MICROFILM DIVIDER

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SFN 2053 (2/85) 5M

ROLL NUMBER

DESCRIPTION

2429

2001 SENATE INDUSTRY, BUSINESS AND LABOR

SB 2429

2001 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2429

Senate Industry, Business and Labor Committee

☐ Conference Committee

Hearing Date February 12, 2001.

Tape Number	Side A	Side B	Meter #
1		x	10.6 to 32
(Feb 13/01) 3	x		1.2 to 6.4

Committee Clerk Signature Doris E Pitz

Minutes:

The meeting was called to order. All committee members, except SENATOR MUTCH, present. Hearing was opened on SB 2429 relating to voidable provisions in computer information agreements.

SENATOR DWIGHT COOK, District 34, introduced Glenn A. Elliot, a constituent on whose behalf he introduced this bill.

GLENN A. ELLIOT, on his own behalf. Intent is to pre-establish choice of law and forum under UCITA (Uniform Computer Information Transaction Act) for North Dakotans so they are not bound by the licensing agreement found in the software you buy. Distributed explanatory notes.

Feb. 13/01. Tape 3-A- 1.2 to 6.4

Committee reconvened. All members, except SENATOR ESPEGARD, present. Discussion held.

JIM FLEMING, Attorney General's Office, to inform, neither in favor nor against. Our office monitors this bill because of the quantity of technology contracts the state has to sign. Our worry

is that this bill is not workable with other states. ND consumer won't be protected from other courts. If consumer agreed to an agreement mailed from Virginia and managed from there that court will have jurisdiction. What Mr. Elliot wants won't be accomplished by this bill.

SENATOR KREBSBACH: Any connection between UCC and UCITA?

J FLEMING: Initially UCITA part of UCC. Only one or two states have enacted UCITA.

SENATOR KREBSBACH: In view the bill won't accomplish its intent and requires more study, I move do not pass. SENATOR TOLLEFSON: Second.

Roll call vote: 6 yes; 0 no; 1 absent, not voting. Carrier: SENATOR EVERY.

Date: 2/13/01
Roll Call Vote #: 1

2001 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 2429

Senate Industry, Business and Labor Committee

☐ Subcommittee on _____
or
☐ Conference Committee

Legislative Council Amendment Number _____

Action Taken DNP

Motion Made By Sen Krebsbach Seconded By Sen Tollefson

Senators	Yes	No	Senators	Yes	No
Senator Mutch - Chairman	✓		Senator Every	✓	
Senator Klein - Vice Chairman	✓		Senator Mathern	✓	
Senator Espegard	A				
Senator Krebsbach	✓				
Senator Tollefson	✓				

Total (Yes) 6 No 0

Absent 1

Floor Assignment Sen Every

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE (410)
February 14, 2001 8:17 a.m.

Module No: SR-27-3267
Carrier: Every
Insert LC: . Title: .

REPORT OF STANDING COMMITTEE

SB 2429: Industry, Business and Labor Committee (Sen. Mutch, Chairman) recommends **DO NOT PASS** (6 YEAS, 0 NAYS, 1 ABSENT AND NOT VOTING). SB 2429 was placed on the Eleventh order on the calendar.

2001 TESTIMONY

SB 2429

EXPLANATORY NOTES TO SENATE BILL 2429 (SB 2429) TO RENDER CHOICE OF LAW OR FORUM UNDER UCITA VOIDABLE

As prepared by Glenn A. Elliott, author of Senate Bill 2429, a private North Dakota resident acting on his own and not on behalf of any other individual or group.

*** What is UCITA, and why do we have to worry about it since it isn't North Dakota law? ***

UCITA, or the Uniform Computer Information Transactions Act, started out as a proposed Article 2B of the Uniform Commercial Code. The Uniform Commercial Code has been almost completely accepted by all states to govern a multitude of commercial transactions. UCC is a joint project between the National Conference of Commissioners on Uniform State Laws (NCCUSL) and the American Law Institute (ALI). Both organizations are composed of lawyers, judges, and law professors.

UCC Article 2 (NDCC 41-02) covers sales of goods, and UCC Article 2A was added to cover leases. UCC Article 2B was to cover transactions involving software and data stores, which have been addressed under Article 2 to this point, but mostly involve the sale of licenses to use software or access data stored on a CD or available through a direct dial-up phone connection or over the Internet. Yes, if you buy a computer program, you probably don't own the program. Instead, you probably possess a license to use the program. No, you may not own the license forever and you may not be able to transfer it.

UCC Article 2B became one of the more contentious proposals for the UCC. In fact, for the first time in the 50 year partnership between NCCUSL and ALI, ALI pulled out of the drafting of Article 2B after expressing concern about what 2B was becoming. After the ALI withdrew, NCCUSL renamed 2B as UCITA, and the final version of UCITA was accepted by NCCUSL at its annual meeting in August 2000.

UCITA has been extensively criticized because it codifies in statute many provisions found in software licenses that have been overturned by various courts on principles of general contract law or consumer protection statutes. If enacted, as a specific law, UCITA would override general contract law. UCITA states that it does not override consumer protection statutes, but since those usually deal with goods, and UCITA defines virtually all of its transactions as licenses covering intangible property (software and data), it may remove its subject matter from the scope of those statutes. The effect of UCITA is amplified because many if not most transactions (in goods or intangibles) are "standard form" contracts, also called contracts of adhesion. There is no real negotiation between buyer and seller. Mainly as the buyer, you take it or leave it.

UCITA has been criticized by (among others):
* The American Library Association and four specialized library organizations, including the American Association of Law Libraries.
* 24 state attorneys general.
* The Association for Computing Machinery and the Institute for Electrical and Electronic Engineers (representing the people who actually write and maintain the software as opposed to selling it).
* The American Society for Quality.
* The American Intellectual Property Association.
* The Federal Trade Commission.

Some specific criticisms of UCITA include:

1. Allowing "contractual use restriction" clauses that:

a. Prevent you from selling or giving away a used copy of software, even if you uninstall it from your computer(s) and destroy all backup copies (UCITA Section 503). Think about this: Can Simon and Schuster prevent you from buying a book, reading it, and then reselling it or giving it to a friend when you're done? Publishers tried this many years back, then Macy's (the department store) took them to court and won.

b. Prevent you or someone you engage from examining the "guts" of a program or file, ("reverse engineering"), even to find out why it doesn't work (it may not have to--see below), how to get it to work with other programs or files, whether it contains program code stolen from your work, or how to recover your own data.

c. Prevent you from talking to anyone except the licensor about concerns or problems with the program. You can't warn people about possible security "holes," tell a friend not to buy the program because half of the features don't work, or publish an article comparing that program to others.

2. Exempting software publishers from virtually all liability and responsibility for the proper function of their programs and databases. This can apply even if the publishers know about problems before the items were shipped, and regardless of the severity or consequences. Software publishers can also be exempt from providing improvements, modifications, and upgrades (including "bug fixes") unless the contract specifically says so. [UCITA Sections 307(d), 403, 405, 406(b)(2)]

3. Allowing software purchasers to be bound by contract provisions that can't be examined until after the software is purchased, because the license agreement is only available on a paper inside the box or on a screen during installation of the program. This allows the licensor (usually the software publisher) to change or implement a number of terms through such an agreement, such as:
a. Standards of notice.
b. Waiver of right to cancel for unilateral change in a material provision in the agreement.
c. Defining what is good faith, diligence, and reasonable care. [UCITA Sections 112(e), 112(f), 113, 208(3), 209, 304(b)(2), 304(c)]

4. Allowing "choice of law" or "choice of forum" provisions as presumptively valid, so you have to show why the agreement shouldn't be covered under UCITA or why you shouldn't have to take a dispute over your $200 software to a Florida court if you're in North Dakota. If a court in a non-UCITA state upholds the choice of law, you're stuck. The "Official Comments" to UCITA say that "(c)hoice of forum agreements are generally enforceable" (see farther below about Carnival Cruise Lines). This is the most immediate reason that North Dakotans have to be worried about what's not North Dakota law. [UCITA Sections 109 and 110]

5. Conflicting in plain wording with other law, such as the First Amendment to the US Constitution, consumer protection statutes, and the "first sale" and "fair use" provisions of United States copyright law, to the extent that litigation will be required to sort things out.

*** Come on, this stuff is never going to fly in the courts, at least not in states that have not enacted UCITA. ***

The Washington State Supreme Court upheld a lower court that decided a case essentially according to a UCITA principle, even with case law to the contrary and even though UCITA was only in draft form and had not been enacted by any state. In the case of Mortenson v. Timberline Software, construction bidding software made by Timberline produced an underbid of $1.9 million because of a bug known to Timberline. The software had been provided and installed by a contractor to Mortenson, and the package contained a "shrink-wrap" license agreement not visible until the package was opened. The court held that a clause in the agreement limiting any damages to the actual cost of the software ($5000) was valid.

*** Is SB 2429 derived from an existing statute or proposed act? ***

The first two sentences of Section 2 of SB 2429 are derived from Subsection 4 of Section 554D.104 of the Iowa statutes, as follows:

"A choice of law provision, which is contained in a computer information agreement that governs a transaction subject to this chapter, that provides that the contract is to be interpreted pursuant to the laws of a state that has enacted the uniform computer information transactions Act, as proposed by the national conference of commissioners on uniform state laws, or any substantially similar law, is voidable and the agreement shall be interpreted pursuant to the laws of this state if the party against whom enforcement of the choice of law provision is sought is a resident of this state or has its principal place of business located in this state. For purposes of this subsection, a "computer information agreement" means an agreement that would be governed by the uniform computer information transactions Act or substantially similar law as enacted in the state specified in the choice of laws provision if that state's law were applied to the agreement."

This subsection has been called a "bomb shelter" provision by various commentators.

[In legislative history, this subsection was House Amendment 8232 as passed and incorporated into House File 2205, Iowa legislature 2000, signed into law 15 May 2000 as the Uniform Electronic Transactions Act, and effective 1 July 2000 except for certain provisions becoming effective upon signature.]

*** Why does SB 2429 go beyond the provision of the Iowa statute? ***

Since the Iowa statute only addresses a choice of law provision, it might be circumvented by not including a choice of law provision in an agreement, followed by action by the enforcing party in another court (probably according to a choice of forum provision) that recognizes UCITA as controlling law.

The case of Carnival Cruise Lines v. Shute is another reason to make a choice of forum provision voidable. Carnival's travel contract provides that lawsuits over the contract must be brought in a court located in Florida. The U.S. Supreme Court overruled a U.S. Appeals Court and held that this provision was valid even though it worked hardship upon a consumer in another state to the point that the consumer could not pursue the case.

Choice of law or forum voidability under SB 2429 is not designed to allow a North Dakota party to pursue an action. "The law is a shield, not a sword." SB 2429 only protects a North Dakota party from being required to expend the considerable time and money to defend itself in an action brought in a faraway state under law that is not the law of North Dakota, and which the North Dakota party had no intention of being bound by simply because someone clicked "OK" on a license agreement during software installation or because the provisions are on a "shrink-wrap" document that is packaged with software but not visible until the software has already been bought and opened. Under UCITA, "click-wrap" (click OK to continue installing) and shrink-wrap agreements are completely binding, even though courts have previously ruled against the validity of various provisions in them.

These and other provisions of SB 2429 will be explained elsewhere in this document.

*** Why does SB 2429 make provisions for choice of law or forum voidable instead of void? ***

"Let not the law mandate what the citizen should properly decide."

It is a recognized principle of contract law that the law should allow the parties to a contract to conduct themselves according to the contract to the greatest extent possible. If the North Dakota party considers that it is in its best interest to accept UCITA as the controlling law of the contract, or to accept the jurisdiction of a court in another state, North Dakota should not prevent this. SB 2429 only protects the North Dakota party from being forced into either or both.

*** Why does SB 2429 allow the parties to agree on other controlling law if a choice of law provision is voided by the North Dakota party? ***

Same reasoning as to why choice of law or forum provisions are held voidable instead of void.

*** Why does SB 2429 allow the North Dakota party to object to the application of UCITA in a North Dakota court? ***

As discussed above, this prevents the enforcing party from being able to circumvent voidability of a choice of law provision by not including such a provision.

*** Why is the enforcing party allowed to unilaterally accept North Dakota law in an action on the agreement before a North Dakota court? ***

This is to prevent the North Dakota party from inexcusably paralyzing an action by not agreeing to any governing law. It should be obvious that the North Dakota party, present and acting within the borders of North Dakota, is properly subject to North Dakota law and the jurisdiction of North Dakota courts.

SB 2429 is proposed to protect the North Dakota party from being unfairly burdened by a controversial law that is not North Dakota law (and won't become so if the author can help it). It is not proposed to allow the North Dakota party to generally avoid contract obligations.
