- (3) A diversion or other change of shipping instructions by the consignor in a nonnegotiable bill of lading which causes the bailee not to deliver to the consignee defeats the consignee's title to the goods if they have been delivered to a buyer in ordinary course of business and in any event defeats the consignee's rights against the bailee.
- (4) Delivery pursuant to a nonnegotiable document may be stopped by a seller under §26-2-705, and subject to the requirement of due notification there provided. A bailee honoring the seller's instructions is entitled to be indemnified by the seller against any resulting loss or expense.

**§26-7-505 Endorser Not a Guarantor for Other Parties**

The endorsement of a document of title issued by a bailee does not make the endorser liable for any default by the bailee or by previous endorsers.

**§26-7-506 Delivery Without Endorsement; Right to Compel Endorsement**

The transferee of a negotiable document of title has a specifically enforceable right to have his transferor supply any necessary endorsement but the transfer becomes a negotiation only of the time the endorsement is supplied.

**§26-7-507 Warranties on Negotiation or Transfer of Receipt or Bill**

- (1) Where a person negotiates or transfers a document of title for value otherwise than as a mere intermediary under the next following section, then unless otherwise agreed he warrants to his immediate purchaser only in addition to any warranty made in selling the goods:
  - (a) that the document is genuine; and
  - (b) that he has no knowledge of any fact which would impair its validity or worth; and
  - (c) that his negotiation or transfer is rightful and fully effective with respect to the title to the document and the goods it represents.

**§26-7-508 Warranties of Collecting Bank as to Documents**

A collecting bank or other intermediary known to be entrusted with documents on behalf of another or with collection of a draft or other claim against delivery of documents warrants by such delivery of the documents only its own good faith and authority. This rule applies even though the intermediary has purchased or made advances against the claim or draft to be collected.

**§26-7-509 Receipt or Bill: When Adequate Compliance With Commercial Contract**

The question whether a document is adequate to fulfill the obligations of a contract for sale or the conditions of a credit is governed by the chapters on Sales (Chapter 2) and on Letters of Credit (Chapter 5).

## PART 6

### WAREHOUSE RECEIPTS AND BILLS OF LADING. MISCELLENOUS PROVISIONS

#### §26-7-601 **Lost and Missing Documents**

- (1) If a document has been lost, stolen or destroyed, a court may order delivery of the goods or issuance of a substitute document and the bailee may without liability to any person comply with such order. If the document was negotiable the claimant must post security approved by the court to indemnify any person who may suffer loss as a result of nonsurrender of the document. If the document was not negotiable, such security may be required at the discretion of the court. The court may also in its discretion order payment of the bailee's reasonable costs and counsel fees.
- (2) A bailee who without court order delivers goods to a person claiming under a missing negotiable document is liable to any person injured thereby, and if the delivery is not in good faith becomes liable for conversion. Delivery in good faith is not conversion if made in accordance with a filed classification or tariff or, where no classification or tariff is filed, if the claimant posts security with the bailee in an amount at least double the value of the goods at the time of posting to indemnify any person injured by the delivery who files a notice of claim within one (1) year after the delivery.

#### §26-7-602 **Attachment of Goods Covered by a Negotiable Document**

Except where the document was originally issued upon delivery of the goods by a person who had no power to dispose of them, no lien attaches by virtue of any judicial process to goods in the possession of a bailee for which a negotiable document of title is outstanding unless the document be first surrendered to the bailee or its negotiation enjoined, and the bailee shall not be compelled to deliver the goods pursuant to process until the document is surrendered to him or impounded by the court. One who purchases the document for value without notice of the process or injunction takes free of the lien imposed by judicial process.

#### §26-7-603 **Conflicting Claims; Interpleader**

If more than one (1) person claims title or possession of the goods, the bailee is excused from the delivery until he has had a reasonable time to ascertain the validity of the adverse claims or to bring an action to compel all claimants to interplead and may compel such interpleader, either in defending an action for nondelivery of the goods, or by original action, whichever is appropriate.

**CHAPTER 8  
INVESTMENT SECURITIES [NOT ADOPTED]**

**CHAPTER 9  
UNIFORM COMMERCIAL CODE; SECURED TRANSACTIONS,  
SALE OF ACCOUNTS, CONTRACT RIGHTS AND CHATTEL PAPER**

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§26-9-108	When After-Acquired Collateral Not Security for Antecedent Debt
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§26-9-203	Attachment and Enforceability of Security Interest; Proceeds, Formal Requisites
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- §26-9-303 When Security Interest Is Perfected; Continuity of Perfection
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- §26-9-306 “Proceeds”; Secured Party’s Rights on Disposition of Collateral
- §26-9-307 Protection of Buyers of Goods
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- §26-9-310 Priority of Certain Liens Arising by Operation of Law
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## PART 1

### SHORT TITLE, APPLICABILITY AND DEFINITIONS

#### §26-9-101 Short Title

This Chapter shall be known and may be cited as Uniform Commercial Code – Secured Transaction.

#### §26-9-102 Policy and Subject Matter of Chapter

- (1) Except as otherwise provided in §26-9-104 on excluded transactions, this chapter applies:
  - (a) to any transaction (regardless of its form) which is intended to create a security interest in personal property or fixtures including goods, documents, instruments, general intangibles, chattel paper or accounts; and also
  - (b) to any sale of accounts or chattel paper.
- (2) This Chapter applies to security interests created by contract including pledge, assignment, chattel mortgage, chattel trust, trust deed, factor's lien, equipment trust, conditional sale, trust receipt, other lien or title retention contract and lease or consignment intended as security. This Chapter does not apply to statutory liens except as provided in §26-9-310.
- (3) The application of this Chapter to a security interest in a secured obligation is not affected by the fact that the obligation is itself secured by a transaction or interest to which this Chapter does not apply.

#### §26-9-103 Perfection of Security Interests in Multiple Jurisdictional Transactions

- (1) Documents, instruments, letters of credit, and ordinary goods.
  - (a) This subsection applies to documents, instruments, rights to proceeds of written letters of credit, and goods other than those covered by a certificate of title described in §26-9-103(2), mobile goods described in §26-9-103(3), and minerals described in §26-9-103(5).
  - (b) Except as otherwise provided in this subsection, perfection and the effect of perfection or nonperfection of a security interest in collateral are governed by the law of the jurisdiction where the collateral is when the last event occurs on which is based the assertion that the security interest is perfected or unperfected.
  - (c) If the parties to a transaction creating a purchase money security interest in goods in one jurisdiction understand at the time that the security interest attaches that the goods will be kept in another jurisdiction, then the law of the other jurisdiction governs the perfection and the effect of perfection or nonperfection of the security interest from the time it attaches until thirty (30) days after the debtor receives possession of the goods and thereafter if the goods are taken to the other jurisdiction before the end of the thirty-day period.

- (d) When collateral is brought into and kept in this jurisdiction while subject to a security interest perfected under the law of the jurisdiction from which the collateral was removed, the security interest remains perfected, but if action is required by Part 3 of this Chapter to perfect the security interest:
  - (i) if the action is not taken before the expiration of the period of perfection in the other jurisdiction or the end of four (4) months after the collateral is brought into this jurisdiction, whichever period first expires, the security interest becomes unperfected at the end of that period and is thereafter deemed to have been unperfected as against a person who became a purchaser after removal;
  - (ii) if the action is taken before the expiration of the period specified in §26-9-103(1)(d)(i), the security interest continues perfected thereafter;
  - (iii) for the purpose of priority over a buyer of consumer goods (§26-9-307(2)), the period of the effectiveness of a filing in the jurisdiction from which the collateral is removed is governed by the rules with respect to perfection in §26-9-103(1)(d)(i) and (ii).
  
- (2) Certificate of title:
  - (a) This subsection applies to goods covered by a Certificate of Title issued under a statute of this jurisdiction or of another jurisdiction under the law of which indication of a security interest on the certificate is required as a condition of perfection.
  - (b) Except as otherwise provided in this subsection, perfection and the effect of perfection or nonperfection of the security interest are governed by the law (including the conflict of laws rules) of the jurisdiction issuing the certificate until four (4) months after the goods are removed from that jurisdiction and thereafter until the goods are registered in another jurisdiction, but in any event not beyond surrender of the certificate. After the expiration of that period, the goods are not covered by the certificate of title within the meaning of this section.
  - (c) Except with respect to the rights of a buyer described in the next paragraph, a security interest, perfected in another jurisdiction otherwise than by notation on a certificate of title, in goods brought into this jurisdiction and thereafter covered by a certificate of title issued by this jurisdiction is subject to the rules stated in paragraph (d) of subsection (1).
  - (d) If goods are brought into this jurisdiction while a security interest therein is perfected in any manner under the law of the jurisdiction from which the goods are removed and a certificate of title is issued by this jurisdiction and the certificate does not show that the goods are subject to the security interest or that they may be subject to security interests not shown on the certificate, the security interest is subordinate to the rights of a buyer of the goods who is not in the business of selling goods of that kind to the extent that he gives value and receives delivery of the goods after issuance of the certificate and without knowledge of the security interest.

- (3) Accounts, general intangibles and mobile goods.
- (a) this subsection applies to accounts (other than an account described in §26-9-103(5) on minerals) and general intangibles (other than uncertificated securities) and to goods which are mobile and which are of a type normally used in more than one jurisdiction, such as motor vehicles, trailers, rolling stock, airplanes, shipping containers, road building and construction machinery and commercial harvesting machinery and the like, if the goods are equipment or are inventory leased or held for lease by the debtor to others, and are not covered by a certificate of title described in §26-9-103(2).
  - (b) The law (including the conflict of laws rules) of the jurisdiction in which the debtor is located governs the perfection and the effect of perfection or nonperfection of the security interest.
  - (c) If, however, the debtor is located in a jurisdiction which is not a part of the United States, and which does not provide for perfection of the security interest by filing or recording in that jurisdiction, the law of the jurisdiction in the United States in which the debtor has its major executive office in the United States governs the perfection and the effect of perfection or nonperfection of the security interest through filing. In the alternative, if the debtor is located in a jurisdiction which is not a part of the United States or Canada and the collateral is accounts or general intangibles for money due or to become due, the security interest may be perfected by notification to the account debtor. As used in this paragraph "United States" includes its territories and possessions and the Commonwealth of Puerto Rico.
  - (d) A debtor shall be deemed located at his place of business if he has one, at his chief executive office if he has more than one place of business, otherwise at his residence. If, however, the debtor is a foreign air carrier under the Federal Aviation Act of 1958, as amended, it shall be deemed located at the designated office of the agent upon whom service of process may be made on behalf of the foreign air carrier.
  - (e) A security interest perfected under the law of the jurisdiction of the location of the debtor is perfected until the expiration of four (4) months after a change of the debtor's location to another jurisdiction, or until perfection would have ceased by the law of the first jurisdiction, whichever period first expires. Unless perfected in the new jurisdiction before the end of that period, it becomes unperfected thereafter and is deemed to have been unperfected as against a person who became a purchaser after the change.

(4) Chattel paper.

The rules stated for goods in §26-9-103(1) apply to a possessory security interest in chattel paper. The rules stated for accounts in §26-9-103(3) apply to a non-possessory security interest in chattel paper, but the security interest may not be perfected by notification to the account debtor.

(5) Minerals.

Perfection and the effect of perfection or nonperfection of a security interest which is created by a debtor who has an interest in minerals or the like (including oil and gas) before the extraction and which attaches thereto as extracted, or which attaches to an account resulting from the sale thereof at the wellhead or minehead are governed by the law (including the conflict of laws rules) of the jurisdiction wherein the wellhead or minehead is located.

- (6) Investment property.
- (a) This subsection applies to investment property.
  - (b) Except as otherwise provided in Paragraph (f), during the time that a security certificate is located in a jurisdiction, perfection of a security interest, the effect of perfection or nonperfection, and the priority of a security interest in the certificated security represented thereby are governed by the local law of that jurisdiction.
  - (c) Except as otherwise provided in Paragraph (f), perfection of a security interest, the effect of perfection or nonperfection, and the priority of a security interest in an uncertificated security are governed by the local law of the issuer's jurisdiction as specified in §26-8-110(d).
  - (d) Except as otherwise provided in Paragraph (f), perfection of security interest, the effect of perfection or nonperfection, and the priority of a security interest in a security entitlement or securities account are governed by the local law of the securities intermediary's jurisdiction as specified in §26-8-110(e).
  - (e) Except as otherwise provided in Paragraph (f), perfection of a security interest, the effect of perfection or nonperfection, and the priority of a security interest in a commodity contract or commodity account are governed by the local law of the Commodity Intermediary's Jurisdiction. The following rules determine a "Commodity Intermediary's Jurisdiction" for purposes of this paragraph:
    - (i) if an agreement between the commodity intermediary and commodity customer specifies that it is governed by the law of a particular jurisdiction, that jurisdiction is the Commodity Intermediary's Jurisdiction.
    - (ii) If an agreement between the commodity intermediary and commodity customer does not specify the governing law as provided in §26-9-103(6)(e)(i), but expressly specifies that the commodity account is maintained at an office in a particular jurisdiction, that jurisdiction is the commodity intermediary's jurisdiction.
    - (iii) If an agreement between the commodity intermediary and commodity customer does not specify a jurisdiction as provided in §26-9-103(6)(e)(i) or (ii), the Commodity Intermediary's Jurisdiction is the jurisdiction in which is located the office identified in an account statement as the office serving the commodity customer's account.

- (iv) If an agreement between the commodity intermediary and commodity customer does not specify a jurisdiction as provided in s§26-9-103 (6)(e)(i) or (ii) and an account statement does not identify an office serving the commodity customer's account as provided in §26-9-103 (6)(e)(iii), the commodity intermediary's jurisdiction is the jurisdiction in which is located the chief executive office of the commodity intermediary.
- (f) Perfection of a security interest by filing, automatic perfection of a security interest in investment property granted by a broker or securities intermediary, and automatic perfection of a security interest in a commodity contract or commodity account granted by a commodity intermediary are governed by the local law of the jurisdiction in which the debtor is located.

**§26-9-104 Transactions Excluded From Chapter**

- (1) This Chapter does not apply:
  - (a) to a security interest subject to any statute of the United States to the extent that such statute governs the rights of parties to and third parties affected by transactions in particular types of property; or
  - (b) to a landlord's lien; or
  - (c) to a lien given by statute or other rule of law for services or materials except as provided in §26-9-310 on priority of such liens; or
  - (d) to a transfer of a claim for wages, salary or other compensation of an employee; or
  - (e) [Abrogated]
  - (f) to a sale of accounts or chattel paper as part of a sale of the business out of which they arose, or an assignment of accounts or chattel paper which is for the purpose of collection only, or a transfer of a right to payment under a contract to an assignee who is also to do the performance under the contract or a transfer of a single account to an assignee in whole or partial satisfaction of a preexisting indebtedness; or
  - (g) to a transfer of an interest or claim in or under any policy of insurance, except as provided with respect to proceeds (§26-9-306) and priorities in proceeds (§26-9-312); or
  - (h) to a right represented by a judgment (other than a judgment taken on a right to payment which was collateral); or
  - (i) to any right of setoff; or
  - (j) except to the extent that provision is made for fixtures in §26-9-313 to the creation or transfer of an interest in or lien on real estate, including a lease or rents thereunder; or

- (k) to a transfer in whole or in part of any claim arising out of tort; or
- (l) to a transfer of an interest in any deposit account except as provided with respect to proceeds (§26-9-306) and priorities in proceeds (§26-9-312); or
- (m) to a transfer of an interest in a letter of credit other than the rights to proceeds of a written letter of credit.

**§26-9-105 Definitions and Index of Definitions**

- (1) In this Chapter unless the context otherwise requires:
  - (a) “Account Debtor” means the person who is obligated on an account, chattel paper or general intangible;
  - (b) “Chattel Paper” means a writing or writings which evidence both a monetary obligation and a security interest in or a lease of specific goods, but a charter or other contract involving the use or hire of a vessel is not chattel paper. When a transaction is evidenced both by such a security agreement or a lease and by an instrument or a series of instruments, the group of writings taken together constitutes chattel paper;
  - (c) “Collateral” means the property subject to a security interest, and includes accounts and chattel paper which have been sold;
  - (d) “Debtor” means the 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 chapter dealing with the collateral, the obligor in any provision dealing with the obligation, and may include both where the context so requires;
  - (e) “Deposit Account” means a demand, time, savings, passbook or like account maintained with a bank, savings, and loan association, credit union or like organization, other than an account evidenced by a certificate of deposit;
  - (f) “Document” means document of title as defined in the general definitions of Chapter 1 §26-1-201, and a receipt of the kind described in §26-7-201(2);
  - (g) “Encumbrance” includes real estate mortgages and other liens on real estate and all other rights in real estate that are not ownership interests;
  - (h) “Goods” includes all things which are movable at the time the security interest attaches or which are fixtures (§26-9-313), but does not include money, documents, instruments, investment property, accounts, chattel paper, general intangibles, or minerals or the like (including oil and gas) before extraction. “Goods” also includes standing timber which is to be cut and removed under a conveyance or contract for sale, the unborn young of animals, growing crops, and farm-raised fish produced in fresh water according to the usual and customary

techniques of commercial agriculture, and marine vessels (herein defined as every type of watercraft used, or capable of being used, as a means of transportation on water) including both marine vessels under construction including engines and all items of equipment installed or to be installed therein, whether such vessels are being constructed by the shipbuilder for his own use or for sale (said vessels under construction being classified as inventory within the meaning of §26-9-109(4), and marine vessels after completion of construction so long as such vessels have not become “vessels of the United States” within the meaning of the Ship Mortgage Act of 1920, 46 U.S.C., §911(4), as same is now written or may hereafter be amended (said completed vessels being classified as equipment within the meaning of §26-9-109(2);

- (i) “Instrument” means a negotiable instrument (defined in §26-3-104) or any other writing which evidences a right to the payment of money and is not itself a security agreement or lease and is of a type which is in ordinary course of business transferred by delivery with any necessary endorsement or assignment. The term does not include investment property;
  - (j) “Mortgage” means a consensual interest created by a real estate mortgage, a trust deed on real estate, or the like;
  - (k) An advance is made “Pursuant to Commitment” if the secured party has bound himself to make it, whether or not a subsequent event of default or other event not within his control has relieved or may relieve him from his obligations;
  - (l) “Security Agreement” means an agreement which creates or provides for a security interest;
  - (m) “Secured Party” means a lender, seller or other person in whose favor there is a security interest, including a person to whom accounts or chattel paper have been sold. When the holders of obligations issued under an indenture of trust, equipment trust agreement or the like are represented by a trustee or other person, the representative is the secured party;
  - (n) “Transmitting Utility” means any person primarily engaged in the railroad, street railway or trolley bus business, the electric or electronics communications transmission business, the transmission of goods by pipeline, or the transmission or the production and transmission of electricity, steam, gas or water, or the provision of sewer service.
- (2) Other definitions applying to this Chapter and the sections in which they appear are:

“Account”	§26-9-106
“Attach”	§26-9-203
“Commodity Contract”	§26-9-115
“Commodity Customer”	§26-9-115
“Commodity Intermediary”	§26-9-115
“Construction Mortgage”	§26-9-313(1)
“Consumer Goods”	§26-9-109(1)
“Control”	§26-9-115
“Equipment”	§26-9-109(2)

“Farm Products”	§26-9-109(3)
“Fixture”	§26-9-313
“Fixture Filing”	§26-9-313
“General Intangibles”	§26-9-106
“Inventory”	§26-9-109(4)
“Investment Property”	§26-9-115
“Letter of Credit”	§26-5-102
“Lien Creditor”	§26-9-301(3)
“Proceeds”	§26-9-306(1)
“Proceeds of a Letter of Credit”	§26-5-114(a)
“Purchase Money Security Interest”	§26-9-107
“United States”	§26-9-103

- (3) The following definitions in other chapters, or from the Mississippi Code of 1972, as amended, apply to this Chapter:

“Broker”	See Miss. Code Ann. §75-8-102
“Certificated Security”	See Miss. Code Ann. §75-8-102
“Check”	See Miss. Code Ann. §75-3-104
“Clearing Corporation”	See Miss. Code Ann. §75-8-102
“Contract For Sale”	See Miss. Code Ann. §75-2-106
“Control”	See Miss. Code Ann. §75-8-106
“Delivery”	See Miss. Code Ann. §75-8-301
“Entitlement Holder”	See Miss. Code Ann. §75-8-102
“Financial Asset”	See Miss. Code Ann. §75-8-102
“Holder in Due Course”	See Miss. Code Ann. §75-3-302
“Note”	See Miss. Code Ann. §75-3-104
“Sale”	See Miss. Code Ann. §75-2-106
“Securities Intermediary”	See Miss. Code Ann. §75-8-102
“Security”	See Miss. Code Ann. §75-8-102
“Security Certificate”	See Miss. Code Ann. §75-8-102
“Security Entitlement”	See Miss. Code Ann. §75-8-102
“Uncertificated security”	See Miss. Code Ann. §75-8-102

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

**§26-9-106 Definitions: “Account”; “General Intangibles”**

“Account” means any right to payment for goods sold or leased or for services rendered which is not evidenced by an instrument or chattel paper, whether or not it has been earned by performance. “General intangibles” means any person property (including things in action) other than goods, accounts, chattel paper, documents, instruments, investment property, rights to proceeds of written letters of credit, and money. All rights to payment earned or unearned under a charter or other contract involving the use or hire of a vessel and all rights incident to the charter or contract are accounts.

**§26-9-107 Definitions: “Purchase Money Security Interest”**

- (1) A security interest is a “Purchase Money Security Interest” to the extent that it is:

- (a) taken or retained by the seller of the collateral to secure all or part of its price; or
- (b) taken by a person who by making advances or incurring an obligation gives value to enable the debtor to acquire rights in or the use of collateral if such value is in fact so used.

**§26-9-108      When After-Acquired Collateral Not Security for Antecedent Debt**

Where a secured party makes an advance, incurs an obligation, releases a perfected security interest, or otherwise gives new value which is to be secured in whole or in part by after-acquired property his security interest in the after-acquired collateral shall be deemed to be taken for new value and not as security for an antecedent debt if the debtor acquires his rights in such collateral either in the ordinary course of his business or under a contract of purchase made pursuant to the security agreement within a reasonable time after new value is given.

**§26-9-109      Classification of Goods: “Consumer Goods”; “Equipment”; “Farm Products”; “Inventory”**

Goods are:

- (1) “Consumer Goods” if they are used or bought for use primarily for personal, family or household purposes;
- (2) “Equipment” if they are used or bought for use primarily in business (including farming or a profession) or by a debtor who is a nonprofit organization or a governmental subdivision or agency or if the goods are not included in the definitions of inventory, farm products or consumer goods;
- (3) “Farm Products” if they are crops or livestock or supplies used or produced in farming operations or if they are products of crops or livestock in their unmanufactured states (such as ginned cotton, wool clip, maple syrup, milk and eggs), and if they are in the possession of a debtor engaged in raising, fattening, grazing or other farming operations. If goods are farm products they are neither equipment nor inventory;
- (4) “Inventory” if they are held by a person who holds them for sale or lease or to be furnished under contracts of service or if he has so furnished them, or if they are raw materials, work in process or material used or consumed in a business. Inventory of a person is not to be classified as his equipment.

**§26-9-110      Sufficiency of Description**

For the purposes of this Chapter any description of personal property or real estate is sufficient whether or not it is specific if it reasonably identifies what is described, except that a description of real estate in an instrument filed to perfect a security interest in fixtures is sufficient only if the filing or recording of the same constitutes constructive notice under the laws of this jurisdiction, other than this Chapter, which are applicable to the filing or recording of real estate mortgages and deeds of trust.

**§26-9-111      Applicability of Bulk Transfer Laws**

The creation of a security interest is not a bulk transfer under Chapter 6(§26-6-103).

**§26-9-112      Where Collateral is Not Owned by Debtor**

- (1) Unless otherwise agreed, when a secured party knows that collateral is owned by a person who is not the debtor, the owner of the collateral is entitled to receive from the secured party any surplus under §26-9-502(2) or under §26-9-504(1), and is not liable for the debt or for any deficiency after resale, and he has the same right as the debtor:
  - (a) to receive statements under §26-9-208;
  - (b) to receive notice of and to object to a secured party's proposal to retain the collateral in satisfaction of the indebtedness under §26-9-505;
  - (c) to redeem the collateral under §26-9-506;
  - (d) to obtain injunctive or other relief under §26-9-507(1); and
  - (e) to recover losses caused to him under §26-9-208(2).

**§26-9-113      Security Interests Arising Under Chapter on Sales or Under Chapter on Leases**

- (1) A security interest arising solely under the Chapter on Sales (Chapter 2) or the Chapter on Leases (Chapter 2A) is subject to the provisions of this Chapter except that to the extent that and so long as the debtor does not have or does not lawfully obtain possession of the goods:
  - (a) no security agreement is necessary to make the security interest enforceable; and
  - (b) no filing is required to perfect the security interest; and
  - (c) the rights of the secured party on default by the debtor are governed:
    - (i) by the Chapter on Sales (Chapter 2) in the case of a security interest arising solely under such chapter; or
    - (ii) by the Chapter on Leases (Chapter 2A) in the case of a security interest arising solely under such chapter.

**§26-9-114      Consignment**

- (1) A person who delivers goods under a consignment which is not a security interest and who would be required to file under this Chapter by §26-2-326(3)(c) has priority over a secured party who is or becomes a creditor of the consignee and who would have a perfected security interest in the goods if they were the property of the consignee, and also has priority with respect to identifiable cash proceeds received on or before delivery of the goods to a buyer, if:

- (a) the consignor complies with the filing provision of the Chapter on Sales with respect to consignments (§26-2-326(3)(c)) before the consignee receives possession of the goods; and
  - (b) the consignor gives notification in writing to the holder of the security interest if the holder has filed a financing statement covering the same types of goods before the date of the filing made by the consignor; and
  - (c) the holder of the security interest receives the notification within five (5) years before the consignee receives possession of the goods; and
  - (d) the notification states that the consignor expects to deliver goods on consignment to the consignee, describing the goods by item or type.
- (2) In the case of a consignment which is not a security interest and in which the requirements of the preceding subsection have not been met, a person who delivers goods to another is subordinate to a person who would have a perfected security interest in the goods if they were the property of the debtor.

**§26-9-115 Investment Property**

- (1) In this article:
- (a) “Commodity Account” means an account maintained by a commodity intermediary in which a commodity contract is carried for a commodity customer.
  - (b) “Commodity Contract” means a commodity futures contract, an option on a commodity futures contract, a commodity option, or other contract that, in each case, is:
    - (i) traded on or subject to the rules of a board of trade that has been designated as a contract market for such a contract pursuant to the federal commodities laws; or
    - (ii) traded on a foreign commodity board of trade, exchange, or market, and is carried on the books of a commodity intermediary for a commodity customer.
  - (c) “Commodity Customer” means a person for whom a commodity intermediary carries a commodity contract on its books.
  - (d) “Commodity Intermediary” means:
    - (i) a person who is registered as a futures commission merchant under the federal commodities laws; or
    - (ii) a person who is in the ordinary course of its business provides clearance or settlement services for a board of trade that has been designated as a contract market pursuant to the federal commodities laws.

- (e) “Control” with respect to a certificated security, uncertificated security, or security entitlement has the meaning specified in Miss. Code Ann. §75-8-106. A secured party has control over a commodity contract if by agreement among the commodity customer, the commodity intermediary, and the secured party, the commodity intermediary has agreed that it will apply any value distributed on account of the commodity contract as directed by the secured party without further consent by the commodity customer. If a commodity customer grants a security interest in a commodity contract to its own commodity intermediary, the commodity intermediary as secured party has control. A secured party has control over a securities account of commodity account if the secured party has control over all security entitlements or commodity contracts carried in the securities account or commodity account.
- (f) “Investment Property” means:
  - (i) a security, whether certificated or uncertificated;
  - (ii) a security entitlement;
  - (iii) a securities account;
  - (iv) a commodity contract; or
  - (v) a commodity account.
- (2) Attachment or perfection of a security interest in a securities account is also attachment or perfection of a security interest in all security entitlements carried in the securities account. Attachment or perfection of a security interest in a commodity account is also attachment or perfection of a security interest in all commodity contracts carried in the commodity account.
- (3) A description of collateral in a security agreement or financing statement is sufficient to create or perfect a security interest in a certificated security, uncertificated security, security collateral by those terms, or as investment property, or by description of the underlying security, financial asset, or commodity contract. A description of investment property collateral in a security agreement or financing statement is sufficient if it identifies the collateral by specific listing, by category, by quantity, by a computational or allocational formula or procedure, or by any other method, if the identity of the collateral is objectively determinable.
- (4) Perfection of a security interest in investment property is governed by the following rules:
  - (a) a security interest in investment property may be perfected by control.
  - (b) Except as otherwise provided in Paragraphs (c) and (d), a security interest in investment property may be perfected by filing.
  - (c) If the debtor is a broker or securities intermediary, a security interest in investment property is perfected when it attaches. The filing of a financing statement with respect to a security interest in investment property granted by a

broker or securities intermediary has no effect for purposes of perfection or priority with respect to that security interest.

- (d) If a debtor is a commodity intermediary, a security interest in a commodity contract or a commodity account is perfected when it attaches. The filing of a financing statement with respect to a security interest in a commodity contract or a commodity account granted by a commodity intermediary has no effect for purposes of perfection or priority with respect to that security interest.
- (5) Priority between conflicting security interests in the same investment property is governed by the following rules:
  - (a) a security interest of a secured party who has control over investment property has priority over a security interest of a secured party who does not have control over the investment property.
  - (b) Except as otherwise provided in Paragraphs (c) and (d), conflicting security interests of secured parties each of whom has control rank equally.
  - (c) Except as otherwise agreed by the securities intermediary, a security interest in a security entitlement or a securities account granted to the debtor's own securities intermediary has priority over any security interest granted by the debtor to another secured party.
  - (d) Except as otherwise agreed by the commodity intermediary, a security interest in a commodity contract or a commodity account granted to the debtor's own commodity intermediary has priority over any security interest granted by the debtor to another secured party.
  - (e) Conflicting security interests granted by a broker, a securities intermediary, or a commodity intermediary which are perfected without control rank equally.
  - (f) In all other cases, priority between conflicting security interests in investment property is governed by §26-9-312(5), (6), and (7). §26-9-312(4) does not apply to investment property.
- (6) If a security certificate in registered form is delivered to a secured party pursuant to agreement, a written security agreement is not required for attachment or enforceability of the security interest, delivery suffices for perfection of the security interest, and the security interest has priority over a conflicting security interest perfected by means other than control, even if a necessary endorsement is lacking.

**§26-9-116 Security Interest Arising in Purchase or Delivery of Financial Asset**

- (1) If a person buys a financial asset through a securities intermediary in a transaction in which the buyer is obligated to pay the purchase price to the securities intermediary at the time of the purchase, and the securities intermediary credits the financial asset to the buyer's securities account before the buyer pays the securities intermediary, the securities intermediary has a security interest in the buyer's security entitlement securing the buyer's obligation to pay. A security agreement is not required for attachment or enforceability of the security interest, and the security interest is automatically perfected.

- (2) If a certificated security, or other financial asset represented by a writing which in the ordinary course of business is transferred by delivery with any necessary endorsement or assignment is delivered pursuant to an agreement between persons in the business of dealing with such securities or financial assets and the agreement calls for delivery versus payment, the person delivering the certificate or other financial asset has a security interest in the certificated security or other financial asset securing the seller's right to receive payment. A security agreement is not required for attachment or enforceability of the security interest, and the security interest is automatically perfected.

## PART 2

### VALIDITY OF SECURITY OF AGREEMENT AND RIGHTS OF PARTY THERETO

#### §26-9-201 General Validity of Security Agreement

Except as otherwise provided by this code a security agreement is effective according to its terms between the parties, against purchasers of the collateral and against creditors. Nothing in this Chapter validates any charge or practice illegal under any statute or regulation thereunder governing usury, small loans, retail installment sales, or the like, or extends the application of any such statute or regulation to any transaction not otherwise subject thereto.

#### §26-9-202 Title to Collateral Immaterial

Each provision of this Chapter with regard to rights, obligations and remedies applies whether title to collateral is in the secured party or in the debtor.

#### §26-9-203 Attachment and Enforceability of Security Interest; Proceeds, Formal Requisites

- (1) Subject to the provisions of any other applicable law on the security interest of a collecting bank, §§26-9-115 and 26-9-116 on security interests in investment property, and §26-9-113 on a security interest arising under the Chapter on Sales, a security interest is not enforceable against the debtor or third parties with respect to the collateral and does not attach unless:
  - (a) the collateral is in the possession of the secured party pursuant to agreement, the collateral is investment property and the security party has control pursuant to agreement, or the debtor has signed a security agreement which contains a description of the collateral and in addition, when the security interest covers crops growing or to be grown or timber to be cut, a description of the land concerned;
  - (b) value has been given; and
  - (c) the debtor has rights in the collateral.
- (2) A security interest attaches when it becomes enforceable against the debtor with respect to the collateral. Attachment occurs as soon as all of the events specified in §26-9-203(1) have taken place unless explicit agreement postpones the time of attaching.
- (3) Unless otherwise agreed, a security agreement gives the secured party the rights to proceeds provided by §26-9-306.

#### §26-9-204 After-Acquired Property; Future Advances

- (1) Except as provided in §26-9-204(2), a security agreement may provide that any or all obligations covered by the security agreement are to be secured by after-acquired collateral.

- (2) No security interest attaches under an after-acquired property clause to consumer goods other than accessions (§26-9-314) when given as additional security unless the debtor acquires rights in them within ten (10) days after the secured party gives value.
- (3) Obligations covered by a security agreement may include future advances or other value whether or not the advances or value are given pursuant to commitment (§26-9-105(1)).

**§26-9-205 Use or Disposition of Collateral Without Accounting Permissible**

A security interest is not invalid or fraudulent against creditors by reason of liberty in the debtor to use, commingle or dispose of all or part of the collateral (including returned or repossessed goods) or to collect or compromise accounts or chattel paper, or to accept the return of goods or make repossessions, or to use, commingle or dispose of proceeds, or by reason of the failure of the secured party to require the debtor to account for proceeds or replace collateral. This section does not relax the requirements of possession where perfection of a security interest depends upon possession of the collateral by the secured party or by a bailee.

**§26-9-206 Agreement Not to Assert Defenses Against Assignee; Modification of Sales Warranties Where Security Agreement Exists**

- (1) Subject to any statute or decision which establishes a different rule for buyers or lessees of consumer goods, an agreement by a buyer or lessee that he will not assert against an assignee any claim or defense which he may have against the seller or lessor is enforceable by an assignee who takes his assignment for value, in good faith and without notice of a claim or defense, except as to defenses of a type which may be asserted against a holder in due course of a negotiable instrument under the Chapter on Commercial Paper. A buyer who as part of one (1) transaction signs both a negotiable instrument and a security agreement makes such an agreement.
- (2) When a seller retains a purchase money security interest in goods the Chapter on Sales (Chapter 2) governs the sale and any disclaimer, limitation or modification of the seller's warranties.

**§26-9-207 Rights and Duties When Collateral Is in Secured Party's Possession**

- (1) A secured party must use reasonable care in the custody and preservation of collateral in his possession. In the case of an instrument or chattel paper reasonable care includes taking necessary steps to preserve rights against prior parties unless otherwise agreed.
- (2) Unless otherwise agreed, when collateral is in the secured party's possession:
  - (a) reasonable expenses (including the cost of any insurance and payment of taxes or other charges) incurred in the custody, preservation, use or operation of the collateral are chargeable to the debtor and are secured by the collateral;
  - (b) the risk of accidental loss or damage is on the debtor to the extent of any deficiency in any effective insurance coverage;

- (c) the secured party may hold as additional security any increase or profits (except money) received from the collateral, but money so received, unless remitted to the debtor, shall be applied in reduction of the secured obligation;
  - (d) the secured party must keep the collateral identifiable but fungible collateral may be commingled;
  - (e) the secured party may repledge the collateral upon terms which do not impair the debtor's right to redeem it.
- (3) A secured party is liable for any loss caused by his failure to meet any obligation imposed by the preceding subsections but does not lose his security interest.
  - (4) A secured party may use or operate the collateral for the purpose of preserving the collateral or its value or pursuant to the order of a court of appropriate jurisdiction or, except in the case of consumer goods, in the manner and to the extent provided in the security agreement.

**§26-9-208 Request for Statement of Account or List of Collateral**

- (1) A debtor may sign a statement indicating what he believes to be the aggregate amount of unpaid indebtedness as of a specified date and may send it to the secured party with a request that the statement be approved or corrected and returned to the debtor. When the security agreement or any other record kept by the secured party identifies the collateral a debtor may similarly request the secured party to approve or correct a list of the collateral.
- (2) The secured party must comply with such a request within two (2) weeks after receipt by sending a written correction or approval. If the secured party claims a security interest in all of a particular type of collateral owned by the debtor he may indicate that fact in his reply and need not approve or correct an itemized list of such collateral. If the secured party without reasonable excuse fails to comply he is liable for any loss caused to the debtor thereby; and if the debtor has properly included in his request a good faith statement of the obligation or a list of the collateral or both the secured party may claim a security interest only as shown in the statement against persons misled by his failure to comply. If he no longer has an interest in the obligation or collateral at the time the request is received he must disclose the name and address of any successor in interest known to him and he is liable for any loss caused to the debtor as a result of failure to disclose. A successor in interest is not subject to this section until a request is received by him.
- (3) A debtor is entitled to such a statement once every six (6) months without charge. The secured party may require payment of a charge not exceeding ten dollars (\$10.00) for each additional statement furnished.

## PART 3

### RIGHTS OF THIRD PARTIES; PERFECTED AND UNPERFECTED SECURITY INTERESTS; RULES OF PRIORITY

#### §26-9-301 Persons Who Take Priority Over Unperfected Security Interests; Rights of “Lien Creditor”

- (1) Except as otherwise provided in §26-9-301(2), an unperfected security interest is subordinate to the rights of:
  - (a) persons entitled to priority under §26-9-312;
  - (b) a person who becomes a lien creditor before the security interest is perfected;
  - (c) If the case of goods, instruments, documents and chattel paper, a person who is not a secured party and who is a transferee in bulk or other buyer not in ordinary course of business, or is a buyer of farm products in ordinary course of business, to the extent that he gives value and receives delivery of the collateral without knowledge of the security interest and before it is perfected;
  - (d) in the case of accounts, general intangibles, and investment property, a person who is not a secured party and who is a transferee to the extent that he gives value without knowledge of the security interest before it is perfected.
- (2) If the secured party files with respect to a purchase money security interest before or within twenty (20) days after the debtor receives possession of the collateral, he takes priority over the rights of a transferee in bulk or of a lien creditor which arise between the time the security interest attaches and the time of filing.
- (3) A “Lien Creditor” means a creditor who has acquired a lien on the property involved by attachment, levy or the like and includes an assignee for benefit of creditors from the time of assignment, and a trustee in bankruptcy from the date of filing of the petition or a receiver in equity from the time of appointment.
- (4) A person who becomes a lien creditor while a security interest is perfected takes subject to the security interest only to the extent that it secures advances made before he becomes a lien creditor or within forty-five (45) days thereafter or made without knowledge of the lien or pursuant to a commitment entered into without knowledge of the lien.

#### §26-9-302 When Filing is Required to Perfect Security Interest; Security Interests to Which Filing Provisions of This Chapter Do Not Apply

- (1) A financing statement must be filed to perfect all security interests except the following:
  - (a) a security interest in collateral in possession of the secured party under §26-9-305;

- (b) a security interest temporarily perfected in instruments, certificated securities, or documents without delivery under §26-9-304 or in proceeds for a period of ten (10) days under §26-9-306;
  - (c) a security interest created by an assignment of a beneficial interest in a trust or decedent's estate;
  - (d) a purchase money security interest in consumer goods; but filing is required for a motor vehicle required to be registered; and fixture filing is required for priority over conflicting interests in fixtures to the extent provided in §26-9-313;
  - (e) an assignment of accounts which does not alone or in conjunction with other assignments to the same assignee transfer a significant part of the outstanding accounts of the assignor;
  - (f) a security interest of a collecting bank §26-4-208 or arising under the chapter on Sales (see §26-9-113) or covered in §26-9-302(3) of this section;
  - (g) an assignment for the benefit of all the creditors of the transferor, and subsequent transfers by the assignee thereunder;
  - (h) a security interest in investment property which is perfected without filing under §26-9-115 or §26-9-116.
- (2) If a secured party assigns a perfected security interest, no filing under this Chapter is required in order to continue the perfected status of the security interest against creditors of and transferees from the original debtor.
- (3) The filing of a financing statement otherwise required by this Chapter is not necessary or effective to perfect a security interest in property subject to:
- (a) a statute or treaty of the United States which provides for a national or international registration or a national or international certificate of title or which specifies a place of filing different from that specified in this Chapter for filing of the security interest; or
  - (b) the following statutes of the State of Mississippi: §63-21-1 et seq., but during any period in which collateral is inventory held for sale by a person who is in the business of selling goods of that kind, the filing provisions of this Chapter (Part 4) apply to a security interest in that collateral created by him as debtor; or
  - (c) a certificate of title statute of another jurisdiction under the law of which indication of a security interest on the certificate is required as a condition of perfection (§26-9-103(2)).
- (4) Compliance with a statute or treaty described in §26-9-302(3) is equivalent to the filing of a financing statement under this Chapter, and a security interest in property subject to the statute or treaty can be perfected only by compliance therewith except as provided in §26-9-103 on multiple jurisdictional transactions. Duration and renewal of perfection of a security interest perfected by compliance with the statute or treaty are governed by the

provisions of the statute or treaty; in other respects the security interest is subject to this Chapter.

- (5) The filing of a financing statement pursuant to this chapter, whether before or after the effective date of this provision, is the exclusive method of perfecting a security interest in instruments evidencing student loans, including loans that are insured by the United States Secretary of Education under 20 U.S.C.A. 1071 et seq., as amended, or by a governmental agency or nonprofit private institution or organization with which the United States Secretary of Education has an agreement under 20 U.S.C.A. 1078(b), as amended; in other respects such security interest is subject to this chapter as if such security interest were a security interest in general intangibles. The provisions of this chapter providing for security interests prevail over the possession, negotiation and assignment provisions of any other applicable law as each provision affects the rights of a secured party in instruments evidencing student loans, and the rights of a secured party in instruments evidencing student loans perfected in accordance with this subsection are prior to the rights of a holder, owner or transferee of any instrument evidencing the right to receive payment under student loans.

**§26-9-303 When Security Interest Is Perfected; Continuity of Perfection**

- (1) A security interest is perfected when it has attached and when all of the applicable steps required for perfection have been taken. Such steps are specified in §§26-9-115, 26-9-302, 26-9-304, 26-9-305 and 26-9-306. If such steps are taken before the security interest attaches, it is perfected at the time when it attaches.
- (2) If a security interest is originally perfected in any way permitted under this Chapter and is subsequently perfected in some other way under this Chapter, without an intermediate period when it was unperfected, the security interest shall be deemed to be perfected continuously for the purposes of this Chapter.

**§26-9-304 Perfection of Security Interest in Instruments, Documents, and Good Covered by Documents; Perfection by Permissive Filing; Temporary Perfection Without Filing or Transfer of Possession**

- (1) A security interest in chattel paper or negotiable documents may be perfected by filing. A security interest in the rights to proceeds of a written letter of credit can be perfected only by the secured party's taking possession of the letter of credit. A security interest in money or instruments (other than instruments which constitute part of chattel paper) can be perfected only by the secured party's taking possession, except as provided in §26-9-304(4) and (5) of this section and §26-9-306(2) and (3) on "Proceeds".
- (2) During the period that goods are in the possession of the issuer of a negotiable document therefore, a security interest in the goods is perfected by perfecting a security interest in the document, and any security interest in the goods otherwise perfected during such period is subject thereto.
- (3) A security interest in goods in the possession of a bailee other than one who has issued a negotiable document therefore is perfected by issuance of a document in the name of the secured party or by the bailee's receipt of notification of the secured party's interest or by filing as to the goods.

- (4) A security interest in instruments, certificated securities, or negotiable documents is perfected without filing or the taking of possession for a period of twenty-one (21) days from the time it attaches to the extent that it arises for new value given under a written security agreement.
- (5) A security interest remains perfected for a period of twenty-one (21) days without filing where a secured party having a perfected security interest in an instrument, a certificated security, a negotiable document or goods in possession of a bailee other than one who has issued a negotiable document therefore:
  - (a) Makes available to the debtor the goods or documents representing the goods for the purpose of ultimate sale or exchange, or for the purpose of loading, unloading, storing, shipping, transshipping, manufacturing, processing, or otherwise dealing with them in a manner preliminary to their sale or exchange, but priority between conflicting security interests in the goods is subject to §26-9-312(3); or
  - (b) delivers the instrument of certificated security to the debtor for the purpose of ultimate sale or exchange or of presentation, collection, renewal, or registration of transfer.
- (6) After the twenty-one day period in §26-9-304(4) and (5) perfection depends upon compliance with applicable provisions of this Chapter.

**§26-9-305 When Possession by Secured Party Perfects Security Interest Without Filing**

A security interest in goods, instruments, money, negotiable documents or chattel paper may be perfected by the secured party's taking possession of the collateral. A security interest in the right to proceeds of a written Letter of Credit may be perfected by the secured party's taking possession of the Letter of Credit. If such collateral other than goods covered by a negotiable document is held by a bailee, the secured party is deemed to have possession from the time the bailee receives notification of the secured party's interest. A security interest is perfected by possession from the time possession is taken without relation back and continues only so long as possession is retained, unless otherwise specified in this Chapter. The security interest may be otherwise perfected as provided in this chapter before or after the period of possession by the secured party.

**§26-9-306 "Proceeds"; Secured Party's Rights on Disposition of Collateral**

- (1) "Proceeds" includes whatever is received upon the sale, exchange, collection or other disposition of collateral or proceeds. Insurance payable by reason of loss or damage to the collateral is proceeds, except to the extent that it is payable to a person other than a party to the security agreement. Any payments or distributions made with respect to investment property collateral are proceeds. Money, checks, deposit accounts, and the like are "Cash Proceeds." All other proceeds are "Noncash Proceeds."
- (2) Except where this chapter otherwise provides, a security interest continues in collateral notwithstanding sale, exchange or other disposition thereof unless the disposition was authorized by the secured party in the security agreement or otherwise, and also continues in any identifiable proceeds including collections received by the debtor.

- (3) The security interest in proceeds is a continuously perfected security interest if the interest in the original collateral was perfected, but it ceases to be a perfected security interest and becomes unperfected ten (10) days after receipt of the proceeds by the debtor unless:
- (a) a filed financing statement covers the original collateral and the proceeds are collateral in which a security interest may be perfected by filing in the office or offices where the financing statement has been filed and, if the proceeds are acquired with cash proceeds, the description of collateral in the financing statement indicates the types of property constituting the proceeds;
  - (b) a filed financing statement covers the original collateral and the proceeds are identifiable cash proceeds;
  - (c) the original collateral was investment property and the proceeds are identifiable cash proceeds; or
  - (d) The security interest in the proceeds is perfected before the expiration of the ten-day period.

Except as provided in this section, a security interest in proceeds can be perfected only the methods or under the circumstances permitted in this Chapter for original collateral of the same type.

- (4) In the event of insolvency proceedings instituted by or against a debtor, a secured party with a perfected security interest in proceeds has a perfected security interest only in the following proceeds:
- (a) in identifiable noncash proceeds, and in separate deposit accounts containing only proceeds;
  - (b) in identifiable cash proceeds in the form of money which is neither commingled with other money nor deposited in a deposit account prior to the insolvency proceedings;
  - (c) in identifiable cash proceeds in the form of checks and the like which are not deposited in a deposit account prior to the insolvency proceedings; and
  - (d) in all cash and deposit accounts of the debtor in which proceeds have been commingled with other funds, but the perfected security interest under this Paragraph (9) is:
    - (i) subject to any right to set-off; and
    - (ii) limited to an amount not greater than the amount of any cash proceeds received by the debtor within ten (10) days before the institution of the insolvency proceedings less the sum of (i) the payments to the secured party on account of cash proceeds received by the debtor during such period and (ii) the cash proceeds received by the debtor during such period to which the secured party is entitled under §26-9-306(4)(a) (c).

- (5) If a sale of goods results in an account or chattel paper which is transferred by the seller to a secured party, and if the goods are returned to or are repossessed by the seller or the secured party, the following rules determine priorities:
- (a) If the goods were collateral at the time of sale, for an indebtedness of the seller which is until unpaid, the original security interest attaches again to the goods and continues as a perfected security interest if it was perfected at the time when the goods were sold. If the security interest was originally perfected by a filing which is still effective, nothing further is required to continue the perfected status; in any other case, the secured party must take possession of the returned or repossessed goods or must file.
  - (b) An unpaid transferee of the chattel paper has a security interest in the goods against the transferor. Such security interest is prior to a security interest asserted under Paragraph (a) to the extent that the transferee of the chattel paper was entitled to priority under §26-9-308.
  - (c) An unpaid transferee of the account has a security interest in the goods against the transferor. Such security interest is subordinate to a security interest asserted under Paragraph (a).
  - (d) A security interest of an unpaid transferee asserted under Paragraph (b) or (c) must be perfected for protection against creditors of the transferor and purchasers of the returned or repossessed goods.

**§26-9-307 Protection of Buyers of Goods**

- (1) A buyer in ordinary course of business §26-1-201(9), other than a person buying farm products from a person engaged in farming operations, takes free of a security interest created by his seller even though the security interest is perfected and even though the buyer knows of its existence.
- (2) In the case of consumer goods, a buyer takes free of a security interest even though perfected if he buys without knowledge of the security interest, for value and for his own personal, family or household purposes unless prior to the purchase the secured party has filed a financing statement covering such goods.
- (3) A buyer other than a buyer in ordinary course of business §26-9-307(1) of this section) takes free of a security interest to the extent that secures future advances made after the secured party acquires knowledge of the purchase, or more than forty-five (45) days after the purchase, whichever first occurs, unless made pursuant to a commitment entered into without knowledge of the purchase and before the expiration of the 45-day period.
- (4) Notwithstanding §26-9-307(1) of this section, a secured party may not enforce a security interest in farm products against a buyer, commission merchant or selling agent who purchases or sells farm products in the ordinary course of business from or for a person engaged in farming operations unless the secured party has complied with the regulations issued by the Secretary of State under §26-9-319 or unless the buyer, commission merchant or selling agent has received from the secured party or seller written notice of the security interest which complies with the requirements of Section 1324 of the Food Security Act of 1985, as now enacted or as hereafter may be amended.

**§26-9-308 Purchase of Chattel Paper and Instruments**

- (1) A purchaser of chattel paper or an instrument who gives new value and takes possession of it in the ordinary course of his business has priority over a security interest in the chattel paper or instrument:
  - (a) which is perfected under §26-9-304 (permissive filing and temporary perfection) or under §26-9-306 (perfection as to proceeds) if he acts without knowledge that the specific paper or instrument is subject to a security interest; or
  - (b) which is claimed merely as proceeds of inventory subject to a security interest (§26-9-306) even though he knows that the specific paper or instrument is subject to the security interest.

**§26-9-309 Protection of Purchasers of Instruments, Documents, and Securities**

Nothing in this chapter limits the rights of a holder in due course of a negotiable instrument (§26-3-302) or a holder to whom a negotiable document of title has been duly negotiated (§26-7-501) or a protected purchaser of a security (§26-8-303) and such holders or purchasers take priority over an earlier security interest even though perfected. Filing under this chapter does not constitute notice of the security interest to such holders or purchasers.

**§26-9-310 Priority of Certain Liens Arising by Operation of Law**

When a person in the ordinary course of his business furnishes services or materials with respect to goods subject to a security interest, a lien upon goods in the possession of such person given by statute or rule of law for such materials or services takes priority over a perfected security interest unless the lien is statutory and the statute expressly provides otherwise.

**§26-9-311 Alienability of Debtor's Rights; Judicial Process**

The debtor's rights in collateral may be voluntarily or involuntarily transferred (by way of sale, creation of a security interest, attachment, levy, garnishment or other judicial process) notwithstanding a provision in the security agreement prohibiting any transfer or making the transfer constitute a default.

**§26-9-312 Priorities Among Conflicting Security Interests in the Same Collateral**

- (1) The rules of priority stated in other sections of this part and in the following sections shall govern when applicable: §26-4-210 with respect to the security interest of collecting banks in items being collected, accompanying documents and proceeds; §26-9-103 on security interests related to other jurisdictions; §26-9-114 on consignments; §26-9-115 on security interests in investment property.
- (2) A perfected security interest in crops for new value given to enable the debtor to produce the crops during the production season and given not more than three (3) months before the crops become growing crops by planting or otherwise takes priority over an earlier perfected security interest to the extent that such earlier interest secures obligations due

more than six (6) months before the crops become growing crops by planting or otherwise, even though the person giving new value had knowledge of the earlier security interest.

- (3) A perfected purchase money security interest in inventory has priority over a conflicting security interest in the same inventory and also has priority in identifiable cash proceeds received on or before the delivery of the inventory to a buyer if:
  - (a) the purchase money security interest is perfected at the time the debtor receives possession of the inventory; and
  - (b) the purchase money secured party gives notification in writing to the holder of the conflicting security interest if the holder had filed a financing statement covering the same types of inventory:
    - (i) before the date of the filing made by the purchase money secured party, or
    - (ii) before the beginning of the twenty-one day period where the purchase money security interest is temporary perfected without filing or possession (§26-9-304(5)); and
  - (c) the holder of the conflicting security interest receives the notification within five (5) years before the debtor receives possession of the inventory; and
  - (d) the notification states that the person giving the notice has or expects to acquire a purchase money security interest in inventory of the debtor, describing such inventory by item or type.
- (4) A purchase money security interest in collateral other than inventory has priority over a conflicting security interest in the same collateral or its proceeds if the purchase money security interest is perfected at the time the debtor receives possession of the collateral or within twenty (20) days thereafter.
- (5) In all cases not governed by other rules stated in this section (including cases of purchase money security interest which do not qualify for the special priorities set forth in §26-9-312(3) and (4) of this section), priority between conflicting security interests in the same collateral shall be determined according to the following rules:
  - (a) Conflicting security interests rank according to priority in time of filing or perfection. Priority dates from the time a filing is first made covering the collateral or the time the security interest is first perfected, whichever is earlier, provided that there is no period thereafter when there is neither filing nor perfection.
  - (b) So long as conflicting security interests are unperfected, the first to attach has priority.
- (6) For the purposes of §26-9-312(5), a date of filing or perfection as to collateral is also a date of filing or perfection as to proceeds.

- (7) If future advances are made which a security interest is perfected by filing, the taking of possession, or under §26-9-115 or §26-9-116 on investment property, the security interest has the same priority for the purposes of §26-9-312(5) or §26-9-115(5) with respect to the future advances as it does with respect to the first advance. If a commitment is made before or while the security interest is so perfected, the security interest has the same priority with respect to advances made pursuant thereto. In other cases a perfected security interest has priority from the date the advance is made.

**§26-9-313 Priority of Security Interests in Fixtures**

- (1) In this section and in the provisions of Part 4 of this Chapter referring to fixture filing, unless the context otherwise requires:
- (a) goods are “Fixtures” when they become so related to particular real estate that an interest in them arises under real estate law;
  - (b) A “Fixture Filing” is the filing in the office where a mortgage on the real estate would be filed or recorded for a financing statement covering goods which are or are to become fixtures and conforming to the requirements of §26-9-313(5), §26-9-402;
  - (c) a mortgage is a “Construction Mortgage” to the extent that it secures an obligation incurred for the construction of an improvement on land including the acquisition costs of the land, if the recorded writing so indicates.
- (2) A security interest under this Chapter may be created in goods which are fixtures or may continue in goods which become fixtures, but no security interest exists under this Chapter in ordinary building materials incorporated into an improvement on land.
- (3) This Chapter does not prevent creation of an encumbrance upon fixtures purchase to real estate law.
- (4) A perfected security interest in fixtures has priority over the conflicting interest of an encumbrancer or owner of the real estate where:
- (a) the security interest is a purchase money security interest, the interest of the encumbrancer or owner arises before the goods become fixtures, the security interest is perfected by a fixture filing before the goods become fixtures or within twenty (20) days thereafter, the debtor has an interest of record in the real estate or is in possession of the real estate; or
  - (b) the security interest is perfected by a fixture filing before the interest of the encumbrancer or owner is of record, the security interest has priority over any conflicting interest of a predecessor in title of the encumbrancer or owner, and the debtor has an interest of record in the real estate or is in possession of the real estate; or
  - (c) the fixtures are readily removable factory or office machines or readily removable replacements of domestic appliances which are consumer goods, and before the goods become fixtures the security interest is perfected by any method permitted by this Chapter; or

- (d) the conflicting interest is a lien on the real estate obtained by legal or equitable proceedings after the security interest was perfected by any method permitted by this Chapter.
- (5) A security interest in fixtures, whether or not perfected, has priority over the conflicting interest of an encumbrancer or owner of the real estate where:
  - (a) the encumbrancer or owner has consented in writing to the security interest or has disclaimed an interest in the goods as fixtures; or
  - (b) the debtor has a right to remove the good as against the encumbrancer or owner. If the debtor's right terminates, the priority of the security interest continues for a reasonable time.
- (6) Notwithstanding §26-9-313(4)(a) but otherwise subject to §26-9-313(4) and (5) of this section, a security interest in fixtures is subordinate to a construction mortgage recorded before the goods become fixtures if the goods become fixtures before the completion of the construction. To the extent that it is given to refinance a construction mortgage, a mortgage has this priority to the same extent as the construction mortgage.
- (7) In cases not within the preceding subsections, a security interest in fixtures is subordinate to the conflicting interest of an encumbrancer or owner of the related real estate who is not the debtor.
- (8) When the secured party has priority over all owners and encumbrancers of the real estate, he may, on default, subject to the provisions of Part 5, remove his collateral from the real estate but he must reimburse any encumbrancer or owner of the real estate who is not the debtor and who has not otherwise agreed for the cost of repair of any physical injury, but not for any diminution in value of the real estate caused by the absence of the goods removed or by any necessity of replacing them. A person entitled to reimbursement may refuse permission to remove until the secured party gives adequate security for the performance of this obligation.
- (9)
  - (a) Subject to provisions in §26-9-313(4) and (5) of this section, but notwithstanding any contrary provision of the law of this jurisdiction, a security interest in fixtures or goods that become fixtures shall not have priority over the conflicting interest of an encumbrancer or owner of real estate whose interest has been perfected under real estate law prior to the perfection of a security interest in fixtures against the real estate.
  - (b) For the purposes of this section, a security interest in fixtures is perfected against the real estate only when the filing or recording of an instrument, with respect to such security interests, constitutes constructive notice of such interest under the laws of this jurisdiction, other than this Chapter, which are applicable to the filing or recording of real estate mortgages and deeds of trust; provided, however, that no provision of this Chapter nor of any other law of this state shall be construed to require that an instrument filed to perfect a security interest in fixtures shall

have the signatures of the parties acknowledged or provided as required by §89-3-1, Mississippi Code of 1972.

- (c) Subject to the contrary provisions in §26-9-313(4) and (5) of this section, but notwithstanding any contrary provision of the law of this jurisdiction, no party having a security interest in fixtures which is subordinate to the interest of an encumbrancer or owner of real estate who is not the debtor, may remove his collateral from the real estate without the written permission of such encumbrancer or owner of the real estate.

#### **§26-9-314 Accessions**

- (1) A security interest in goods which attaches before they are installed in or affixed to other goods takes priority as to the goods installed or affixed (called in this section “Accessions”) over the claims of all persons to the whole except as stated in §26-9-314(3) and subject to §26-9-314(1).
- (2) A security interest which attaches to goods after they become part of a whole is valid against all persons subsequently acquiring interests in the whole except as stated in §26-9-314(3) but is invalid against any person with an interest in the whole at the time the security interest attaches to the goods who has not in writing consented to the security interest or disclaimed an interest in the goods as part of the whole.
- (3) The security interests described in §26-9-314(1) and (2) do not take priority over:
  - (a) a subsequent purchaser for value of any interest in the whole; or
  - (b) a creditor with a lien on the whole subsequently obtained by judicial proceedings; or
  - (c) a creditor with a prior perfected security interest in the whole to the extent that he make subsequent advances if the subsequent purchase is made, the lien by judicial proceedings obtained or the subsequent advance under the prior perfected security interest is made or contracted for without knowledge of the security interest and before it is perfected. A purchase of the whole at a foreclosure sale other than the holder of a perfected security interest purchasing at his own foreclosure sale is a subsequent purchaser within this section.
- (4) When under subsections (1) or (2) and (3) a secured party has an interest in accessions which has priority over the claims of all persons who have interests in the whole, he may on default subject to the provisions of Part 5 remove his collateral from the whole but he must reimburse any encumbrancer or owner of the whole who is not the debtor and who has not otherwise agreed for the cost of repair of any physical injury but not for any diminution in value of the whole caused by the absence of the goods removed or by any necessity for replacing them. A person entitled to reimbursement may refuse permission to remove until the secured party gives adequate security for the performance of this obligation.

#### **§26-9-315 Priority When Goods Are Commingled or Processed**

- (1) If a security interest in goods was perfected and subsequently the goods or a party thereof have become a part of the product or mass, the security interest continues in the product or mass if:
  - (a) the goods are so manufactured, processed, assembled or commingled that their identity is lost in the product or mass; or
  - (b) a financing statement covering the original goods also covers the product into which the goods have been manufactured, processed or assembled.

In a case to which paragraph (b) applies, no separate security interest in that part of the original goods which has been manufactured, processed or assembled into the product may be claimed under §26-9-314.

- (2) When under §26-9-315(1) more than one (1) security interest attaches to the product or mass, they rank equally according to the ratio that the cost of the goods to which each interest originally attached bears to the cost of the total product or mass.

**§26-9-316 Priority Subject to Subordination**

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

**§26-9-317 Secured Party Not Obligated on Contract of Debtor**

The mere existence of a security interest or authority given to the debtor to dispose of or use collateral does not impose contract or tort liability upon the secured party for the debtor's acts or omissions.

**§26-9-318 Defenses Against Assignee; Modification of Contract After Notification of Assignment; Term Prohibiting Assignment Ineffective; Identification and Proof of Assignment**

- (1) Unless an account debtor has made an enforceable agreement not to assert defenses or claims arising out of a sale as provided in §26-9-206, the rights of an assignee are subject to:
  - (a) all the terms of the contract between the account debtor and assignor and any defense or claim arising therefrom; and
  - (b) any other defense or claim of the account debtor against the assignor which accrues before the account debtor receives notification of the assignment.
- (2) So far as the right to payment or a part thereof under an assigned contract has not been fully earned by performance, and notwithstanding notification of the assignment, any modification of or substitution for the contract made in good faith and in accordance with reasonable commercial standards is effective against an assignee unless the account debtor has otherwise agreed but the assignee acquires corresponding rights under the modified or substituted contract. The assignment may provide that such modification or substitution is a breach by the assignor.

- (3) The account debtor is authorized to pay the assignor until the account debtor receives notification that the amount due or to become due has been assigned and that payment is to be made to the assignee. A notification which does not reasonably identify the rights assigned is ineffective. If requested by the account debtor, the assignee must seasonably furnish reasonable proof that the assignment has been made and unless he does so the account debtor may pay the assignor.
- (4) A term in any contract between the account debtor and an assignor is ineffective if it prohibits assignment of an account or prohibits creation of a security interest in a general intangible for money due or to become due or requires the account debtor's consent to such assignment or security interest.

**§26-9-319      Regulations Implementing Central Filing System for Farm Products**

The Secretary of the State of Mississippi issues regulations implementing a central filing system relating to farm products which conforms with the requirements of §1324 of the Food Security Act of 1985, as now enacted or as hereafter may be amended.

## PART 4

## FILING

### §26-9-401 **Place of Filing; Erroneous Filing; Removal of Collateral**

- (1) The proper place to file in order to perfect a security interest is as follows:
  - (a)
    - (i) when the collateral is equipment used in farming operations, or accounts or general intangibles arising from or relating to the sale of farm products by a farmer, in the Office of the Tribal Court Clerk;
    - (ii) when the collateral is consumer goods other than goods covered by §26-9-401(c), in the Office of the Tribal Court Clerk;
    - (iii) when the collateral is farm products, in the Office of the Tribal Court Clerk and in the Office of the Secretary of the State of Mississippi;
    - (iv) when the collateral is crops growing or to be grown, in the Office of the Tribal Court Clerk and in the Office of the Secretary of the State of Mississippi.
  - (b) When the collateral is timber to be cut or is minerals or the like (including oil and gas) or accounts subject to §26-9-103(5), or when the financing statement is filed as a fixture filing (§26-9-313) and the collateral is goods which are or are to become fixtures, then in the Office of the Tribal Court Clerk and of the Secretary of the State of Mississippi.
  - (c) When the collateral is a sailboat or other vessel required to be numbered pursuant to §59-21-1 et seq., or an inboard or outboard motor used for the propulsion of vessels required to be so numbered, then in the Office of the Tribal Court Clerk and in the Office of the Secretary of the State of Mississippi.
  - (d) In all other cases, in the Office of the Secretary of the State of Mississippi and in addition, if the debtor has a place of business or resides on the Choctaw Indian Reservation, also in the Office of the Tribal Court Clerk.
- (2) Except as provided in §26-9-313, a filing which is made in good faith in an improper place or not in all of the places required by this section is nevertheless effective with regard to any collateral as to which the filing complied with the requirements of this Chapter and is also effective with regard to collateral covered by the financing statement against any person who has knowledge of the contents of such financing statement.
- (3) Except as provided in §26-9-313, a filing which is made in the proper place in this jurisdiction continues effective even though the debtor's residence or place of business or the location of the collateral or its use, whichever controlled the original filing, is thereafter changed.

- (4) The rules stated in §26-9-103 determine whether filing is necessary in this jurisdiction.
- (5) Notwithstanding the preceding subsections, and subject to §26-9-302(3), the proper place to file in order to perfect a security interest in collateral, including fixtures, of a transmitting utility is the office of the Secretary of State. This filing constitutes a fixture filing (§26-9-313) as to the collateral described therein which is or is to become fixtures.
- (6) For the purposes of this section, the residence of an organization is its place of business if it has one, or its chief executive office if it has more than one (1) place of business.
- (7) For the purposes of this section, in those counties having two (2) judicial districts, each such district shall be considered a separate county.

**§26-9-402      Formal Requisites of Financing Statement; Amendments; Mortgage as Financing Statement**

- (1) A financing statement is sufficient if it gives the names of the debtor and the secured party, is signed by the debtor, gives an address of the secured party from which information concerning the security interest may be obtained, gives a mailing address of the debtor, and contains a statement indicating the types, or describing the items, or collateral. A financing statement may be filed before a security agreement is made or a security interest otherwise attaches. When the financing statement covers crops growing or to be grown, the statement must also contain a description of the real estate concerned. When the financing statement covers timber to be cut or covers minerals or the like (including oil and gas) or accounts subject to §26-9-103(5), or when the financing statement is filed as a fixture filing (§26-9-313) and the collateral is goods which are or are to become fixtures, the statement must also comply with §26-9-402(5). A copy of the security agreement is sufficient as a financing statement if it contains the above information and is signed by the debtor. A carbon, photographic or other reproduction of a security agreement or a financing statement is sufficient as a financing statement if the security agreement so provides or if the original has been filed in this state.
- (2) A financing statement which otherwise complies with §26-9-402(1) is sufficient when it is signed by the secured party instead of the debtor if it is filed to perfect a security interest in:
  - (a) collateral already subject to a security interest in another jurisdiction when it is brought into this jurisdiction, or when the debtor's location is changed to this jurisdiction. Such a financing statement must state that the collateral was brought into this jurisdiction or that the debtor's location was changed to this jurisdiction under such circumstances; or
  - (b) proceeds under §26-9-306 if the security interest in the original collateral was perfected. Such a financing statement must describe the original collateral; or
  - (c) collateral as to which the filing has lapsed; or
  - (d) collateral acquired after a change of name, identity or corporate structure of the debtor (§26-9-402(7)).

(3) A form substantially as follows is sufficient to comply with §26-9-402(1):

Name of debtor (or assignor) \_\_\_\_\_

Address \_\_\_\_\_

Name of secured party (or assignee) \_\_\_\_\_

Address \_\_\_\_\_

1. This financing statement covers the following types (or items) of property:

(Describe) \_\_\_\_\_

2. (If collateral is crops) The above-described crops are growing or are to be grown on:

(Describe real estate) \_\_\_\_\_

3. (If applicable)

The above goods are to become fixtures on:

The above timber is standing on:

The above minerals or the like (including oil and gas) or accounts will be financed at the wellhead or minehead of the well or mine located on:

(Describe real estate by legal description) \_\_\_\_\_

and this financing statement is to be filed for record in the real estate records.

(If the debtor does not have an interest of record in real estate) The name of the record owner or record lessee is \_\_\_\_\_

4. (If products of collateral are claimed) Products of the collateral are also covered.

Signature of debtor (or assignor) \_\_\_\_\_

Signature of Secured Party (or assignee) \_\_\_\_\_

(4) A financing statement may be amended by filing a writing signed by both the debtor and the secured party. An amendment does not extend the period of effectiveness of a financing statement. If any amendment adds collateral, it is effective as to the added collateral only from the filing date of the amendment. In this Chapter, unless the context otherwise requires, the term "financing statement" means the original financing statement and any amendments.

(5) A financing statement covering timber to be cut or covering minerals or the like (including oil and gas) or accounts subject to §26-9-103(5), or a financing statement filed as a fixture filing (§26-9-313) where the debtor is not a transmitting utility, must show that it covers this type of collateral, must recite that it is to be filed for record in the real estate records, and the financing statement must contain a description of the real estate sufficient if it were contained in a mortgage of the real estate to give constructive notice of the mortgage under the law of this jurisdiction. If the debtor does not have an interest of record in the real estate, the financing statement must show the name of a record owner or record lessee. No provision of this Chapter nor of any other law of this jurisdiction shall be construed to require that an instrument filed to perfect a security interest under this subsection shall have the signatures of the parties acknowledged or proved.

- (6) A mortgage is effective as a financing statement filed as a fixture filing from the date of its recording if:
  - (a) the goods are described in the mortgage by item or type; and
  - (b) the goods are or are to become fixtures related to the real estate described in the mortgage; and
  - (c) the mortgage complies with the requirements for a financing statement in this section other than a recital that it is to be filed in the real estate records; and
  - (d) the mortgage is duly recorded. No fee with reference to the financing statement is required other than the regular recording and satisfaction fees with respect to the mortgage.
- (7) A financing statement sufficiently shows the name of the debtor if it gives the individual, partnership or corporate name of the debtor, whether or not it adds other trade names or the names of partners. Where the debtor so changes his name (or in the case of an organization its name, identity or corporate structure) that a filed financing statement becomes seriously misleading, the filing is not effective to perfect a security interest in collateral acquired by the debtor more than four (4) months after the change, unless a new appropriate financing statement is filed before the expiration of that time. A filed financing statement remains effective with respect to collateral transferred by the debtor even though the secured party knows of or consents to the transfer.
- (8) A financing statement substantially complying with the requirements of this section is effective even though it contains minor errors which are not seriously misleading.

**§26-9-403 What Constitutes Filing; Duration of Filing; Effect of Lapsed Filing; Duties of Filing Officer**

- (1) Presentation for filing of a financing statement and tender of the filing fee or acceptance of the statement by the filing officer constitutes filing under this Chapter.
- (2) Except as provided in §26-9-403(6), a filed financing statement is effective for a period of five (5) years from the date of filing. The effectiveness of a filed financing statement lapses on the expiration of the five-year period unless a continuation statement is filed prior to the lapse. If a security interest perfected by filing exists at the time insolvency proceedings are commenced by or against the debtor, the security interest remains perfected until termination of the insolvency proceedings and thereafter for a period of sixty (60) days or until expiration of the five-year period, whichever occurs later. Upon lapse, the security interest becomes unperfected unless it is perfected without filing. If the security interest becomes unperfected upon lapse, it is deemed to have been unperfected as against a person who became a purchaser or lien creditor before lapse.
- (3) A continuation statement may be filed by the secured party within six (6) months prior to the expiration of the five-year period specified in §26-9-403(2). Any such continuation statement must be signed by the secured party, identify the original statement by file number, and state that the original statement is still effective. A continuation statement

signed by a person other than the secured party of record must be accompanied by a separate written statement of assignment signed by the secured party of record and complying with §26-9-405(2), including payment of the required fee. Upon timely filing of the continuation statement, the effectiveness of the original statement is continued for five (5) years after the last date to which the filing was effective, whereupon it lapses in the same manner as provided in §26-9-403(2) unless another continuation statement is filed prior to such lapse. Succeeding continuation statements may be filed in the same manner to continue the effectiveness of the original statement. Unless a statute on disposition of public records provides otherwise, the filing officer may remove a lapsed statement from the files and destroy it immediately if he has retained a microfilm or other photographic record, or in other cases after one (1) year after the lapse. The filing officer shall so arrange matters by physical annexation of financing statements to continuation statements or other related filings, or by other means, that if he physically destroys the financing statements of a period more than five (5) years past, those which have been continued by a continuation statement or which are still effective under §26-9-403(6) shall be retained.

- (4) Except as provided in §26-9-403(7), a filing officer shall mark each statement with a file number and with the date and hour of filing and shall hold the statement or a microfilm or other photographic copy thereof for public inspection. In addition, the filing officer shall index the statements according to the name of the debtor and shall note in the index the file number and the address of the debtor given in the statement. Also, for indexing purposes, a continuation statement shall be treated as a financing statement by the filing officer and indexed in the same manner as financing statements.
- (5)
  - (a) Except as provided in §26-9-403(b), upon the filing of an original financing statement or a continuation statement, the filing officer will furnish the secured party a copy thereof showing the file number and the date, hour and place of filing. If the statement is in the standard form prescribed by the Secretary of the State of Mississippi, the filing fee shall be five dollars (\$5.00), and otherwise it shall be ten dollars (\$10.00). The secured party may, at his option, show a trade name for any person. The uniform fee for each name, including trade name, more than one (1) required to be indexed shall be two dollars (\$2.00).
  - (b) If an original financing statement or a continuation statement is filed under the provisions of §26-9-402(5), the uniform fee for recording and indexing the first page of the statement shall be five dollars (\$5.00). If the statement consists of more than one (1) page, the recording fee for such excess page shall be one dollar (\$1.00). The secured party may, at his option, show a trade name for any person. The uniform fee for indexing each name, including trade name, more than one (1) shall be two dollars (\$2.00). When the statement has been recorded and indexed, the filing officer will return the statement, or a copy thereof, to the secured party showing the date, hour, book and page number and place of recording.
- (6) If the debtor is a transmitting utility (§26-9-401(5)) and a filed financing statement so states, it is effective until a termination statement is filed. A real estate mortgage which is effective as a fixture filing under §26-9-402(6) remains effective as a fixture filing under the mortgage is released or satisfied of record or its effectiveness otherwise terminates as to the real estate. A financing statement covering a mobile home, other than a mobile

home constituting inventory, remains effective, if it so states, until a termination statement is filed.

- (7) When a financing statement covers timber to be cut or covers minerals or the like (including oil and gas) or accounts subject to §26-9-103(5) or is filed as a fixture filing, it shall be filed for record and the filing officer shall index it under the names of the debtor and any owner of record shown on the financing statement in the same fashion as if they were the mortgagors in a mortgage of the real estate described.

#### **§26-9-404 Termination Statement**

- (1) Within one (1) month or within ten (10) days following written demand by the debtor after there is no outstanding secured obligation and no commitment to make advances, incur obligations or otherwise give value, the secured party must file with each filing officer with whom the financing statement was filed, a termination statement to the effect that he no longer claims a security interest under the financing statement, which shall be identified by file number.

In other cases, whenever there is no outstanding secured obligation and no commitment to make advances, incur obligations or otherwise give value, the secured party must on written demand by the debtor send the debtor, for each filing officer with whom the financing statement was filed, a termination statement to the effect that he no longer claims a security interest under the financing statement, which shall be identified by file number. A termination statement signed by a person other than the secured party of record must be accompanied by a separate written statement of assignment signed by the secured party of record complying with §26-9-405(2), including payment of the required fee. If the affected secured party fails to file such a termination statement as required by this subsection, or to send such a termination statement within ten (10) days after proper demand therefore, he shall be liable to the debtor for one hundred dollars (\$100.00), and in addition for any loss caused to the debtor by such failure.

- (2) On presentation to the filing officer of such a termination statement he must note it in the index. If he has received the termination statement in duplicate, he shall return one (1) copy of the termination statement to the secured party stamped to show the time of receipt thereof. If the filing officer has a microfilm or other photographic record of the financing statement, and of any related continuation statement, statement of assignment and statement of release, he may remove the originals from the files at any time after receipt of the termination statement, or if he has no such record, he may remove them from the files at any time after one (1) year after receipt of the termination statement.
- (3) If the termination statement is in the standard form prescribed by the Secretary of the State of Mississippi, the uniform fee for filing and indexing the termination statement shall be five dollars (\$5.00), and otherwise shall be ten dollars (\$10.00), plus in each case in additional fee of two dollars (\$2.00) for each name more than one (1) against which the termination statement is required to be indexed.

#### **§26-9-405 Assignment of Security Interest; Duties of Filing Officer; Fees**

- (1) A financing statement may disclose an assignment of a security interest in the collateral described in the financing statement by indication in the financing statement of the name

and address of the assignee or by an assignment itself or a copy thereof on the face or back of the statement. On presentation to the filing officer of such a financing statement, the filing officer shall mark the same as provided in §26-9-403(4). The uniform fee for filing, indexing and furnishing filing data for a financing statement so indicating an assignment shall be five dollars (\$5.00) if the statement is in the standard form prescribed by the Secretary of State of Mississippi, and otherwise shall be ten dollars (\$10.00), plus in each case an additional fee of two dollars (\$2.00) for each name more than one against which the financing statement is required to be indexed.

- (2) A secured party may assign of record all or part of his rights under a financing statement by the filing in the place where the original financing statement was filed of a separate written statement of assignment signed by the secured party of record and setting forth the name of the secured party of record, and the debtor, the file number and the date of filing of the financing statement and the name and address of the assignee, and containing a description of the collateral assigned. A copy of the assignment is sufficient as a separate statement if it complies with the preceding sentence. On presentation to the filing officer of such a separate statement, the filing officer shall mark such separate statement with the date and hour of the filing. He shall note the assignment on the index of the financing statement, or in the case of a fixture filing, or a filing covering timber to be cut, or covering minerals or the like (including oil and gas) or accounts subject to §26-9-103(5), he shall index the assignment under the name of the assignor as grantor. The uniform fee for filing, indexing and furnishing filing data about such a separate statement of assignment shall be five dollars (\$5.00) if the statement is in the standard form prescribed by the Secretary of the State of Mississippi, and otherwise shall be ten dollars (\$10.00), plus in each case an additional fee of two dollars (\$2.00) for each name more than one against which the statement of assignment is required to be indexed. Notwithstanding the provisions of this subsection, an assignment of record of a security interest in a fixture contained in a mortgage effective as a fixture filing (§26-9-402(6)) may be made only by an assignment of the mortgage in the manner provided by the law of this jurisdiction other than this act.
- (3) After the disclosure or filing of an assignment under this section, the assignee is the secured party of record.

**§26-9-406 Release of Collateral; Duties of Filing Officer; Fees**

A secured party of record may by his signed statement release all or part of any collateral described in a filed financing statement. The statement of release is sufficient if it contains a description of the collateral being released, the name and address of the debtor, the name and address of the secured party, and the file number of the financing statement. A statement of release signed by a person other than the secured party of record must be accompanied by a separate written statement of assignment signed by the secured party of record and complying with §26-9-405(2), including payment of the required fee. Upon presentation of such a statement of release to the filing officer; he shall mark the statement with the hour and date of filing and shall note the same upon the margin of the index of the filing of the financing statement. The uniform fee for filing and noting such a statement of release shall be five dollars (\$5.00) if the statement is in the standard form prescribed by the Secretary of the State of Mississippi, and otherwise shall be ten dollars (\$10.00), plus in each case an additional fee of two dollars (\$2.00) for each name more than one against which the statement of release is required to be indexed.

**§26-9-407 Information From Filing Officer**

- (1) If the person filing any financing statement, termination statement, statement of assignment, or statement of release, furnishes the filing officer a copy thereof, the filing officer shall upon request note upon the copy the file number and date and hour of the filing of the original, and deliver or send the copy to such person.
- (2) Upon request in writing of any person, the filing officer shall issue his certificate showing whether there is on file, on the date and hour stated therein, any presently effective financing statements naming a particular debtor thereof, and if there is, giving the date and hour of filing and file number of each such financing statement and the name and address of each secured party or his assignee therein. Each such request shall be accompanied by a search fee of five dollars (\$5.00) if the request is made on the standard form prescribed by the Secretary of the State of Mississippi, and otherwise it shall be ten dollars (\$10.00). An additional fee of two dollars (\$2.00) shall be paid by the requesting party for each financing statement listed on the filing officer's certificate, the aggregate of which shall be billed to the requesting party at the time the filing officer's certificate is issued. Failure to pay the additional fee by any requesting party when due may result in denial of further service to the requesting party until the amount due has been paid.
- (3) Upon request, the filing officer shall furnish a copy of any presently effective financing statements on file for a uniform fee of two dollars (\$2.00) per page naming a particular debtor when the request is made on the form and in the manner hereinbefore provided for listing the same.

**§26-9-408 Financing Statements Covering Consigned or Leased Goods**

A Consignor or Lessor of Goods may file a financing statement using the terms "Consignor", "Consignee", "Lessor", "Lessee" or the like instead of the terms specified in §26-9-402. The provisions of this Part shall apply as appropriate to such a financing statement, but its filing shall not of itself be a factor in determining whether or not the consignment or lease is intended as security (26-1-201(37)). However, if it is determined for other reasons that the consignment or lease is so intended, a security interest of the consignor or lessor which attaches to the consigned or lease goods is perfected by such filing.

**§26-9-409 Forms**

The Tribe adopts the forms prescribed by the Secretary of the State of Mississippi coming within the framework and meeting the requirements of the Uniform Commercial Code. The use of nonstandard forms necessitates special handling by the filing officers, and a party submitting a filing on a nonstandard form shall be liable for costs incurred by special handling in the sum of five dollars (\$5.00), payable to the filing officer concerned, in addition to the regular filing fee for the filing submitted on a nonstandard form.

**§26-9-410 Cumulative List of Filings**

The Office of the Tribal Court Clerk may prepare a cumulative list of filings made in his office each day and furnish such list to any person requesting same, with the cost of its preparation and delivery to be charged to the requesting party and payable to the Secretary of State at the time and

in the manner agreed upon between the parties; provided, however, failure by the requesting party to pay as agreed may result in his suspension from receipt of further lists.

## PART 5

### DEFAULT

#### §26-9-501 **Default; Procedure When Security Agreement Covers Both Real and Personal Property**

- (1) When a debtor is in default under a security agreement, a secured party has the rights and remedies provided in this Part and except as limited by §26-9-501(3) those provided in the security agreement. He may reduce his claim to judgment, foreclose or otherwise enforce the security interest by any available judicial procedure. If the collateral is documents, the secured party may proceed either as to the documents or as to the goods covered thereby. A secured party in possession has the rights, remedies and duties provided in §26-9-207. The rights and remedies referred to in this subsection are cumulative.
- (2) After default, the debtor has the rights and remedies provided in this Part, those provided in the security agreement, and those provided in §26-9-207.
- (3) To the extent that they give rights to the debtor and impose duties on the secured party, the rules stated in the subsections referred to below may not be waived or varied except as provided with respect to compulsory disposition of collateral (§26-9-504(3)) and §26-9-505(1)) and with respect to redemption of collateral (§26-9-506); but the parties may by agreement determine the standards by which the fulfillment of these rights and duties is to be measured if such standards are not manifestly unreasonable:
  - (a) §26-9-502(2) and §26-9-504(2) insofar as they require accounting for surplus proceeds of collateral;
  - (b) §26-9-504(3) and §26-9-505(1) which deal with disposition of collateral;
  - (c) §26-9-505(2) which deals with acceptance of collateral as discharge of obligation;
  - (d) §26-9-506 which deals with redemption of collateral; and
  - (e) §26-9-507(1) which deals with the secured party's liability for failure to comply with this Part.
- (4) If the security agreement covers both real and personal property, the secured party may proceed under this Part as to the personal property or he may proceed as to both the real and the personal property in accordance with his rights and remedies in respect of the real property in which case the provisions of this Part do not apply.
- (5) When a secured party has reduced his claim to judgment, the lien of any levy which may be made upon his collateral by virtue of any execution based upon the judgment shall relate back to the date of the perfection of the security interest in such collateral. A judicial sale, purchase to such execution, is a foreclosure of the secured interest by judicial procedure within the meaning of this section, and the secured party may purchase at the sale and thereafter hold the collateral free of any other requirements of this Chapter.

**§26-9-502      Collection Rights Of Secured Party**

(1)      When so agreed and in any event on default, the secured party is entitled to notify an account debtor of the obligor on an instrument to make payment to him whether or not the assignor was theretofore making collections on the collateral, and also to take control of any proceeds to which he is entitled under §26-9-306.

(2)      A secured party who by agreement is entitled to charge back uncollected collateral or otherwise to full or limited recourse against the debtor, and who undertakes to collect from the account debtors or obligors, must proceed in a commercially reasonable manner and may deduct his reasonable expenses of realization from the collections. If the security agreement secures indebtedness, the secured party must account to the debtor for any surplus, and unless otherwise agreed, the debtor is liable for any deficiency. But, if the underlying transaction was a sale of accounts or chattel paper, the debtor is entitled to any surplus or is liable for any deficiency only if the security agreement so provides.

**§26-9-503      Secured Party's Right to Take Possession After Default**

(1)      General

- (a)      As used in this section, "Person" shall mean an individual, partnership, corporation, limited liability company, joint venture, governmental unit, or any other form of business, organization or association.
- (b)      Repossession of Personal Property/Consumer Goods. The personal property of members of the Mississippi Band of Choctaw Indians shall not be taken from lands subject to the jurisdiction of the Choctaw Tribal government under the procedures of repossession except in strict compliance with the following:
  - (i)      written consent to remove the property from lands subject to the jurisdiction of the Mississippi Band of Choctaw Indians shall be secured from the Tribal member consumer purchaser at the time repossession is sought. The written consent shall be retained by the creditor and exhibited to the Tribal Court upon proper demand.
  - (ii)     Where the Tribal member consumer refuses to sign a written consent to permit removal of the property from the land subject to the jurisdiction of the Mississippi Band of Choctaw Indians, the property shall be removed only by order of the Tribal Court in an appropriate legal proceeding.
- (c)      Any person who repossesses personal property or consumer goods of the Mississippi Band of Choctaw Indians must be licensed by the Secretary/Treasurer of the Tribe. The license fee is \$25.00. The license requirement is not applicable to attorney admitted to practice before the Choctaw Tribal Court and does not apply if the repossession is pursuant to court order.

(2)      Penalties

- (a) Any non-member of the Mississippi Band of Choctaw Indians who is found to be in willful violation of §26-9-503(1) may be excluded from lands subject to the jurisdiction of the Mississippi Band of Choctaw Indians pursuant to Title XX of the Tribal Code.
  - (b) Any Indian subject to this Court's criminal jurisdiction who violates any provision of §26-9-503(1) of this Code shall be guilty of a Class C offense.
- (3) Civil Liability
- (a) Any person who violates the provisions of §26-9-503(1) shall be subject to a private right of action by the debtor. The debtor shall be entitled to actual damages plus a civil penalty up to \$1,000, in addition to court costs and attorneys' fees, if the debtor prevails.
  - (b) The Attorney General of the Tribe may institute proceedings to collect the civil penalty in conjunction with the private party, or independently, if the private party has not commenced civil proceedings.
  - (c) The remedies in this section are in addition to any other criminal or civil penalties.

**§26-9-504 Secured Party's Right to Dispose of Collateral After Default; Effect of Disposition**

- (1) A secured party after default may sell, lease or otherwise dispose of any or all of the collateral in its then condition or following any commercially reasonable preparation or processing. Any sale of goods is subject to the Chapter on Sales (Chapter 2). The proceeds of disposition shall be applied in the order following to:
  - (a) the reasonable expenses of retaking, holding, preparing for sale or lease, selling, leasing and the like and, to the extent provided for in the agreement and not prohibited by law, the reasonable attorneys' fees and legal expenses incurred by the secured party;
  - (b) the satisfaction of indebtedness secured by the security interest under which the disposition is made;
  - (c) the satisfaction of indebtedness secured by any subordinate security interest in the collateral if written notification of demand therefore is received before distribution of the proceeds is completed. If requested by the secured party, the holder of a subordinate security interest must seasonably furnished reasonable proof of his interest, and unless he does so, the secured party need not comply with his demand.
- (2) If the security interest secures indebtedness, the secured party must account to the debtor for any surplus, and, unless otherwise agreed, the debtor is liable for any deficiency. But if the underlying transaction was a sale of accounts or chattel paper, the debtor is entitled to any surplus or is liable for any deficiency only if the security agreement so provides.

- (3) Disposition of the collateral may be by public or private proceedings and may be made by way of one (1) or more contracts. Sale or other disposition may be as a unit or in parcels and at any time and place and on any terms, but every aspect of the disposition including the method, manner, time, place and terms must be commercially reasonable. Unless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, reasonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor, if he has not signed after default a statement renouncing or modifying his right to notification of sale. In the case of consumer goods, no other notification need be sent. In other cases, notification shall be sent to any other secured party from whom the secured party has received (before sending his notification to the debtor or before the debtor's renunciation of his rights) written notice of a claim of an interest in the collateral. The secured party may buy at any public sale; and if the collateral is of a type customarily sold in a recognized market or is of a type which is the subject of widely distributed standard price quotations he may buy at private sale.
- (4) When collateral is disposed of by a secured party after default, the disposition transfers to a purchaser for value all of the debtor's rights therein, discharges the security interest under which it is made, and any security interest or lien subordinate thereto. The purchaser takes free of all such rights and interests even though the secured party fails to comply with the requirements of this Part or of any judicial proceedings:
  - (a) in the case of a public sale, if the purchaser has no knowledge of any defects in the sale and if he does not buy in collusion with the secured party, other bidders or the person conducting the sale; or
  - (b) in any other case, if the purchaser acts in good faith.
- (5) A person who is liable to a secured party under a guaranty, endorsement, repurchase agreement or the like and who receives a transfer of collateral from the secured party or is subrogated to his rights has thereafter the rights and duties of the secured party. Such a transfer of collateral is not a sale or disposition of the collateral under this Chapter.

**§26-9-505 Compulsory Disposition of Collateral; Acceptance of the Collateral as Discharge of Obligation**

- (1) If the debtor has paid sixty percent (60%) of the cash price in the case of a purchase money security interest in consumer goods, or sixty percent (60%) of the loan in the case of another security interest in consumer goods, and has not signed after default a statement renouncing or modifying his rights under this Part, a secured party who has taken possession of collateral must dispose of it under §26-9-504; and if he fails to do so within ninety (90) days after he takes possession, the debtor at his option may recover in conversion or under §26-9-507(1) on secured party's liability.
- (2) In any other case involving consumer goods or any other collateral, a secured party in possession may, after default, propose to retain the collateral in satisfaction of the obligation. Written notice of such proposal shall be sent to the debtor if he has not signed after default a statement renouncing or modifying his rights under this subsection. In the case of consumer goods, no other notice need be given. In other cases, notice shall be sent

to any other secured party from whom the secured party has received (before sending his notice to the debtor or before the debtor's renunciation of his rights) written notice of a claim of an interest in the collateral. If the secured party receives objection in writing from a person entitled to receive notification within twenty-one (21) days after the notice was sent, the secured party must dispose of the collateral under §26-9-504. In the absence of such written objection, the secured party may retain the collateral in satisfaction of the debtor's obligation.

#### **§26-9-506 Debtor's Right to Redeem Collateral**

At any time before the secured party has disposed of collateral or entered into a contract for its disposition under §26-9-504 or before the obligation has been discharged under §26-9-505(2) the debtor or any other secured party may after default redeem the collateral by tendering fulfillment of all obligations secured by the collateral then due or past due (excluding any sums that would not then be due except for an acceleration provision) as well as the expenses reasonably incurred by the secured party in retaking, holding and preparing the collateral for disposition, in arranging for the sale, and to the extent provided in the agreement and not prohibited by law, his reasonable attorneys' fees and legal expenses.

#### **§26-9-507 Secured Party's Liability for Failure to Comply With This Part**

- (1) If it is established that the secured party is not proceeding in accordance with the provisions of this Part disposition may be ordered or restrained on appropriate terms and conditions. If the disposition has occurred the debtor or any person entitled to notification or whose security interest has been made known to the secured party prior to the disposition has a right to recover from the secured party any loss caused by a failure to comply with the provisions of this Part. If the collateral is consumer goods, the debtor has a right to recover in any event an amount not less than the credit service charge plus ten percent (10%) of the principal amount of the debt or the time price differential plus ten percent (10%) of the cash price.
- (2) The fact that a better price could have been obtained by a sale at a different time or in a different method from that selected by the secured party is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner. If the secured party either sells the collateral in the usual manner in any recognized market therefore or if he sells at the price current in such market at the time of his sale or if he has otherwise sold in conformity with reasonable commercial practices among dealers in the type of property sold he has sold in a commercially reasonable manner. The principles stated in the two (2) preceding sentences with respect to sales also apply as may be appropriate to other types of disposition. A disposition which has been approved in any judicial proceeding or by any bona fide creditors' committee or representative of creditors shall conclusively be deemed to be commercially reasonable, but this sentence does not indicate that any such approval must be obtained in any case nor does it indicate that any disposition not so approved is not commercially reasonable.