

Fifty-eighth  
Legislative Assembly  
of North Dakota

## HOUSE BILL NO. 1069

Introduced by

Industry, Business and Labor Committee

(At the request of the Commission on Uniform State Laws)

1 A BILL for an Act to create and enact chapter 41-01 of the North Dakota Century Code, relating  
2 to Uniform Commercial Code Article 1, general provisions; to amend and reenact subdivision b  
3 of subsection 2 of section 9-16-02, subsection 4 of section 9-16-15, subsection 39 of section  
4 10-19.1-01, subsection 43 of section 10-32-02, subsection 24 of section 10-33-01, subdivision b  
5 of subsection 1 of section 41-02-03, subsection 1 of section 41-02-09, subsection 3 of section  
6 41-02.1-03, subsection 4 of section 41-02.1-49, subsection 2 of section 41-02.1-66,  
7 subsection 1 of section 41-02.1-67, subsection 2 of section 41-02.1-75, subsection 1 of section  
8 41-02.1-76, subdivision d of subsection 1 of section 41-03-03, subdivision j of subsection 1 of  
9 section 41-03-03, subsection 3 of section 41-04-04, subsection 1 of section 41-04.1-05,  
10 subsection 1 of section 41-04.1-06, subsection 2 of section 41-04.1-12, subsection 3 of section  
11 41-05-03, subdivision e of subsection 1 of section 41-07-02, section 41-07-06, subdivision k of  
12 subsection 1 of section 41-08-02, subdivision ss of subsection 1 of section 41-09-02,  
13 subsection 18 of section 45-10.1-01, subsection 14 of section 45-13-01, subsection 15 of  
14 section 45-22-01, subsection 12 of section 45-23-01, and section 47-15.1-02 of the North  
15 Dakota Century Code, relating to chapter 41-01 and references to chapter 41-01; and to repeal  
16 chapter 41-01 and sections 41-02-15 and 41-02.1-16 of the North Dakota Century Code,  
17 relating to general provisions of the Uniform Commercial Code, contracts, and leases.

### 18 **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

19 **SECTION 1. AMENDMENT.** Subdivision b of subsection 2 of section 9-16-02 of the  
20 North Dakota Century Code is amended and reenacted as follows:

21 b. The Uniform Commercial Code other than ~~sections 41-01-07 and 41-01-16~~  
22 section 41-01-20 and chapters 41-02 and 41-02.1; and

23 **SECTION 2. AMENDMENT.** Subsection 4 of section 9-16-15 of the North Dakota  
24 Century Code is amended and reenacted as follows:

- 1           4. Except as otherwise agreed, a person having control of a transferable record is the  
2 holder, as defined in section ~~41-01-14~~ 41-01-09, of the transferable record and has  
3 the same rights and defenses as a holder of an equivalent record or writing under  
4 title 41 including, if the applicable statutory requirements under subsection 1 of  
5 section 41-03-28, section 41-07-30, or section 41-09-29 are satisfied, the rights  
6 and defenses of a holder in due course, a holder to which a negotiable document  
7 of title has been duly negotiated, or a purchaser, respectively. Delivery,  
8 possession, and endorsement are not required to obtain or exercise any of the  
9 rights under this subsection.

10           **SECTION 3. AMENDMENT.** Subsection 39 of section 10-19.1-01 of the North Dakota  
11 Century Code is amended and reenacted as follows:

- 12           39. "Signed" means that the signature of a person is placed on a document, as  
13 provided in ~~subsection 39 of~~ under section ~~41-01-14~~ 41-01-09, and:  
14           a. With respect to a document required by this chapter to be filed with the  
15 secretary of state, means that the document is signed by a person authorized  
16 to do so by this chapter, the articles or bylaws, or a resolution approved by the  
17 directors as required under section 10-19.1-46 or the shareholders as  
18 required under section 10-19.1-74; and  
19           b. With respect to a document not required by this chapter to be filed with the  
20 secretary of state, the signature may be a facsimile affixed, engraved, printed,  
21 placed, stamped with indelible ink, transmitted by facsimile telecommunication  
22 or electronically, or in any other manner reproduced on the document.

23           **SECTION 4. AMENDMENT.** Subsection 43 of section 10-32-02 of the North Dakota  
24 Century Code is amended and reenacted as follows:

- 25           43. "Signed" means the signature of a person has been placed on a document, as  
26 provided in ~~subsection 39 of~~ under section ~~41-01-14~~ 41-01-09, and, with respect to  
27 a document:  
28           a. Required by this chapter to be filed with the secretary of state, means the  
29 document has been signed by a person authorized to do so by this chapter,  
30 the articles of organization, a member-control agreement, or the bylaws or a

resolution approved by the governors as required by section 10-32-83 or the members as required by section 10-32-42; and

- b. Not required by this chapter to be filed with the secretary of state, the signature may be a facsimile affixed, engraved, printed, placed, stamped with indelible ink, transmitted by facsimile telecommunication or electronically, or in any other manner reproduced on the document.

**SECTION 5. AMENDMENT.** Subsection 24 of section 10-33-01 of the North Dakota Century Code is amended and reenacted as follows:

24. "Signed" means the signature of a person is placed on a document, as provided in ~~subsection 39 of~~ under section 41-01-11 41-01-09, and:

- a. With respect to a document required by this chapter to be filed with the secretary of state, means the document has been signed by a person authorized to sign by this chapter, the articles, the bylaws, a resolution approved by the directors as required by section 10-33-42, or the members with voting rights, if any, as required by section 10-33-72; and
- b. With respect to a document not required by this chapter to be filed with the secretary of state, the signature may be a facsimile affixed, engraved, printed, placed, stamped with indelible ink, transmitted by facsimile telecommunication or electronically, or in any other manner reproduced on the document.

**SECTION 6.** Chapter 41-01 of the North Dakota Century Code is created and enacted as follows:

Part 1

General Provisions

**41-01-01. (1-101) Short titles.**

1. This title may be cited as the Uniform Commercial Code.
2. This chapter may be cited as Uniform Commercial Code - General Provisions.

**41-01-02. (1-102) Scope of chapter.** This chapter applies to a transaction to the extent that the transaction is governed by another chapter of this title.

**41-01-03. (1-103) Construction of title to promote the title's purposes and policies - Applicability of supplemental principles of law.**

- 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.

**41-01-04. (1-104) Construction against implied repeal.** This title is a general act intended as a unified coverage of its subject matter. A part of this title may not be deemed to have been impliedly repealed by subsequent legislation if such construction can reasonably be avoided.

**41-01-06. (1-106) Use of singular and plural - Gender.** In this title, unless the  
 ry context otherwise requires:

2. Words of any gender also refer to any other gender.

**41-01-08. (1-108) Relation to Electronic Signatures in Global and National**

## Part 2

**41-01-09. (1-201) General definitions.**

- 1       1. Unless the context otherwise requires, words or phrases defined in this section, or  
2       in additional definitions contained in other chapters of this title which apply to  
3       particular chapters or parts of chapter, have the meanings stated.
- 4       2. Subject to definitions contained in other chapters of this title which apply to  
5       particular chapters or parts of chapters:
  - 6       a. "Action", in the sense of a judicial proceeding, includes recoupment,  
7       counterclaim, setoff, suit in equity, and any other proceeding in which rights  
8       are determined.
  - 9       b. "Aggrieved party" means a party entitled to pursue a remedy.
  - 10      c. "Agreement", as distinguished from "contract", means the bargain of the  
11      parties in fact, as found in their language or inferred from other  
12      circumstances, including course of performance, course of dealing, or usage  
13      of trade as provided under section 41-09-17.
  - 14      d. "Bank" means a person engaged in the business of banking and includes a  
15      savings bank, savings and loan association, credit union, and trust company.
  - 16      e. "Bearer" means a person in possession of a negotiable instrument, document  
17      of title, or certificated security that is payable to bearer or indorsed in blank.
  - 18      f. "Bill of lading" means a document evidencing the receipt of goods for  
19      shipment issued by a person engaged in the business of transporting or  
20      forwarding goods.
  - 21      g. "Branch" includes a separately incorporated foreign branch of a bank.
  - 22      h. "Burden of establishing" a fact means the burden of persuading the trier of  
23      fact that the existence of the fact is more probable than its nonexistence.
  - 24      i. "Buyer in ordinary course of business" means a person that buys goods in  
25      good faith, without knowledge that the sale violates the rights of another  
26      person in the goods, and in the ordinary course from a person, other than a  
27      pawnbroker, in the business of selling goods of that kind. A person buys  
28      goods in the ordinary course if the sale to the person comports with the usual  
29      or customary practices in the kind of business in which the seller is engaged  
30      or with the seller's own usual or customary practices. A person that sells oil,  
31      gas, or other minerals at the wellhead or minehead is a person in the

1 business of selling goods of that kind. A buyer in ordinary course of business  
2 may buy for cash, by exchange of other property, or on secured or unsecured  
3 credit, and may acquire goods or documents of title under a preexisting  
4 contract for sale. Only a buyer that takes possession of the goods or has a  
5 right to recover the goods from the seller under chapter 41-02 may be a buyer  
6 in ordinary course of business. "Buyer in ordinary course of business" does  
7 not include a person that acquires goods in a transfer in bulk or as security for  
8 or in total or partial satisfaction of a money debt.

9 j. "Conspicuous", with reference to a term, means so written, displayed, or  
10 presented that a reasonable person against which it is to operate ought to  
11 have noticed it. Whether a term is "conspicuous" or not is a decision for the  
12 court. Conspicuous terms include the following:

- 13 (1) A heading in capitals equal to or greater in size than the surrounding  
14 text, or in contrasting type, font, or color to the surrounding text of the  
15 same or lesser size; and  
16 (2) Language in the body of a record or display in larger type than the  
17 surrounding text, or in contrasting type, font, or color to the surrounding  
18 text of the same size, or set off from surrounding text of the same size  
19 by symbols or other marks that call attention to the language.

20 k. "Consumer" means an individual who enters into a transaction primarily for  
21 personal, family, or household purposes.

22 l. "Contract", as distinguished from "agreement", means the total legal  
23 obligation that results from the parties' agreement as determined by this title  
24 as supplemented by any other applicable laws.

25 m. "Creditor" includes a general creditor, a secured creditor, a lien creditor, and  
26 any representative of creditors, including an assignee for the benefit of  
27 creditors, a trustee in bankruptcy, a receiver in equity, and an executor or  
28 administrator of an insolvent debtor's or assignor's estate.

29 n. "Defendant" includes a person in the position of defendant in a counterclaim,  
30 cross-claim, or third-party claim.

- 1           o. "Delivery", with respect to an instrument, document of title, or chattel paper,  
2           means voluntary transfer of possession.
- 3           p. "Document of title" includes bill of lading, dock warrant, dock receipt,  
4           warehouse receipt, or order for the delivery of goods, and also any other  
5           document that in the regular course of business or financing is treated as  
6           adequately evidencing that the person in possession of that document is  
7           entitled to receive, hold, and dispose of the document and the goods that  
8           document covers. To be a document of title, a document must purport to be  
9           issued by or addressed to a bailee and purport to cover goods in the bailee's  
10           possession which are either identified or are fungible portions of an identified  
11           mass.
- 12          q. "Fault" means a default, breach, or wrongful act or omission.
- 13          r. "Fungible goods" means:
- 14           (1) Goods of which any unit, by nature or usage of trade, is the equivalent  
15           of any other like unit; or
- 16           (2) Goods that by agreement are treated as equivalent.
- 17          s. "Genuine" means free of forgery or counterfeiting.
- 18          t. "Good faith", except as otherwise provided in chapter 41-05, means honesty  
19           in fact and the observance of reasonable commercial standards of fair  
20           dealing.
- 21          u. "Holder" means:
- 22           (1) The person in possession of a negotiable instrument that is payable  
23           either to bearer or to an identified person that is the person in  
24           possession; or
- 25           (2) The person in possession of a document of title if the goods are  
26           deliverable either to bearer or to the order of the person in possession.
- 27          v. "Insolvency proceeding" includes an assignment for the benefit of creditors or  
28           other proceeding intended to liquidate or rehabilitate the estate of the person  
29           involved.
- 30          w. "Insolvent" means:

- 1                   (1) Having generally ceased to pay debts in the ordinary course of  
2                   business other than as a result of bona fide dispute;  
3                   (2) Being unable to pay debts as they become due; or  
4                   (3) Being insolvent within the meaning of federal bankruptcy law.  
5           x. "Money" means a medium of exchange currently authorized or adopted by a  
6           domestic or foreign government. The term includes a monetary unit of  
7           account established by an intergovernmental organization or by agreement  
8           between two or more countries.  
9           y. "Organization" means a person other than an individual.  
10          z. "Party", as distinguished from "third party", means a person that has engaged  
11          in a transaction or made an agreement subject to this title.  
12          aa. "Person" means an individual, a corporation, a business trust, an estate, a  
13          trust, a partnership, a limited liability company, an association, a joint venture,  
14          a government, a governmental subdivision, an agency, or an instrumentality,  
15          a public corporation, or any other legal or commercial entity.  
16          bb. "Present value" means the amount as of a date certain of one or more sums  
17          payable in the future, discounted to the date certain by use of either an  
18          interest rate specified by the parties if that rate is not manifestly unreasonable  
19          at the time the transaction is entered or, if an interest rate is not so specified,  
20          a commercially reasonable rate that takes into account the facts and  
21          circumstances at the time the transaction is entered.  
22          cc. "Purchase" means taking by sale, lease, discount, negotiation, mortgage,  
23          pledge, lien, security interest, issue or reissue, gift, or any other voluntary  
24          transaction creating an interest in property.  
25          dd. "Purchaser" means a person that takes by purchase.  
26          ee. "Record" means information that is inscribed on a tangible medium or that is  
27          stored in an electronic or other medium and is retrievable in perceivable form.  
28          ff. "Remedy" means any remedial right to which an aggrieved party is entitled  
29          with or without resort to a tribunal.



- 1           gg. "Representative" means a person empowered to act for another, including an  
2           agent, an officer of a corporation or association, and a trustee, executor, or  
3           administrator of an estate.
- 4           hh. "Right" includes remedy.
- 5           ii. "Security interest" means an interest in personal property or fixtures which  
6           secures payment or performance of an obligation. "Security interest" includes  
7           any interest of a consignor and a buyer of accounts, chattel paper, a payment  
8           intangible, or a promissory note in a transaction that is subject to  
9           chapter 41-09. "Security interest" does not include the special property  
10          interest of a buyer of goods on identification of those goods to a contract for  
11          sale under section 41-02-46, but a buyer may also acquire a "security  
12          interest" by complying with chapter 41-09. Except as otherwise provided in  
13          section 41-02-53, the right of a seller or lessor of goods under chapter 41-02  
14          or 41-02.1 to retain or acquire possession of the goods is not a "security  
15          interest", but a seller or lessor may also acquire a "security interest" by  
16          complying with chapter 41-09. The retention or reservation of title by a seller  
17          of goods notwithstanding shipment or delivery to the buyer under section  
18          41-02-46 is limited in effect to a reservation of a "security interest". Whether a  
19          transaction in the form of a lease creates a "security interest" is determined  
20          under section 41-01-11.
- 21          jj. "Send" in connection with a writing, record, or notice means:
- 22               (1) To deposit in the mail or deliver for transmission by any other usual  
23               means of communication with postage or cost of transmission provided  
24               for and properly addressed and, in the case of an instrument, to an  
25               address specified on the instrument or otherwise agreed, or if there be  
26               none to any address reasonable under the circumstances; or
- 27               (2) In any other way to cause to be received any record or notice within the  
28               time it would have arrived if properly sent.
- 29          kk. "Signed" includes using any symbol executed or adopted with present  
30          intention to adopt or accept a writing.

- 1            ll. "State" means a state of the United States, the District of Columbia, Puerto  
2            Rico, the United States Virgin Islands, or any territory or insular possession  
3            subject to the jurisdiction of the United States.
- 4            mm. "Surety" includes a guarantor or other secondary obligor.
- 5            nn. "Term" means a portion of an agreement that relates to a particular matter.
- 6            oo. "Unauthorized signature" means a signature made without actual, implied, or  
7            apparent authority. The term includes a forgery.
- 8            pp. "Warehouse receipt" means a receipt issued by a person engaged in the  
9            business of storing goods for hire.
- 10           qq. "Writing" includes printing, typewriting, or any other intentional reduction to  
11           tangible form. "Written" has a corresponding meaning.

12           **41-01-10. (1-202) Notice - Knowledge.**

- 13           1. Subject to subsection 6, a person has "notice" of a fact if the person:  
14           a. Has actual knowledge of that fact;  
15           b. Has received a notice or notification of that fact; or  
16           c. From all the facts and circumstances known to the person at the time in  
17           question, has reason to know that that fact exists.
- 18           2. "Knowledge" means actual knowledge. "Knows" has a corresponding meaning.
- 19           3. "Discover", "learn", or words of similar import refer to knowledge rather than to  
20           reason to know.
- 21           4. A person "notifies" or "gives" a notice or notification to another person by taking  
22           such steps as may be reasonably required to inform the other person in ordinary  
23           course, whether or not the other person actually comes to know of it.
- 24           5. Subject to subsection 6 a person "receives" a notice or notification when:  
25           a. It comes to that person's attention; or  
26           b. It is duly delivered in a form reasonable under the circumstances at the place  
27           of business through which the contract was made or at another location held  
28           out by that person as the place for receipt of such communications.
- 29           6. Notice, knowledge, or a notice or notification received by an organization is  
30           effective for a particular transaction from the time it is brought to the attention of the  
31           individual conducting that transaction and, in any event, from the time it would have

1           been brought to the individual's attention if the organization had exercised due  
2           diligence. An organization exercises due diligence if the organization maintains  
3           reasonable routines for communicating significant information to the person  
4           conducting the transaction and there is reasonable compliance with the routines.  
5           Due diligence does not require an individual acting for the organization to  
6           communicate information unless the communication is part of the individual's  
7           regular duties or the individual has reason to know of the transaction and that the  
8           transaction would be materially affected by the information.

9           **41-01-11. (1-203) Lease distinguished from security interest.**

- 10          1.   Whether a transaction in the form of a lease creates a lease or security interest is  
11           determined by the facts of each case.
- 12          2.   A transaction in the form of a lease creates a security interest if the consideration  
13           that the lessee is to pay the lessor for the right to possession and use of the goods  
14           is an obligation for the term of the lease and is not subject to termination by the  
15           lessee, and:
- 16           a.   The original term of the lease is equal to or greater than the remaining  
17           economic life of the goods;
- 18           b.   The lessee is bound to renew the lease for the remaining economic life of the  
19           goods or is bound to become the owner of the goods;
- 20           c.   The lessee has an option to renew the lease for the remaining economic life  
21           of the goods for no additional consideration or for nominal additional  
22           consideration upon compliance with the lease agreement; or
- 23           d.   The lessee has an option to become the owner of the goods for no additional  
24           consideration or for nominal additional consideration upon compliance with  
25           the lease agreement.
- 26          3.   A transaction in the form of a lease does not create a security interest merely  
27           because:
- 28           a.   The present value of the consideration the lessee is obligated to pay the  
29           lessor for the right to possession and use of the goods is substantially equal  
30           to or is greater than the fair market value of the goods at the time the lease is  
31           entered;

- 1           b. The lessee assumes risk of loss of the goods;
- 2           c. The lessee agrees to pay, with respect to the goods, taxes, insurance, filing,
- 3           recording, or registration fees, or service or maintenance costs;
- 4           d. The lessee has an option to renew the lease or to become the owner of the
- 5           goods;
- 6           e. The lessee has an option to renew the lease for a fixed rent that is equal to or
- 7           greater than the reasonably predictable fair market rent for the use of the
- 8           goods for the term of the renewal at the time the option is to be performed; or
- 9           f. The lessee has an option to become the owner of the goods for a fixed price
- 10           that is equal to or greater than the reasonably predictable fair market value of
- 11           the goods at the time the option is to be performed.
- 12       4. Additional consideration is nominal if that consideration is less than the lessee's
- 13       reasonably predictable cost of performing under the lease agreement if the option
- 14       is not exercised. Additional consideration is not nominal if:
- 15           a. When the option to renew the lease is granted to the lessee, the rent is stated
- 16           to be the fair market rent for the use of the goods for the term of the renewal
- 17           determined at the time the option is to be performed; or
- 18           b. When the option to become the owner of the goods is granted to the lessee,
- 19           the price is stated to be the fair market value of the goods determined at the
- 20           time the option is to be performed.
- 21       5. The "remaining economic life of the goods" and "reasonably predictable" fair
- 22       market rent, fair market value, or cost of performing under the lease agreement
- 23       must be determined with reference to the facts and circumstances at the time the
- 24       transaction is entered.
- 25       **41-01-12. (1-204) Value.** Except as otherwise provided in chapters 41-03, 41-04, and
- 26       41-05, a person gives value for rights if the person acquires the rights:
- 27           1. In return for a binding commitment to extend credit or for the extension of
- 28           immediately available credit, whether or not drawn upon and whether or not a
- 29           charge-back is provided for in the event of difficulties in collection;
- 30           2. As security for, or in total or partial satisfaction of, a preexisting claim;
- 31           3. By accepting delivery under a preexisting contract for purchase; or

4. In return for any consideration sufficient to support a simple contract.

**41-01-13. (1-205) Reasonable time - Seasonableness.**

1. Whether a time for taking an action required under this title is reasonable depends on the nature, purpose, and circumstances of the action.

2. An action is taken seasonably if the action is taken at or within the time agreed or, if no time is agreed, at or within a reasonable time.

**41-01-14. (1-206) Presumptions.** If this title creates a "presumption" with respect to a fact or provides that a fact is "presumed", the trier of fact shall find the existence of the fact unless and until evidence is introduced that supports a finding of the fact's nonexistence.

Part 3

Territorial Applicability and General Rules

**41-01-15. (1-301) Territorial applicability - Parties' power to choose applicable law.**

1. In this section:

a. "Domestic transaction" means a transaction other than an international transaction.

b. "International transaction" means a transaction that bears a reasonable relation to a country other than the United States.

2. This section applies to a transaction to the extent that the transaction is governed by another chapter of this title.

3. Except as otherwise provided in this section:

a. An agreement by parties to a domestic transaction that any or all of their rights and obligations are to be determined by the law of this state or of another state is effective, regardless of whether the transaction bears a relation to the state designated; and

b. An agreement by parties to an international transaction that any or all of their rights and obligations are to be determined by the law of this state or of another state or country is effective, regardless of whether the transaction bears a relation to the state or country designated.

4. In the absence of an agreement effective under subsection 3, and except as provided in subsections 5 and 7, the rights and obligations of the parties are

determined by the law that would be selected by application of this state's conflict of laws principles.

5. If one of the parties to a transaction is a consumer, the following rules apply:

a. An agreement referred to in subsection 3 is not effective unless the transaction bears a reasonable relation to the state or country designated.

b. Application of the law of the state or country determined under subsection 3 or 4 may not deprive the consumer of the protection of any rule of law governing a matter within the scope of this section, which both is protective of consumers and may not be varied by agreement:

(1) Of the state or country in which the consumer principally resides, unless paragraph 2 applies; or

(2) If the transaction is a sale of goods, of the state or country in which the consumer both makes the contract and takes delivery of those goods, if such state or country is not the state or country in which the consumer principally resides.

6. An agreement otherwise effective under subsection 3 is not effective to the extent that application of the law of the state or country designated would be contrary to a fundamental policy of the state or country whose law would govern in the absence of agreement under subsection 4.

7. To the extent that this title governs a transaction, if one of the following provisions of this title specifies the applicable law, that provision governs and a contrary agreement is effective only to the extent permitted by the law so specified:

a. Section 41-02-47;

b. Sections 41-02.1-05 and 41-02.1-06;

c. Section 41-04-02;

d. Section 41-04.1-38;

e. Section 41-05-16;

f. Section 41-08-10; and

g. Sections 41-09-22 through 41-09-28.

**41-01-16. (1-302) Variation by agreement.**

- 1       1. Except as otherwise provided in subsection 2 or elsewhere under this title, the  
2       effect of provisions of this title may be varied by agreement.
- 3       2. The obligations of good faith, diligence, reasonableness, and care prescribed  
4       under this title may not be disclaimed by agreement. The parties, by agreement,  
5       may determine the standards by which the performance of those obligations is to  
6       be measured if those standards are not manifestly unreasonable. If this title  
7       requires an action to be taken within a reasonable time, a time that is not  
8       manifestly unreasonable may be fixed by agreement.
- 9       3. The presence in certain provisions of this title of the phrase "unless otherwise  
10      agreed", or words of similar import, does not imply that the effect of other  
11      provisions may not be varied by agreement under this section.

12      **41-01-17. (1-303) Course of performance - Course of dealing - Usage of trade.**

- 13      1. A "course of performance" is a sequence of conduct between the parties to a  
14      particular transaction that exists if:
  - 15      a. The agreement of the parties with respect to the transaction involves repeated  
16      occasions for performance by a party; and
  - 17      b. The other party, with knowledge of the nature of the performance and  
18      opportunity for objection to it, accepts the performance or acquiesces in the  
19      performance without objection.
- 20      2. A "course of dealing" is a sequence of conduct concerning previous transactions  
21      between the parties to a particular transaction that is fairly to be regarded as  
22      establishing a common basis of understanding for interpreting their expressions  
23      and other conduct.
- 24      3. A "usage of trade" is any practice or method of dealing having such regularity of  
25      observance in a place, vocation, or trade as to justify an expectation that it will be  
26      observed with respect to the transaction in question. The existence and scope of  
27      such a usage must be proved as facts. If it is established that such a usage is  
28      embodied in a trade code or similar record, the interpretation of the record is a  
29      question of law.
- 30      4. A course of performance or course of dealing between the parties or usage of  
31      trade in the vocation or trade in which the parties are engaged or of which the

parties are or should be aware is relevant in ascertaining the meaning of the parties' agreement, may give particular meaning to specific terms of the agreement, and may supplement or qualify the terms of the agreement. A usage of trade applicable in the place in which part of the performance under the agreement is to occur may be so utilized as to that part of the performance.

5. Except as otherwise provided in subsection 6, the express terms of an agreement and any applicable course of performance, course of dealing, or usage of trade must be construed whenever reasonable as consistent with each other. If such a construction is unreasonable:

a. Express terms prevail over course of performance, course of dealing, and usage of trade;

b. Course of performance prevails over course of dealing and usage of trade; and

c. Course of dealing prevails over usage of trade.

6. Subject to section 41-02-16, a course of performance is relevant to show a waiver or modification of any term inconsistent with the course of performance.

7. Evidence of a relevant usage of trade offered by one party is not admissible unless that party has given the other party notice that the court finds sufficient to prevent unfair surprise to the other party.

**41-01-18. (1-304) Obligation of good faith.** Every contract or duty within this title imposes an obligation of good faith in its performance and enforcement.

**41-01-19. (1-305) Remedies to be liberally administered.**

1. The remedies provided under this title must 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 damages nor penal damages may be had except as specifically provided under this title or by other rule of law.

2. Any right or obligation declared under this title is enforceable by action unless the provision declaring the right or obligation specifies a different and limited effect.

**41-01-20. (1-306) Waiver or renunciation of claim or right after breach.** A claim or right arising out of an alleged breach may be discharged in whole or in part without consideration by agreement of the aggrieved party in an authenticated record.



1       **41-01-21. (1-307) Prima facie evidence by third-party documents.** A document in  
2 due form purporting to be a bill of lading, a policy or certificate of insurance, an official weigher's  
3 or inspector's certificate, a consular invoice, or any other document authorized or required by  
4 the contract to be issued by a third party is prima facie evidence of the document's own  
5 authenticity and genuineness and of the facts stated in the document by the third party.

6       **41-01-22. (1-308) Performance or acceptance under reservation of rights.**

7       1. A party that with explicit reservation of rights performs or promises performance or  
8 assents to performance in a manner demanded or offered by the other party does  
9 not thereby prejudice the rights reserved. Such words as "without prejudice",  
10 "under protest", or the like are sufficient.

11       2. Subsection 1 does not apply to an accord and satisfaction.

12       **41-01-23. (1-309) Option to accelerate at will.** A term providing that one party or that  
13 party's successor in interest may accelerate payment or performance or require collateral or  
14 additional collateral "at will" or when the party "deems itself insecure", or words of similar  
15 import, means that the party has power to do so only if that party in good faith believes that the  
16 prospect of payment or performance is impaired. The burden of establishing lack of good faith  
17 is on the party against which the power has been exercised.

18       **41-01-24. (1-310) Subordinated obligations.** An obligation may be issued as  
19 subordinated to performance of another obligation of the person obligated, or a creditor may  
20 subordinate the creditor's right to performance of an obligation by agreement with either the  
21 person obligated or another creditor of the person obligated. Subordination does not create a  
22 security interest as against either the common debtor or a subordinated creditor.

23       **SECTION 7. AMENDMENT.** Subdivision b of subsection 1 of section 41-02-03 of the  
24 North Dakota Century Code is amended and reenacted as follows:

- 25           b. ~~"Good faith" in the case of a merchant means honesty in fact and the~~  
26 ~~observance of reasonable commercial standards of fair dealing in the trade.~~  
27           (Reserved)

28       **SECTION 8. AMENDMENT.** Subsection 1 of section 41-02-09 of the North Dakota  
29 Century Code is amended and reenacted as follows:

- 30       1. By course of performance, course of dealing, or usage of trade (section 41-01-15)  
31 ~~or by course of performance (section 41-02-15 41-01-17); and~~

**SECTION 9. AMENDMENT.** Subsection 3 of section 41-02.1-03 of the North Dakota Century Code is amended and reenacted as follows:

3. The following definitions also apply to this chapter:

- a. "Account". Section 41-09-02.
- b. "Between merchants". Subsection 1 of section 41-02-04.
- c. "Buyer". Subdivision a of subsection 1 of section 41-02-03.
- d. "Chattel paper". Section 41-09-02.
- e. "Consumer goods". Section 41-09-02.
- f. "Document". Section 41-09-02.
- g. "Entrusting". Subsection 3 of section 41-02-48.
- h. "General intangible". Section 41-09-02.
- ~~i. "Good faith". Subdivision b of subsection 1 of section 41-02-03.~~
- j. "Instrument". Section 41-09-02.
- ~~k. j.~~ "Merchant". Subsection 3 of section 41-02-04.
- ~~l. k.~~ "Mortgage". Section 41-09-02.
- ~~m. l.~~ "Pursuant to commitment". Section 41-09-02.
- ~~n. m.~~ "Receipt". Subdivision c of subsection 1 of section 41-02-03.
- ~~o. n.~~ "Sale". Subdivision d of subsection 1 of section 41-02-06.
- ~~p. o.~~ "Sale on approval". Subdivision a of subsection 1 of section 41-02-43.
- ~~q. p.~~ "Sale or return". Subdivision b of subsection 1 of section 41-02-43.
- ~~r. q.~~ "Seller". Subdivision d of subsection 1 of section 41-02-03.

**SECTION 10. AMENDMENT.** Subsection 4 of section 41-02.1-49 of the North Dakota Century Code is amended and reenacted as follows:

4. Except as otherwise provided ~~in~~ under subsection 1 of section ~~41-01-06~~ 41-01-19, this chapter, or the lease agreement, the rights and remedies referred to in subsections 2 and 3 are cumulative.

**SECTION 11. AMENDMENT.** Subsection 2 of section 41-02.1-66 of the North Dakota Century Code is amended and reenacted as follows:

2. Except as otherwise provided with respect to damages liquidated in the lease agreement (section 41-02.1-52) or determined by agreement of the parties (~~subsection 3 of section 41-01-02 and section~~ sections 41-01-16 and 41-02.1-51),

1 if a lessee's cover is by lease agreement substantially similar to the original lease  
2 agreement and the new lease agreement is made in good faith and in a  
3 commercially reasonable manner, the lessee may recover from the lessor as  
4 damages the present value, as of the date of the commencement of the term of the  
5 new lease agreement, of the rent under the new lease agreement applicable to that  
6 period of the new lease term which is comparable to the then remaining term of the  
7 original lease agreement minus the present value as of the same date of the total  
8 rent for the then remaining lease term of the original lease agreement, and any  
9 incidental or consequential damages, less expenses saved in consequence of the  
10 lessor's default.

11 **SECTION 12. AMENDMENT.** Subsection 1 of section 41-02.1-67 of the North Dakota  
12 Century Code is amended and reenacted as follows:

- 13 1. Except as otherwise provided with respect to damages liquidated in the lease  
14 agreement (section 41-02.1-52) or determined by agreement of the parties  
15 (~~subsection 3 of section 41-01-02 and section~~ sections 41-01-16 and 41-02.1-51),  
16 if a lessee elects not to cover or a lessee elects to cover and the cover is by lease  
17 agreement that for any reason does not qualify for treatment under subsection 2 of  
18 section 41-02.1-66, or is by purchase or otherwise, the measure of damages for  
19 nondelivery or repudiation by the lessor or for rejection or revocation of acceptance  
20 by the lessee is the present value, as of the date of the default, of the then market  
21 rent minus the present value as of the same date of the original rent, computed for  
22 the remaining lease term of the original lease agreement together with incidental  
23 and consequential damages, less expenses saved in consequence of the lessor's  
24 default.

25 **SECTION 13. AMENDMENT.** Subsection 2 of section 41-02.1-75 of the North Dakota  
26 Century Code is amended and reenacted as follows:

- 27 2. Except as otherwise provided with respect to damages liquidated in the lease  
28 agreement (section 41-02.1-52) or determined by agreement of the parties  
29 (~~subsection 3 of section 41-01-02 and section~~ sections 41-01-16 and 41-02.1-51),  
30 if the disposition is by lease agreement substantially similar to the original lease  
31 agreement and the lease agreement is made in good faith and in a commercially

reasonable manner, the lessor may recover from the lessee as damages accrued and unpaid rent as of the date of the commencement of the new term of the new lease agreement, the present value, as of the same date, of the total rent for the 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 any incidental damages allowed under section 41-02.1-78, less expenses saved in consequence of the lessee's default.

**SECTION 14. AMENDMENT.** Subsection 1 of section 41-02.1-76 of the North Dakota Century Code is amended and reenacted as follows:

1. Except as otherwise provided with respect to damages liquidated in the lease agreement (section 41-02.1-52) or determined by agreement of the parties (~~subsection 3 of section 41-01-02 and section~~ sections 41-01-16 and 41-02.1-51), if a lessor elects to retain the goods or a lessor elects to dispose of the goods and disposition is by lease agreement that for any reason does not qualify for treatment under subsection 2 of section 41-02.1-75, or is by sale or otherwise, the lessor may recover from the lessee as damages for a default described in subsection 1 of section 41-02.1-71 or in subdivision a of subsection 3 of section 41-02.1-71, or, if agreed, for other default of the lessee 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; 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 any incidental damages allowed under section 41-02.1-78, less expenses saved in consequence of the lessee's default.

**SECTION 15. AMENDMENT.** Subdivision d of subsection 1 of section 41-03-03 of the North Dakota Century Code is amended and reenacted as follows:

- d. ~~"Good faith" means honesty in fact and the observance of reasonable commercial standards of fair dealing.~~ (Reserved)

**SECTION 16. AMENDMENT.** Subdivision j of subsection 1 of section 41-03-03 of the North Dakota Century Code is amended and reenacted as follows:

- j. "Prove" with respect to a fact means to meet the burden of establishing the fact (subdivision h of subsection 8 2 of section 41-01-11 41-01-09).

**SECTION 17. AMENDMENT.** Subsection 3 of section 41-04-04 of the North Dakota Century Code is amended and reenacted as follows:

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

- a. "Acceptance". Section 41-03-46.  
b. "Alteration". Section 41-03-44.  
c. "Cashier's check". Section 41-03-04.  
d. "Certificate of deposit". Section 41-03-04.  
e. "Certified check". Section 41-03-45.  
f. "Check". Section 41-03-04.  
g. ~~"Good faith". Section 41-03-03.~~  
h. "Holder in due course". Section 41-03-28.  
i. ~~h.~~ h. "Instrument". Section 41-03-04.  
j. ~~i.~~ i. "Notice of dishonor". Section 41-03-60.  
k. ~~j.~~ j. "Order". Section 41-03-03.  
l. ~~k.~~ k. "Ordinary care". Section 41-03-03.  
m. ~~l.~~ l. "Person entitled to enforce". Section 41-03-27.  
n. ~~m.~~ m. "Presentment". Section 41-03-58.  
o. ~~n.~~ n. "Promise". Section 41-03-03.  
p. ~~o.~~ o. "Prove". Section 41-03-03.  
q. ~~p.~~ p. "Teller's check". Section 41-03-04.  
r. ~~q.~~ q. "Unauthorized signature". Section 41-03-40.

**SECTION 18. AMENDMENT.** Subsection 1 of section 41-04.1-05 of the North Dakota Century Code is amended and reenacted as follows:

1. In this chapter:

- 1           a. "Authorized account" means a deposit account of a customer in a bank  
2           designated by the customer as a source of payment of payment orders issued  
3           by the customer to the bank. If a customer does not so designate an account,  
4           any account of the customer is an authorized account if payment of a  
5           payment order from that account is not inconsistent with a restriction on the  
6           use of that account.
- 7           b. "Bank" means a person engaged in the business of banking and includes a  
8           savings bank, savings and loan association, credit union, and trust company.  
9           A branch or separate office of a bank is a separate bank for purposes of this  
10          chapter.
- 11          c. "Customer" means a person, including a bank, having an account with a bank  
12          or from whom a bank has agreed to receive payment orders.
- 13          d. "Funds-transfer business day" of a receiving bank means the part of a day  
14          during which the receiving bank is open for the receipt, processing, and  
15          transmittal of payment orders and cancellations and amendments of payment  
16          orders.
- 17          e. "Funds-transfer system" means a wire transfer network, automated  
18          clearinghouse, or other communication system of a clearinghouse or other  
19          association of banks through which a payment order by a bank may be  
20          transmitted to the bank to which the order is addressed.
- 21          f. ~~"Good faith" means honesty in fact and the observance of reasonable~~  
22          ~~commercial standards of fair dealing.~~ (Reserved)
- 23          g. "Prove" with respect to a fact means to meet the burden of establishing the  
24          fact. ~~Subsection 8~~ Subdivision h of subsection 2 of section 41-01-11  
25          41-01-09.

26           **SECTION 19. AMENDMENT.** Subsection 1 of section 41-04.1-06 of the North Dakota  
27 Century Code is amended and reenacted as follows:

- 28           1. The time of receipt of a payment order or communication canceling or amending a  
29           payment order is determined by the rules applicable to receipt of a notice stated in  
30           ~~subsection 27 of~~ under section 41-01-11 41-01-10. A receiving bank may fix a  
31           cutoff time or times on a funds-transfer business day for the receipt and processing

of payment orders and communications canceling or amending payment orders. Different cutoff times may apply to payment orders, cancellations, or amendments, or to different categories of payment orders, cancellations, or amendments. A cutoff time may apply to senders generally or different cutoff times may apply to different senders or categories of payment orders. If a payment order or communication canceling or amending a payment order is received after the close of a funds-transfer business day or after the appropriate cutoff time on a funds-transfer business day, the receiving bank may treat the payment order or communication as received at the opening of the next funds-transfer business day.

**SECTION 20. AMENDMENT.** Subsection 2 of section 41-04.1-12 of the North Dakota Century Code is amended and reenacted as follows:

2. Reasonable time under subsection 1 may be fixed by agreement under subsection 1 of section ~~41-01-14~~ 41-01-16, but the obligation of a receiving bank to refund payment as stated in subsection 1 may not otherwise be varied by agreement.

**SECTION 21. AMENDMENT.** Subsection 3 of section 41-05-03 of the North Dakota Century Code is amended and reenacted as follows:

3. With the exception of this subsection, subsections 1 and 4 of this section, subdivisions i and j of subsection 1 of section 41-05-02, subsection 4 of section 41-05-06, and subsection 4 of section 41-05-14, and except to the extent prohibited in ~~subsection 3 of~~ under section ~~41-01-02~~ 41-01-16 and subsection 4 of section 41-05-17, 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.

**SECTION 22. AMENDMENT.** Subdivision e of subsection 1 of section 41-07-02 of the North Dakota Century Code is amended and reenacted as follows:

- e. "Document" means document of title as defined in the general definitions in chapter 41-01 (section ~~41-01-14~~ 41-01-09).

1           **SECTION 23. AMENDMENT.** Section 41-07-06 of the North Dakota Century Code is  
2 amended and reenacted as follows:

3           **41-07-06. Laws not repealed.** This chapter does not repeal or modify any laws  
4 prescribing the form or contents of documents of title or the services or facilities to be afforded  
5 by bailees, or otherwise regulating bailee's businesses in respects not specifically dealt with  
6 herein; but the fact that such laws are violated does not affect the status of a document of title  
7 which otherwise complies with the definition of a document of title (section ~~41-01-11~~ 41-01-09).

8           **SECTION 24. AMENDMENT.** Subdivision k of subsection 1 of section 41-08-02 of the  
9 North Dakota Century Code is amended and reenacted as follows:

- 10           k.   ~~"Good faith", for purposes of the obligation of good faith in the performance or~~  
11               ~~enforcement of contracts or duties within this chapter, means honesty in fact~~  
12               ~~and the observance of reasonable commercial standards of fair dealing.~~  
13               (Reserved)

14           **SECTION 25. AMENDMENT.** Subdivision ss of subsection 1 of section 41-09-02 of the  
15 North Dakota Century Code is amended and reenacted as follows:

- 16           ss.   ~~"Good faith" means honesty in fact and the observance of reasonable~~  
17               ~~commercial standards of fair dealing. (Reserved)~~

18           **SECTION 26. AMENDMENT.** Subsection 18 of section 45-10.1-01 of the North Dakota  
19 Century Code is amended and reenacted as follows:

- 20           18.   "Signed" means that the signature of a person is placed on a document, as  
21               provided in ~~subsection 39 of~~ under section ~~41-01-11~~ 41-01-09, and:
- 22               a.   With respect to a document required by this chapter to be filed with the  
23               secretary of state, means the document is signed by a person authorized to  
24               sign the document by this chapter or by a resolution approved by the  
25               affirmative vote of the required proportion or number of partners; and
- 26               b.   With respect to a document not required by this chapter to be filed with the  
27               secretary of state, means the signature may be a facsimile affixed, engraved,  
28               printed, placed, stamped with indelible ink, transmitted by facsimile or  
29               electronically, or in any other manner reproduced on the document.

30           **SECTION 27. AMENDMENT.** Subsection 14 of section 45-13-01 of the North Dakota  
31 Century Code is amended and reenacted as follows:



14. "Signed" means the signature of a person is placed on a document, as provided in ~~subsection 39 of~~ under section ~~41-01-14~~ 41-01-09, and:

- a. With respect to a document required by this chapter to be filed with the secretary of state, means the document is signed by a person authorized to do so by this chapter or by a resolution approved by the affirmative vote of the required proportion or number of partners; and
- b. With respect to a document not required by this chapter to be filed with the secretary of state, means the signature may be a facsimile affixed, engraved, printed, placed, stamped with indelible ink, transmitted by facsimile telecommunication or electronically, or in any other manner reproduced on the document.

**SECTION 28. AMENDMENT.** Subsection 15 of section 45-22-01 of the North Dakota Century Code is amended and reenacted as follows:

15. "Signed" means the signature of a person is placed on a document, as provided in ~~subsection 39 of~~ under section ~~41-01-14~~ 41-01-09.

- a. With respect to a document required by this chapter to be filed with the secretary of state, the term means the document is signed by a person authorized to do so by this chapter, or by or pursuant to an agreement among the partners, or by a resolution approved by the affirmative vote of the required proportion or number of partners.
- b. With respect to a document not required by this chapter to be filed with the secretary of state, the signature may be a facsimile affixed, engraved, printed, placed, stamped with indelible ink, transmitted by telecommunication or electronically, or in any other manner reproduced on the document.

**SECTION 29. AMENDMENT.** Subsection 12 of section 45-23-01 of the North Dakota Century Code is amended and reenacted as follows:

12. "Signed" means the signature of a person is placed on a document, as provided in ~~under~~ section ~~41-01-14~~ 41-01-09.

- a. With respect to a document required by this chapter to be filed with the secretary of state, means the document is signed by a person authorized to sign by this chapter, or pursuant to an agreement among the partners, or by a

1 resolution approved by the affirmative vote of the required proportion or  
2 number of partners; and  
3 b. With respect to a document not required by this chapter to be filed with the  
4 secretary of state, the signature may be a facsimile affixed, engraved, printed,  
5 placed, stamped with indelible ink, transmitted by facsimile telecommunication  
6 or electronically, or in any other manner reproduced on the document.

7 **SECTION 30. AMENDMENT.** Section 47-15.1-02 of the North Dakota Century Code is  
8 amended and reenacted as follows:

9 **47-15.1-02. Inapplicability of other laws.** Consumer rental purchase agreements  
10 under this chapter are not governed by the laws relating to a retail installment contract or a  
11 retail installment sale as defined in section 51-13-01 or security interest as defined in section  
12 ~~41-01-11~~ 41-01-09.

13 **SECTION 31. REPEAL.** Chapter 41-01 and sections 41-02-15 and 41-02.1-16 of the  
14 North Dakota Century Code are repealed.